UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

INTERNATIONAL INVESTMENT RULE-MAKING: STOCKTAKING, CHALLENGES AND THE WAY FORWARD

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NOTE

As the focal point in the United Nations system for investment and technology, and building on 30 years of experience in these areas, UNCTAD, through its Division on Investment and Enterprise (DIAE), promotes understanding of key issues, particularly matters related to foreign direct investment and transfer of technology. DIAE also assists developing countries in attracting and benefiting from FDI and in building their productive capacities and international competitiveness. The emphasis is on an integrated policy approach to investment, technological capacity building and enterprise development.

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The following symbols have been used in the tables:

Two dots (..) indicate that data are not available or are not separately reported.

Rows in tables have been omitted in those cases where no data are available for any of the elements in the row;

A dash (-) indicates that the item is equal to zero or its value is negligible;

A blank in a table indicates that the item is not applicable;

A slash (/) between dates representing years, e.g. 1994/1995, indicates a financial year;

Use of a hyphen (-) between dates representing years, e.g. 1994-1995, signifies the full period involved, including the beginning and end years.

Reference to “dollars” ($) means United States dollars, unless otherwise indicated.

Annual rates of growth or change, unless otherwise stated, refer to annual compound rates.

Details and percentages in tables do not necessarily add to totals because of rounding.

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PREFACE

The secretariat of the United Nations Conference on Trade and Development (UNCTAD) is implementing a programme on international investment arrangements. It seeks to help developing countries to participate as effectively as possible in international investment rule-making. The programme 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.

This paper is part of a new Series on International Investment Policies for Development. It builds on, and expands, UNCTAD's Series on Issues in International Investment Agreements. Like the previous one, this new series is addressed to Government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers.

The Series seeks to provide a balanced analysis of issues that may arise in the context of international approaches to investment rule-making and their impact on development. Its purpose is to contribute to a better understanding of difficult technical issues and their interaction, and of innovative ideas that could contribute to an increase in the development dimension of international investment agreements.

The Series is produced by a team led by James Zhan. The members of the team include Bekele Amare, Anna Joubin-Bret, Hamed El-Kady, Joachim Karl, Marie-Estelle Rey and Jörg Weber. Members of the Review Committee are Mark Kantor, John Kline, Peter Muchlinski, Antonio Parra, Patrick Robinson, Karl Sauvant, Pierre Sauvé, M. Sornarajah and Kenneth Vandevelde.

This paper is based on a manuscript prepared by Kenneth Vandevelde. It benefited from comments during an ad-hoc expert on "*International Investment Rule-Setting: Trends, Emerging Issues and Implications*" in March 2007, and the UNCTAD Intergovernmental expert meeting on "*Development Implications of International Investment Rule Making*" in June 2007, both held in Geneva. Further comments were received from John Kline, Patrick Robinson and Christoph Schreuer. Hamed El-Kady, Joachim Karl and Jörg Weber finalized the study.

The paper provides a timely stocktaking of the current state of affairs in international investment policy making, as UNCTAD embarks on implementing its renewed mandate in the area of international investment agreements emanating from the Accra Accord (paragraph 151).

Supachai Panitchpakdi
Secretary-General of UNCTAD

Geneva, October 2008

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ABBREVIATIONS

ADR	Alternative methods of dispute resolution
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral investment treaty
CIS	Commonwealth of Independent States
CSR	Corporate social responsibility
CEPA	Closer economic partnership agreements
DTT	Double taxation treaty
ECT	Energy Charter Treaty
EFTA	European Free Trade Association
EPA	Economic partnership agreements
EU	European Union
FDI	Foreign direct investment
FTA	Free trade agreement
FCN	Friendship, commerce and navigation treaty
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICC	International Chamber of Commerce
ICSID	International Center for Settlement of Investment Disputes
IMF	International Monetary Fund
ISDS	Investor-State dispute settlement
IIA	International investment agreement
LAFTA	Latin American Free Trade Association
MAI	Multilateral Agreement on Investment
MFN	Most favoured nation
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
NIEO	New International Economic Order
OECD	Organization for Economic Co-operation and Development
PTIA	Preferential trade and investment agreement
SCC	Stockholm Chamber of Commerce
TIFA	Trade and investment framework agreement
TNC	Transnational corporation
TRIMs	Agreement on Trade-Related Investment Measures

TRIPS	Agreement on Trade-Related Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

EXECUTIVE SUMMARY

This paper has a three-fold objective. It reviews sixty years of international investment rule-making and identifies main trends in current treaty practice, as well as the core characteristics of the existing universe of international investment agreements (IIAs) at the beginning of the 21st century. Based on this analysis, the third part describes the main challenges for policy makers and IIA negotiators deriving from the present IIA system, and makes a number of suggestions on how to deal with them. The fourth part contains a brief outlook concerning the future evolution of the IIA universe.

Trends in international investment rule-making

The *global network of IIAs is expanding rapidly*. On average, more than three treaties were concluded per week over the past few years. Whereas a decade ago, the IIA universe counted less than 3,400 treaties, by end 2007 their number had exceeded 5,500. An important recent development is the surge in free trade agreements or other treaties on economic cooperation with investment provisions that complement or substitute "classical" bilateral investment treaties (BITs).

The IIA system is also becoming *increasingly atomized, complex and diverse*. It consists of thousands of individual agreements that lack any system-wide coordination. It is multilayered, i.e. composed of investment treaties at various – bilateral, subregional, regional, interregional, sectoral, plurilateral and multilateral – levels that may overlap. The IIA universe is likewise multi-faceted, meaning that it covers not only investment issues *per se*, but may also extend to related matters such as trade, services, intellectual property, industrial policies, labour issues, movement of personnel, environmental concerns, and others. The system shows uniformity at the core, but increasing variation at the periphery, that is, while there is a considerable degree of commonality concerning the key elements of investment protection, there is much diversity with regard to other IIA-related issues. Finally, the IIA universe is dynamic and innovative, both with regard to the evolution of substantive treaty provisions and dispute settlement (UNCTAD 2007a).

Another feature of the IIA system is the ongoing trend towards *more investment arbitration.* In 2007, the number of known treaty-based investor-State dispute settlement cases grew by at least 35, bringing the total number of known treaty-based cases to 290 by the end of 2007. While international arbitration is an important means to strengthen the rule of law and to increase legal stability, a number of conflicting awards have also led to new uncertainties concerning the interpretation of core investment provisions. These concerns resulted in the revision of several model BITs (UNCTAD 2007b)

Finally, the *role of developing countries* in international investment rule-making continues to increase. Some developing countries, such as China and Egypt, are among the most prolific signatories of BITs worldwide. There is also growing South-South cooperation with regard to IIAs, as more and more developing countries are becoming sources of outward investment (UNCTAD 2005a). This new role may have an impact on their bargaining position in future IIA negotiations.

Opportunities and challenges in investment treaty-making

The evolution of the IIA universe into an increasingly complex and diversified system offers both opportunities and challenges. On the one hand, countries nowadays have as many options as never before to conclude the type of IIA that best suits their development objectives, and to draft individual treaty provisions to meet these objectives. On the other hand, countries, in particular developing countries, may have more difficulties to cope with an increasingly intricate and non-transparent IIA patchwork.

Three challenges stand out in particular: First, there is the issue of *policy coherence*. With the growing number and complexity of existing IIAs, it becomes more challenging for countries, in particular developing countries, to keep their IIA network coherent and to – at the very least – avoid major inconsistencies. Second, a denser treaty network might imply a higher risk that a country loses *regulatory flexibility* in dealing with foreign investment, and poses new questions concerning the proper *balancing of private and public interests in IIAs*. In response, some countries have started to clarify treaty language with regard to individual IIA provisions, and to introduce more exception clauses to deal with certain public concerns, such as national security, health or the environment, and modified dispute settlement procedures. In addition, the issue of corporate social responsibility in the context of international investment rule-making is gaining importance. A possible re-balancing of private and public interests may also be an issue with regard to the new role of emerging economies as capital exporters. As a result, they may wish to enhance the protection of their investors abroad. Vice versa, several countries have in recent years re-evaluated their investment liberalization policies and introduced new restrictions. These policy changes might also have an impact on IIA negotiations. Third, there is the issue of how to make the evolving IIA framework more suitable for *development purposes*. Questions under discussion include a stronger emphasis on investment *promotion* in IIAs, the issue of what kind of IIA might best further development objectives, and a more frequent recourse to mediation and conciliation as alternatives to investment arbitration.

As a result of these considerable challenges of content, there is a risk that developing countries lacking the capacity to participate fully in the evolving IIA system are being marginalized and left behind in further international investment rule-making. There is thus a need for more policy dialogue and capacity-building. UNCTAD plays an important role in this field through its policy research and analysis, its technical assistance and advisory services, and its maintenance databases on IIAs and investor-State dispute settlement. These various activities can make a valuable contribution to working towards a more transparent, consistent and development-friendly IIA system.

Outlook

Existing challenges are largely due to *system-immanent deficiencies* inherent in the IIA universe. As long as it continues to be highly atomized, there is limited prospect for achieving a substantially higher degree of homogeny, transparency and recognition of legitimate development concerns. There is a risk that the system eventually degenerates into an increasingly non-transparent hodgepodge of diverging rules that countries, especially capacity-constrained developing countries, find more and more difficult to cope with. These deficiencies could be effectively addressed only by an evolution of the IIA system itself. Therefore, an international investment framework remains an important goal, although there is currently little prospect to make substantial progress in this area. A collective effort could significantly contribute to making the existing system of international investment rules function more effectively and efficiently, and making it more conducive to growth and development. This could gradually increase clarity and stability of investment relations, improve consistency of rules, serve as a main reference for international investment rule-making at all levels, and ensure that all countries irrespective of their level of development can equally participate in the process. As long as countries are not ready to come together at the negotiation table, multilateral discussions of the further evolution of the IIA universe in a forum like UNCTAD remain crucial.

INTRODUCTION

The universe of IIAs continues to grow in number and complexity. The IIA system has long included all regions and, today, almost every country in the world is a party to at least one IIA and the great majority are a party to several. By end of 2007, the number of known IIAs exceeded 5,500, with the number of BITs reaching beyond 2,600, the number of treaties on the avoidance of double taxation (DTTs) beyond 2,700, and the number of free trade agreements (FTAs) and other agreements on economic cooperation incorporating investment provisions (referred to hereinafter as “Preferential Trade and Investment Agreements” or “PTIAs”) reaching 254 (UNCTAD 2008a, 2007b, 2006a). This remarkable treaty-making activity reflects the intention of the countries involved to provide for foreign investment an additional layer of stability and transparency beyond that afforded by their domestic legislation. It therefore complements the continuing general trend of investment liberalization in most countries around the world.

While the increasing variety and complexity of IIAs offer new opportunities for countries in terms of treaty-making and using IIAs as instruments to further their development objectives, they also create unprecedented challenges concerning the negotiation of the "right" agreement, the proper implementation of IIA obligations, and for keeping the IIA system coherent and transparent. The risk of incoherence is particularly high for developing countries with less expertise in IIA matters, frequent policy changes and weak negotiation positions. Furthermore, developing countries acting on their own may find it difficult to ensure in IIAs that the development dimension is properly taken into account and that they retain sufficient regulatory flexibility to pursue their economic and social development goals.

Against this background, this study takes stock of international investment rule-making since the end of the Second World War when first efforts to establish international disciplines in this area had been undertaken. It addresses the opportunities and challenges that the current IIA system presents for countries, in particular developing countries, and suggests possible ways to deal with these challenges, thereby drawing lessons from past experience.

I. THE HISTORY OF THE CURRENT IIA UNIVERSE

International rule-making with respect to foreign investment during the past 60 years has occurred in two stages. The first stage began with the end of the Second World War and continued until the late 1980s when the former Soviet Union collapsed and a global movement towards economic liberalization set in. The second stage started in the late 1980s and continues to the present day. Understanding the origin and development of the current IIA system is critical to evaluating the challenges for countries, in particular developing countries, posed by that system as well as the prospects for effectively addressing them.

A. The first stage: 1945-1989

The first stage of international investment rule-making was shaped by sharp disagreement within the international community concerning the extent to which customary international law protects foreign investment against adverse treatment by the host state. Fearing economic domination, developing countries in some cases expropriated foreign investment, sought to close their economies to foreign participation, and adopted import substitution policies that emphasized the development of domestically controlled enterprises. Developed countries particularly in Western Europe and North America contended that customary international law established an international minimum standard of treatment to which foreign investors were entitled in the territory of the host country. This standard – it was argued – included in particular the payment of fair market value for the expropriation of foreign investment, a standard often referred to as "prompt, adequate and effective" compensation. Developing and socialist countries denied that customary international law established an international minimum standard of treatment for foreign investment and that foreign investment was entitled to, at most, only the treatment afforded by a host-country government to investments made by its own nationals.

The first attempt to develop a multilateral framework for investment protection was the negotiation of the proposed Havana Charter of 1948, which was intended to establish an International Trade Organization. Although the Charter would have applied primarily to trade matters, the United States proposed language to provide certain protections for foreign investment. When the language was not accepted because of the above-mentioned differences concerning the international minimum standard, the Charter lost the support of the United States and was ultimately not adopted. Much of its trade-related portion entered into force as the General Agreement on Tariffs and Trade (GATT).

Somewhat greater success was achieved through regional or plurilateral instruments, where agreement could be reached among countries in the same geographic area or at the same level of economic development. The most complete integration took off in 1957 with the formation of the European Economic Community, which later evolved into the European Union; numerous other examples of such instruments exist, including the 1957 Agreement on Arab Economic Unity, the 1969 Cartagena Agreement to establish an Andean Common Market, and the 1973 Agreement creating the Caribbean Common Market. In some cases, countries signed liberalization agreements that initially did not address investment issues, although they would do so later. Examples include the European Free Trade Association (EFTA) and the Latin American Free Trade Association (LAFTA), both dating from 1960.

As these examples indicate, early plurilateral agreements addressing investment issues tended to be concluded among countries in the same region and at the same level of economic development. To the extent that international rule-making was to occur among countries in different regions or at different levels of economic development, such rules were most likely to be set up through bilateral negotiations. The United States, for example, began in 1945 to negotiate a series of Friendship, Commerce and Navigation (FCN) treaties that, while dealing primarily with trade, included several property-protection provisions, such as a guarantee of fair and equitable treatment, protection in accordance with customary international law, and prompt, adequate and effective compensation for expropriation. These provisions were phrased to cover protection of property in general, rather than investment *per se*. Over the next 20 years, the United States concluded such agreements with both developed and developing countries.

In 1959, the first bilateral treaties addressing solely investment protection were concluded by Germany with Pakistan. Germany continued to negotiate more such BITs and soon other European nations followed suit. Belgium, Denmark, France, Italy, Luxembourg, the Netherlands, Norway, Sweden, and Switzerland all concluded their first BITs between 1960 and 1966.

These BITs shared several features. First, they were, as the name implies, between two countries only. Second, these two countries typically included a developed and a developing country. Third, the BITs addressed exclusively the promotion and protection of investment, though typically they promoted investment only by protecting it. That is, only occasionally were there provisions directed at the promotion, but not the protection of investment. The underlying assumption was that the treaty would protect investment from the developed country in the territory of the developing country and, in that way, attract additional investment from the developed country to the developing country.

Although only 72 BITs were signed between 1959 and 1969, this period was important in establishing the basic model that would characterize the great majority of BITs over the next 40 years. It included guarantees of national treatment and most-favoured nation (MFN) treatment of investment, fair and equitable treatment, treatment in accordance with customary international law, a guarantee of prompt, adequate and effective compensation for expropriation, a right of free transfer of payments related to investment, and provisions for investor-State and State-State dispute resolution.

Developed countries also sought to conclude regional or multilateral agreements to bolster the protection of investment, but with mixed success. In 1965, the World Bank opened for signature the Convention for the Settlement of Investment Disputes Between States and Nationals of Other States. The Convention created the International Centre for the Settlement of Investment Disputes (ICSID) to administer the arbitration of disputes between investors and States, a mechanism that soon became common in BITs. In 1967, the Organisation for Economic Co-operation and Development (OECD) prepared a draft Convention on the Protection of Foreign Property. The Convention was never opened for signature, but it did play a role in promoting uniformity among developed countries in the protection guaranteed by their BITs.

Developing countries also tried to pursue their goal of establishing binding obligations on investors and ensuring domestic regulatory autonomy by adopting in 1974, the United Nations Resolution calling for the Establishment of a New International Economic Order (NIEO).This included the right to expropriate foreign investment subject only to national law. This development, together with additional waves of expropriations in the 1970s, prompted more developed countries to launch BIT initiatives. Austria, Japan, the United Kingdom and the United States all inaugurated BIT programmes in the mid-1970s. The emergence of the United States BIT programme was of particular importance because these BITs contained, in addition to the property protection provisions typical of the European BITs, a right of national treatment and MFN treatment with respect to the establishment of investment, subject to exceptions set forth in an annex.

With additional countries concluding BITs, the pace of negotiations accelerated slightly. In the 1970s, 166 BITs were concluded, or about 1.3 per month. In other words, the pace was about double that in the prior decade. The speed accelerated still further in the 1980s, with 386 BITs concluded, or about 3 per month. This figure is somewhat misleading, however, as the majority of these agreements were concluded at the end of the decade, when the IIA system entered the second stage of the post-war era.

In the early 1980s, another attempt was undertaken to establish multilateral investment rules. The UN Draft Code of Conduct on Transnational Corporations tried to provide guidelines for transnational corporations (TNCs) in order to contribute to the development goals and objectives of the countries in which they operated. The Code also attempted to facilitate co-operation with and among countries on issues relating to TNCs, and to alleviate difficulties derived from the international character of such corporations and the resulting diversity of laws and cultures. Negotiations failed because countries could not agree as to whether, and to what extent, foreign investors should be subject to multilateral obligations, and what should be their nature.

B. The second stage: 1989 - present

In the late 1980s, a series of political and economic events substantially changed the environment in which IIAs were being negotiated. The result was a second stage in the post-war evolution of the IIA system.

The sovereign debt crisis of the 1980s had diminished the willingness of commercial banks to lend to developing countries. With limited aid from international financial institutions and other official sources, developing countries increasingly recognized that the most readily available source of capital for their development needs was foreign investment.

Furthermore, foreign direct investment offered the promise of technology, training, know-how and access to markets, and was thus a relatively attractive means of expanding capital.

At the same time, the rapid economic development of several East Asian economies, which had pursued policies of export-led growth, relative to those in Sub-Saharan Africa and Latin America, which in many cases had pursued import-substitution policies, demonstrated the valuable role that participation in the global market economy could play in economic development. Meanwhile, at the end of the 1980s, countries in Eastern Europe or formerly part of the Soviet Union had begun the transition from socialism to market-based economies.

The net effect of trends such as these was that, by the late 1980s, large numbers of developing countries were opening their economies to market forces and seeking to attract foreign investment. An UNCTAD survey of 895 national changes in FDI policy during the period between 1991 and 1998 ascertained that 94 per cent of the changes were intended to create a more, rather than less, favourable investment climate. Another way in which developing countries sought to attract foreign investment was by concluding IIAs, especially BITs, to provide a stable and transparent investment climate in their countries; this was done in the hope that it would boost investor confidence and contribute to increased investment flows. This led to a substantive increase in the number of BITs being negotiated. While fewer than 400 BITs were concluded in the 30 years from 1959 to 1989, some 2,000 BITs were signed in the next 15 years.

The new consensus was also reflected in the conclusion during the Uruguay Round of trade negotiations of three multilateral agreements that included investment-related issues. The WTO General Agreement on Trade in Services (GATS) established a mechanism for liberalizing investment in the service sector. The Agreement on Trade-Related Investment Measures (TRIMs) prohibits the imposition of certain performance requirements on foreign investment that are inconsistent with the national treatment or quantitative restrictions obligations of the GATT. The Agreement on Trade-Related Intellectual Property Rights (TRIPS) obligates member States to adopt certain protections for intellectual property against infringements.

The Uruguay Round agreements signalled two changes. The first was the growing recognition of the connection between trade and investment. These were no longer seen as alternative means of obtaining resources or serving markets, but as complementary means, with a large segment of world trade occurring between affiliated enterprises. Thus, international investment rules increasingly were adopted as part of bilateral, regional, interregional, intraregional 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, include commitments to liberalize, protect and/or promote investment flows between the parties.

As the foregoing suggests, the second change was the emergence of liberalization as a major dimension of a number of IIAs. Within a few years, Canada and Japan would add to their BITs liberalization commitments similar to those found in the United States' BITs. Liberalization obligations also appeared, for instance, in the 1998 ASEAN Framework Agreement on the ASEAN Investment Area, the Free Trade Agreement (FTA) between Panama and Singapore (2006), and the Economic Partnership Agreement (EPA) between New Zealand and Thailand (2005).

Both trends also were reflected in the 1992 North American Free Trade Agreement (NAFTA) among Canada, Mexico and the United States. The NAFTA deals primarily with trade, but includes an extensive investment chapter with liberalization and protection provisions similar to those found in the BITs concluded by the United States, though more extensive and detailed in some respects.

The late 1980s and early 1990s saw additional investment agreements at the plurilateral level, as well as the regional and sectoral level. In 1987, the ASEAN countries adopted the Agreement on the Promotion and Protection of Investments. In 1994, the Energy Charter Treaty (ECT) was concluded among some 50 countries, including all in Europe, the former Soviet Union, as well as Australia, Japan and Mongolia.[1] It includes both investment protection and liberalization provisions, although it only applies to investment in the energy sector.

Not all efforts in the 1990s at the multilateral level were successful, however. In the mid-1990s, the OECD launched the negotiation of a Multilateral Agreement on Investment (MAI), which would have included investment liberalization and protection provisions (UNCTAD 1999a). It was intended to be a rigorous agreement that would be adopted initially by the OECD countries, but then opened to developing countries and countries with economies in transition for signature as well. The negotiations failed, in no small part because the participating countries already provided sufficiently high levels of protection and openness under their domestic laws that there simply was not enough to be gained in an agreement to justify the continued effort at negotiation. In addition, the agreement eventually attracted strong opposition from various non-governmental organizations fearing that such an agreement would preclude States from adopting high labour and environmental standards. Developing countries were concerned about a "fait accompli" and rejected the idea of an MAI from the negotiation of which they were excluded. They also disagreed with the high standards of investor protection and liberalization provided in the draft MAI.

As initiated by the Singapore Ministerial Conference in 1996, the WTO started to engage in an analysis and debate about the relationship between international trade and investment, and its implications for economic growth and development. At the 2001 WTO Ministerial Conference in Doha (Qatar), it was agreed that negotiations on an investment agreement should take place after the Fifth Ministerial Conference to be held in 2003 in Cancun (Mexico) on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. However, such consensus could not be reached due to diverging interests in the negotiations in investment and in other areas, and it was therefore decided in August 2004 to not pursue this issue any longer as part of the Doha agenda.

As the new century began, several countries began to negotiate bilateral free trade agreements (FTAs) similar to NAFTA in three important respects. First, these agreements included an extensive investment chapter that contained provisions similar to those appearing in BITs. In effect, it was as if a BIT had been incorporated within a free trade agreement. Second, they were often between a developed and a developing country. They went beyond NAFTA in that they often were between countries that were not even in the same region. Third, NAFTA had included a number of provisions that were more elaborate than those typically found in BITs, especially with respect to investor-State dispute resolution, and these more elaborate provisions found their way into the post-2000 FTAs, particularly those concluded by the United States.

These agreements have given rise to a new type of IIAs encompassing both trade and investment components. In addition, these treaties often include further elements as will be explained below. These agreements also typically include provisions that are more specific, complex and sophisticated. Their number is growing rapidly.

Note

[1] However, the ECT has not been ratified by Australia, Belarus, Iceland, Norway, and the Russian Federation.

II. THE IIA UNIVERSE AT THE BEGINNING OF THE 21ST CENTURY

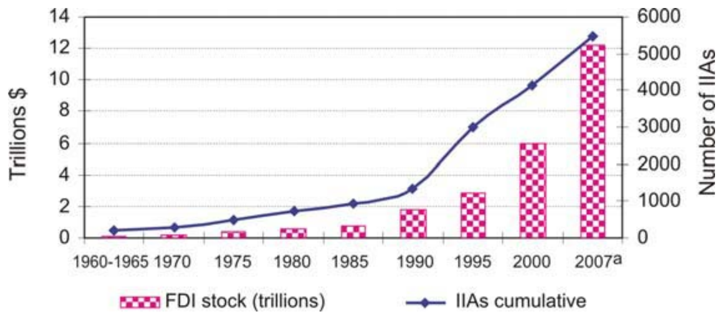
A. Evolution of the IIA universe

1. Continuous expansion of the IIA universe

Parallel to the steady growth of FDI in recent decades, the universe of IIAs has continued to grow in size and complexity. While the increase in the number of treaties was rather modest in the period from the conclusion of the first BIT in 1959 until the mid-1990s, the IIA network expanded rapidly thereafter. Whereas until the mid-1990s, IIAs were mostly concluded in the form of BITs, the last couple of years have witnessed a stronger emphasis on FTAs and other treaties on economic cooperation that include investment provisions (figure 1).

Developed countries have been the main actors in the IIA universe since the beginning (figure 2). However, there has recently been a shift in momentum towards an increased role of developing countries (see below). Among developing countries, the Asia-Pacific region is the most active group, with African, Latin American and the Caribbean countries trailing behind. This pattern is common to all IIAs.

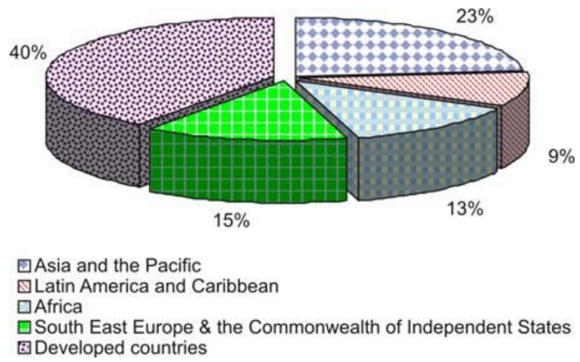
Figure 1. Increase in IIAs and FDI stocks (1960-2007)



[a/] Figure for FDI stocks relates to 2006.

Source: UNCTAD.

Figure 2. Regional distribution of IIAs (end 2007)

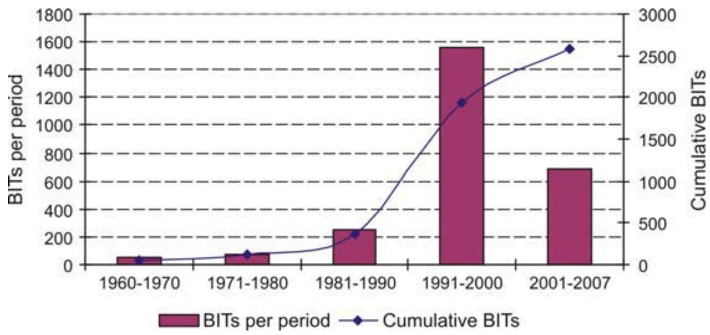


Source: UNCTAD**.**
Note: The above figures reflect multiple counting (e.g. BITs concluded between countries from Asia and Africa are included in *both* regions).

a. Bilateral investment treaties

The total number of BITs was over 2,600 by the end of 2007 (figure 3). While BITs continue to be by far the most prevalent type of IIAs – constituting approximately 47 per cent of all IIAs concluded – their number concluded annually has been slowing down since 2001. The strongest increase in the annual number of BITs negotiated took place in the decade of the 1990s with an average of 147 concluded each year.

Figure 3. Number of BITs concluded by period (1960-2007)

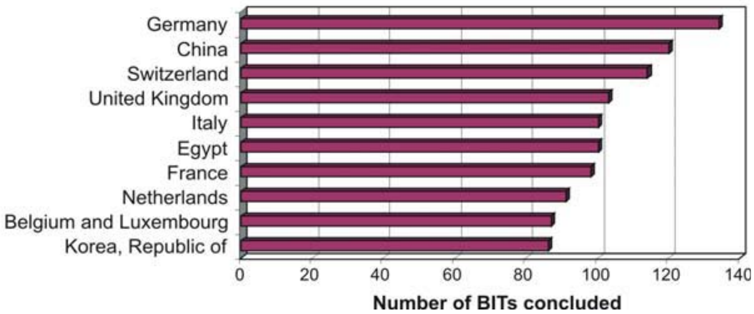


Source: UNCTAD (www.unctad.org/iia).

The most active country involved in the conclusion of BITs has been Germany, followed by China and Switzerland (figure 4).

Developed countries are the dominant factor here, being part to 60 per cent of all BITs. Their share has been declining however, due to the ascendancy of developing countries and transition economies as active pursuers of BITs. The latter two groups now account for 76 per cent and 26 per cent, respectively, of the BITs universe. Among developing countries, by the end of 2007, Asia and the Pacific had concluded over 1,050 BITs, followed by Africa (over 690) and Latin America and Caribbean (more than 485) (UNCTAD 2008b).

Figure 4. Number of BITs concluded by "top ten economies", end 2007



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

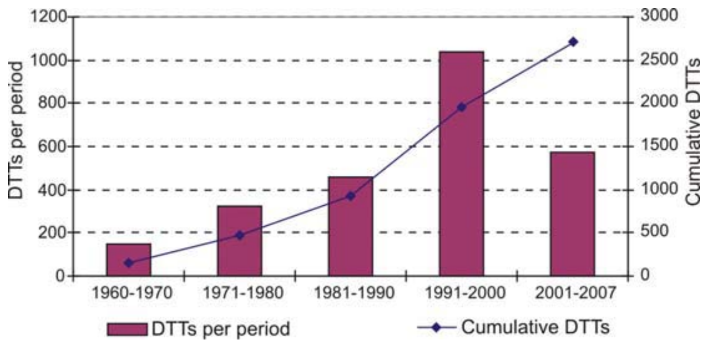
The entry into force of BITs allows the agreements to fulfil their intended role as legally binding instruments for the promotion and protection of foreign investment. According to information contained in the UNCTAD database (April 2006), about 76 per cent of all BITs had entered into force. This rate increases almost constantly with the age of the agreements (UNCTAD 2006a).

A more recent development is the renegotiation of existing BITs. By end 2007, a total of 120 BITs had been renegotiated between countries. One major reason for these efforts is the wish of the contracting parties to update "old" treaties by including "modern" protection standards, such as those relating to national treatment and investor-State dispute settlement. In some cases, however, the contracting parties' intention is to clarify treaty provisions and to reassess the actual balancing of private and public interests in IIAs. The most active countries concerning renegotiation of BITs were Germany (13), China (12), Morocco (12), Egypt (11), and Belgium-Luxembourg (9).

b. Double taxation treaties

The total number of DTTs was over 2,700 by the end of 2007 (figure 5).[1] The regional distribution of DTTs (by country group) shows that 38 per cent of all DTTs have been concluded between developing and developed countries, while 16 per cent were concluded between two developing countries. The share of DTTs between developed countries (24 per cent) is significantly higher than in the case of BITs, which may be explained by the fact that double taxation poses a greater threat in these countries than political risk. Countries in Asia and the Pacific are the most active with 1013 DTTs concluded by the end of 2007, followed by Africa (459), Latin America and the Caribbean (319). At the national level, the United States (153), the United Kingdom (151) and France (133) have signed the highest number of treaties. Among developing countries, China (99), the Republic of Korea (81) and India (79) are the front-runners as of end 2007.

Figure 5. Number of DTTs concluded by period, 1960-2007



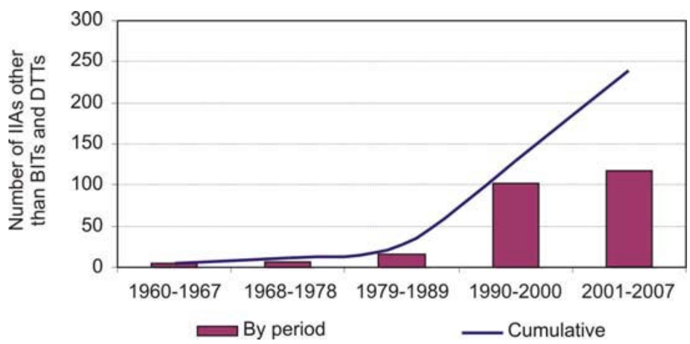
Source: UNCTAD (www.unctad.org/iia).

c. Preferential trade and investment agreements

A significant new development in international investment rule-making in more recent years has been to establish investment rules as part of preferential trade and investment agreements (PTIAs). By end 2007, 254 PTIAs existed, involving 63 countries (figure 6).[2] While the total number of PTIAs is still small compared with the number of BITs (less than 10 per cent), it has nearly doubled over the past five years. In addition, at least 75 agreements involving 110 countries were under negotiation at the end of 2007. This suggests an even more pronounced increase in such treaties in the future.

PTIAs may establish binding obligations for the contracting parties concerning the admission and protection of foreign investment (UNCTAD 2006b). The scope of the protection commitments in these PTIAs is comparable to that found in BITs. Among the recent examples are the Economic Partnership Agreement (EPA) concluded between Japan and Thailand (2007) and the FTA between the United States and the Republic of Korea (2007). However, other agreements only establish a framework for cooperation between the contracting parties. Such cooperation often takes the form of establishing an institutional framework to follow up on investment issues and identify the timeframes for the launching of future negotiations on investment liberalization and/or protection. A recent example of such an agreement is the Trade and Investment Framework Agreement (TIFA) concluded in 2006 between the United States and ASEAN.

Figure 6. The growth of PTIAs, 1960-2007



Source: UNCTAD.

2. Increasing scope, complexity, diversity and interactions of the IIA universe

a. Scope of IIAs

Numerically, traditional BITs emphasizing the protection of foreign investment continue to dominate the IIA system. This is particularly true in the case of South-South BITs. Nevertheless, a growing number of BITs include more detailed investment protection provisions, as well as liberalization commitments (UNCTAD 2007c).

In addition, investment provisions are increasingly being formulated as part of agreements that encompass a broader range of issues, including notably trade in goods and services, but also intellectual property rights, competition policy, government procurement, temporary entry for business persons, transparency, the environment, and labour rights. Increasingly, countries prefer to address traditional investment protection and newer investment liberalization issues in the context of these broader agreements where investment provisions are only part of a larger framework for economic integration. While BITs continue to be more numerous than PTIAs, the latter occupy a much more prominent place in the IIA universe than they did a decade ago. As a result, the IIA system has become increasingly multi-faceted and more complex (see below section III.B.1).

Recent PTIAs concluded by countries such as Australia, Chile, Japan, Singapore and the United States are especially comprehensive and detailed. Thus, the negotiation of IIAs is no longer within the exclusive domain of investment experts, but potentially requires a much broader range of expertise than in the past. This may present a difficult challenge for developing countries, which have limited resources to devote to treaty negotiations and to implement obligations (see below section III.A).

Not all recent IIAs, however, have followed the trend of developing a greater scope. Other recent agreements have remained rather narrow in their coverage of investment issues. These treaties are confined to establishing a framework for cooperation on investment promotion. The cooperation provided for is typically aimed at creating favourable conditions for encouraging 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.

b. Complexity of IIAs

International investment rules are becoming increasingly complex in content. This phenomenon may reflect efforts to address more dimensions of a transaction than had been done in other agreements. As already noted, IIAs have increasingly become multi-faceted and are no longer limited to investment issues *per se*.

Greater complexity may also be the result of a desire to define an obligation with greater specificity and thereby to clarify its scope and application. Examples include recent provisions clarifying the meaning of “fair and equitable treatment” and the concept of “indirect expropriation", discussed in the next subsection. The effect of a clarification may be to give the provision a narrower scope than it otherwise might have had. Thus, a more complex provision may be a less stringent provision. On the other hand, greater complexity may also be the result of an effort to impose more rigorous obligations. For example, some provisions on performance requirements have become more complex as countries have sought to expand the scope of the provisions (UNCTAD 2006c).

The increased complexity of the agreements may also be seen in the procedural provisions of IIAs. For example, some recent IIAs have made significant innovations in their investor-State dispute resolution procedures, addressing issues such as whether hearings are to be open to the public, whether submissions shall be made publicly available, whether non-disputants may be permitted to make submissions, whether preliminary questions may be considered in advance of other questions, or whether related claims may be submitted to a single tribunal for resolution. In the absence of specific language in the IIA, these issues would be left to the tribunal to resolve. By addressing them in the IIA, the parties aim to ensure that these questions are resolved in ways that further their interests, such as the goal of promoting judicial economy and the perceived legitimacy of the process. Also, addressing the issues in the IIA enhances transparency and predictability by giving the disputing parties advance notice of how certain procedural issues will be resolved.

The fact that IIAs have become increasingly complex and diversified offers new options, but also poses unprecedented challenges for countries, in particular developing countries. The greater variation of treaties presents an opportunity for choosing such approaches to promoting international investment flows that better reflect the special circumstances of countries at different levels of economic development and in different regions. At the same time, the more issues an IIA addresses and the more sophisticated it is in dealing with them, the more complex the agreement and the greater the potential for overlaps and inconsistencies (see below section III.B.1).

c. Diversity of IIAs

Greater scope and complexity of IIAs, taken together, also have resulted in greater diversity of treaties. The result is that the structure of IIAs has become much more diverse.

In the first stage of the post-war era, IIAs consisted largely of multilateral liberalization agreements among countries in the same region and at the same level of economic development and BITs between a developed and a developing country. Nowadays, agreements may be multilateral, plurilateral, regional, interregional or bilateral. And regardless of the level at which they are negotiated, they may involve investment liberalization, protection, promotion or regulation. They may involve countries at the same or at different levels of economic development. They may address only a few issues or provide for comprehensive economic integration. They may be simple or highly complex. Thus, it has become difficult to speak in any meaningful way of a “typical” IIA.

d. Interactions within the IIA universe

As the number of IIAs increases, there are more occasions where individual contracting parties face overlapping obligations from various agreements. One and the same country may be bound by investment provisions concluded with the same treaty partner at the bilateral, regional, sectoral or multilateral level. For instance, an EU member country may have investment-related obligations vis-à-vis other EU members under BITs, the EU Treaty, the Energy Charter Treaty, or under the IMF and WTO-Agreements. With the more frequent conclusion of FTAs that include investment provisions, these will increasingly overlap with BITs. Thus, circumstances will arise in which more than one IIA is potentially applicable to a particular transaction involving a particular investment. This raises the issue of consistency between overlapping treaties (see below section III.B.1).

Furthermore, the MFN clause included in practically all IIAs results in interactions between treaties. By definition, this treaty article has the effect of making more favourable provisions from other IIAs applicable within the context of the agreement containing the MFN clause (UNCTAD 1999b). As the IIA universe expands, there are also more occasions for such interactions. However, the result of such interaction in terms of the finally applicable rule has become more difficult to ascertain in the light of some recent contradictory arbitration awards (see below section III.B.1).

3. Investor-State disputes

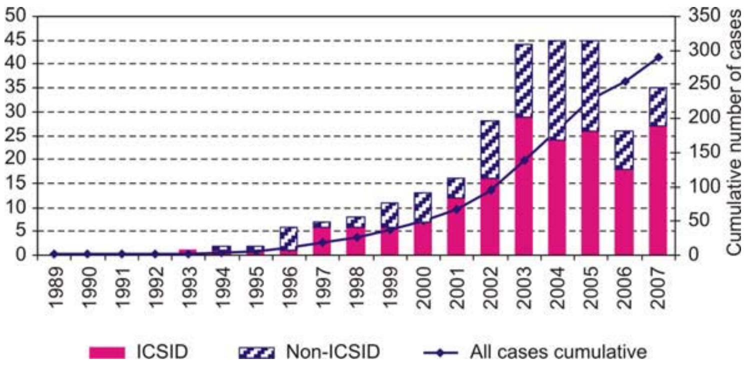
Another important development has been the surge in investor-State disputes in recent years. At the end of 2007, the number of known treaty-based investor-State dispute settlement (ISDS) cases stood at 290 (figure 7).[3] Out of the total of 290 cases, 182 were filed with ICSID. Most other disputes were initiated under the UNCITRAL Arbitration Rules (80) and the Stockholm Chamber of Commerce (14).

Until April 1998, only 14 cases had been brought before the most frequently used arbitration forum concerning BITs – ICSID – and only two awards and two settlements had been issued. However, since the late 1990s, the number of cases has grown enormously, reaching an annual peak in 2005.

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, and more occasions for disputes combined with more IIAs are likely to lead to more cases. Second, with larger numbers of IIAs in place, more investor-State disputes are likely to involve an alleged violation of a treaty provision. Greater transparency in arbitration (e.g. within NAFTA) may also be a factor in giving greater visibility to this legal avenue of dispute settlement (UNCTAD 2005b).

Most of the known cases (39 per cent) involved the services sector (including electricity distribution, telecommunications, debt instruments, water services and waste management), 24 per cent were related to mining and oil and gas exploration activities, and another 31 per cent concerned the manufacturing sector. The sectors involved for the remaining 6 per cent remain unknown.

Figure 7. Known investment treaty arbitrations, cumulative and new cases, 1989-2007



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

At least 73 governments – 44 of developing countries, 15 of developed countries and 14 of South-East Europe and the CIS – faced investment treaty arbitration, with Argentina topping the list (46 claims), followed by Mexico (18) and the Czech Republic (14) (UNCTAD 2008c).

Disputes have involved the whole range of investment activities and all kinds of investments, including privatization contracts and State concessions. Disputes have involved core provisions, such as those on fair and equitable treatment, non-discrimination, expropriation, and the scope of agreements and definition of 'investment'.

The rise in investment disputes arising from IIAs may be regarded as an expression of the rule of law and hence an indication that IIAs do contribute toward creating a favourable investment climate in host countries. Often, awards issued in investor-State arbitrations have helped to clarify the meaning of particular treaty provisions, thereby improving the transparency of the IIA system through a developed body of case law. However, there have also been some inconsistent awards that have contributed to uncertainty. Concerns have also arisen about the potentially high costs of arbitration, in particular for financially constrained developing countries. The possibility of multiple proceedings involving the same set of events has further augmented these concerns (UNCTAD 2005b, 2003a).

The financial implications of the investor-State dispute resolution process may be substantial. Claims and awards sometimes involve large sums, in some cases in the hundreds of millions of dollars. The cost of successfully defending against a claim can also be significant.

These concerns have led to some steps in the reform of the ICSID system as well as to the revision of several model BITs (UNCTAD 2007a). The latter revisions include significant innovations aimed at greater predictability, transparency and consistency in the process.

4. Greater role of developing countries

At the end of 2007, developing countries were party to over 2,000 BITs, more than 1,600 DTTs and approximately 200 PTIAs. There are now three developing countries, (China, Egypt and the Republic of Korea) among the top 10 signatories of BITs worldwide (figure 3). There are, however, exceptions: Least developed countries (LDCs), while host to less than 1 per cent of global inward FDI stock, have concluded more than 400 BITs, close to 200 DTTs, and almost 40 PTIAs (Table 1).

Besides these general trends, the role of developing countries in international investment rule-making is evolving in at least two important ways.

Table 1. International investment agreements concluded by regions (end 2007)

Region	BITs		DTTs		Other IIAs	
	2007	*Cumulative*	*2007*	*Cumulative*	*2007*	*Cumulative*
Asia and Pacific	23	1 068	23	1 013	6	104
Latin America and Caribbean	4	485	5	319	4	73
Africa	11	696	11	459	2	38
SEE&CIS	11	581	28	618	-	37
Developed countries	25	1 652	51	2 012	10	157
Developing countries	39	1 982	36	1 649	12	213
South–South	13	692	8	442	3	94
Least developed countries	5	439	6	195	2	41[a]

Source: UNCTAD

Note: The above figures reflect multiple counting (e.g. BITs concluded between countries from Asia and Africa are included in the list of *both* regions). The net total of each category of IIAs is therefore lower than the sum of the above figures.

First, there is a substantial increase in the number of IIAs concluded among developing countries. For example, by end 2007, more than 690 BITs had been concluded among developing countries, constituting about 27 percent of all BITs. There were more than 90 South-South PTIAs by end 2007.[4] The growth of FDI from the South means that a number of developing countries are becoming both host and home economies.

Second, several emerging economies (e.g. Brazil, China, India, the Russian Federation and South Africa) have become important outward investors during the last couple of years. This marks the beginning of a new phase of globalization, in which a growing number of developing countries have evolved from capital importers and have become much stronger players in the global economy. A considerable part of this outward investment is undertaken by sovereign wealth funds. Much outward investment finds its destination in other developing countries, frequently within the same region. The evolving status of these countries might have implications with regard to their negotiation position vis-à-vis IIAs. As emerging markets become greater sources of capital, their support for international rule-making is likely to grow, as is their influence on the rule-making process itself. Economic globalization is splintering the once monolithic blocks of developed and developing countries, with diametrically opposed on the issue of international investment law. Developing countries that may once have reluctantly agreed to international investment disciplines as the price of attracting foreign investment will increasingly wish to see their own investment protected by the IIA system. Yet, cultural and regional differences might produce a more diverse set of perspectives on what an investment promotion and protection agreement should contain.

More diversity of perspectives is already evident. Just as some emerging economies increasingly see themselves as capital exporters as well as capital importers, a few developed countries, notably Canada and the United States, as a result of concluding NAFTA, have begun to regard themselves as capital importers *and* capital exporters and have sought to define more carefully the scope of their IIA obligations.

As emerging economies become greater sources of outward investment, they need to assess what implications their dual roles as host and home countries might have for their bargaining position. IIA commitments that they seek in order to protect outward investment may limit their discretion to regulate inward investment. At the same time, treaty provisions such as exceptions for measures to protect health, safety, the environment or national security – while desirable to preserve their regulatory discretion – may reduce the scope of protection for their investors abroad.

One possible consequence of this development could be a growing convergence of views among emerging economies and some developed countries, as emerging economies increasingly see themselves as capital exporters and seek to protect their interests. This, in turn, could strengthen consensus seeking in support of core principles of investment protection. At the same time, however, it may also increase the diversity of views among developing countries that increasingly will no longer have monolithic interests as capital importing countries.

5. *Emerging signs of an IIA backlash?*

The ongoing growth of the IIA universe reflects the fact that most countries continue to see FDI as crucial for their economic development and are therefore keen to create and maintain a favourable investment climate that makes them attractive for foreign investors. On the other hand, attitudes towards foreign investment have recently become more critical in several countries, and this might have an impact on future international investment rule-making.

To some extent, FDI criticism may reflect a natural dynamic in the policy-making process. The period from the late 1980s to the early 2000s was a period of strong consensus about the value of foreign investment. This consensus had emerged when many countries became disillusioned with command economies and inward-looking economic policies, leading them to seek greater participation in a global market economy. As with any change in policy, after a time the success of the policy is evaluated and, where the results fall short of expectations, basic premises of the policy are re-examined and in some cases modified.

In this context, one frequently voiced criticism is that IIAs would not have a sufficient impact on attracting foreign investment and on ensuring that foreign investors positively contribute to economic development in the host country. This has even caused a few countries to stop concluding BITs altogether. On the other hand, recent empirical studies have argued that, in general, IIAs do have a positive effect on attracting foreign investment.[5] Most agree, however, that IIAs are only one factor in creating a favourable investment climate and that they may play a greater role in some developing countries than in others.

Other factors also contributed to a more critical attitude towards FDI and IIAs. Growing numbers of investment disputes have demonstrated that IIAs can have a direct financial cost for host countries. National security concerns have also become more salient within some countries, giving rise to new suspicions about foreign investment, especially those undertaken by – often financially powerful – State-owned companies and Sovereign Wealth Funds. It has been suggested that such investments should be closely scrutinised, because of the possibility that vital parts of the domestic economy come under the control of foreign countries that might use their investments for foreign policy purposes. In a number of countries, there have been calls for the re-examination of existing concession contracts that are perceived by some to be too favourable to the foreign investor. In some cases, countries have moved beyond discussions of renegotiation or rescission of contracts with foreign investors to the prospect of expropriating foreign investments. Concerns have not only been raised about the effects of inward investment, but also about the effects of outward investment. This is reflected, for example, in the adverse reaction in many countries to the outsourcing of production, originally in the manufacturing sector, but now in the services sector as well.

Whatever the causes, it appears that the momentum in support of IIAs has slowed in at least some cases. The share of national policy changes less favourable to FDI has increased considerably from 2-3 per cent of all regulatory measures in the late 1990s to almost 25 per cent in 2007 (UNCTAD 2008d). Coupled with increasing concerns about the social dimension of globalization, it cannot be excluded that these multi-faceted tensions affecting FDI evolve into a broader backtracking of liberalization that could have a negative impact on future investment rule-making. This concern has been confirmed by the recent global surveys by UNCTAD on the prospects for FDI in the period 2007-2009. Surveyed TNCs and international investment experts ranked protectionism as a major threat to global FDI flows in the years ahead (UNCTAD 2007e).

These trends might usher in a third stage in the history of post-war international investment rule-making. The first stage was characterized by the existence of two sharply opposed blocs of countries with contrasting views on the role of international law in protecting foreign investment, while the second stage was characterized by a consensus that was close to universal and that supported the development of an IIA system to protect foreign investment. The third stage might be characterized by a wider variety of perspectives that may share a consensus on certain key issues, but differ in other respects. As will be explained below, during the past couple of years the content of IIAs has already become more diverse, as some states seek to clarify the scope of traditional investment protection provisions while adding new protection and liberalization provisions.

B. Main characteristics of the current IIA universe

The evolution of international investment rules over the past decades has resulted in a complex patchwork of thousands of agreements. Despite its huge size and variety in approaches, a number of characteristics of this system are discernable (UNCTAD 2007a).

The system is *universal*, in that nearly every country has signed at least one BIT and the majority of them are members to several, if not numerous, IIAs. This remarkable level of treaty-making activity reflects the willingness of the countries involved to provide an additional layer of protection, stability, predictability and transparency that goes beyond their unilateral efforts to attract FDI.

The structure of agreements is *atomized*. That is, it consists of thousands of individual agreements that lack any system-wide coordination. In the absence of global investment rules, countries continue to conclude investment treaties, thereby further perpetuating and accentuating the IIA universe.

The IIA universe is *multi-layered*. IIAs now exist at the bilateral, regional, intraregional, interregional, sectoral, plurilateral and multilateral level, and IIAs at different levels may overlap. Thus, two countries may have mutual obligations created by agreements at different levels that are simultaneously applicable to the same investment.

The system is *multi-faceted*. IIAs include not only provisions that are specific to investment, but also rules that address other related matters, such as trade in goods, trade in services, intellectual property, labour issues or environmental protection. These other provisions may have an impact on the establishment or operation of an investment. Accordingly, a host country's obligations with respect to investment may arise from many facets of an IIA that are not only investment-specific and that may not have been designed with investment policy primarily in mind.

In substance, the agreements reflect a *considerable degree of consensus* with respect to the principal content. Provisions relating to treatment and protection of investment, such as national and MFN treatment for established investments, fair and equitable treatment, compensation for expropriation, the right to free transfers, and consent to investor-State and State-State dispute resolution appear in a very large majority of agreements. However, the actual wording of these provisions shows great and sometimes surprising diversity. Other provisions, however, such as guarantees of national treatment and MFN treatment with respect to the right to establish investment and prohibitions on performance requirements, appear in only a minority of agreements, sometimes with considerable variation among treaties.

The IIA system is also *dynamic and innovative*. For example, a small, but growing number of IIAs include revisions to the wording of various substantive treaty obligations, such as the meaning of "fair and equitable treatment" and the concept of indirect expropriation. Another new development is that some recent BITs emphasize in a stronger manner public policy concerns associated with foreign investment through exception clauses, covering, for instance, national security and public order, protection of health and the environment, respect for core labour rights, cultural diversity and prudential measures for financial services. Important innovations also take place in investor-State dispute settlement procedures in the IIAs of some countries in order to increase transparency, promote judicial economy, and foster sound and consistent results.

On the one hand, these developments demonstrate that international investment rule-making is flexible to react to new challenges, such as newly emerging public concerns in respect of foreign investment. On the other hand, it should be no surprise that in a highly atomised IIA universe, individual countries seek individual solutions in addressing these concerns – with significant implications for the overall coherence of the system.

Furthermore, most IIAs are typically *only indirectly promotional*. This means that they seek to attract foreign investment through the granting of investment protection rather than through specific promotion measures by home and host countries. IIAs in some cases may even preclude host states from undertaking certain investment promotion activities, such as offering incentives. Offering incentives to particular investors may be inconsistent with the MFN obligations or with prohibitions on performance requirements offered in connection with incentives. This raises the question whether more could be done to strengthen the promotional aspect of IIAs (see below section III.B.3b).

In a similar vein, IIAs establish principally *passive obligations*. This means that the commitments undertaken are in most cases obligations to refrain from particular conduct that is adverse to covered investment. Typically, the agreements impose few obligations on States to take action. An exception are certain home-country measures, such as financial and fiscal incentives, or the active promotion of technology transfer. However, such provisions are rarely included in IIAs (UNCTAD 2001).

Further, IIAs *only establish investor rights*, but remain silent with regard to their obligations. This means that host countries continue regulating foreign investment through their domestic legislation and not by directly imposing commitments on foreign investors in IIAs, for instance with regard to their corporate social responsibilities. Developing countries have tried for many years unsuccessfully to impose greater obligations on foreign investors in IIAs. How to ensure adequate corporate contributions to development remains a key challenge for many developing countries.

Most IIAs are *primarily protective, but only moderately liberalizing*. That is, the vast majority of obligations are intended to protect investment flows by limiting host state regulatory discretion. Liberalization was rarely a goal in agreements concluded during approximately the first half century of the post-war era. If there is a "typical" investment agreement (and increasingly there is not), it is still the one modelled after the European BITs pioneered in the 1960s. Much has changed, however, with the entry into force of the GATS, the most recent FTAs, the Framework Agreement on the ASEAN Investment Area, and recent BITs concluded by Canada, Japan and the United States.

As instruments of protection, most agreements *contribute only slightly to transparency*. Many IIAs further the goal of transparency only insofar as the provisions of the agreements themselves are transparent, but do not require host countries to make their domestic laws transparent. This characteristic is less true of PTIAs, which increasingly include chapters on transparency establishing obligations for information exchange or even general obligations of transparency in dealing with investment.

Most existing IIAs do not specifically address *development concerns*, or only in a marginal manner. The title of these agreements speaks for itself: IIAs are called treaties for the promotion and protection of foreign investment – and not economic development treaties. This aspect comes only later, namely in the preamble, which is not legally binding. The development objective of these treaties is therefore a political goal and is not specifically aimed at the developing country treaty partner, but at the economic development of all contracting partners, irrespective of their status. Apart from the preamble language, IIAs mainly pursue the development goal in an indirect manner, namely through the protection of foreign investment in the host country.

Notes

1. This study does not deal with DTTs in substance, as taxation issues reach beyond the subject of investment promotion and protection. For further information concerning taxation in the context of IIAs, see (UNCTAD 2000).
2. These agreements appear under a variety of names, for example free trade agreements (FTAs), closer economic partnership agreements (CEPAs), regional economic integration agreements or framework agreements on economic cooperation.
3. This number does not include cases where a party signaled its intention to submit a claim to arbitration but has not yet commenced the arbitration (notice of intent); if these cases are submitted to arbitration, the number of pending cases will increase.
4. Recent examples of such agreements include the ASEAN agreements for the establishment of free trade and investment areas with China (2002), India (2003) and the Republic of Korea (2005), the FTA between Panama and Singapore (2006), and the FTA between China and Pakistan (2006).
5. See for example, Banga (2003); Neumayer and Spess (2005); Tobin and Rose-Ackerman (2006). See, on the other hand, Gallagher and Birch (2006).

III. CHALLENGES IN MANAGING THE EXISTING IIA UNIVERSE

The preceding section identified a number of trends in the IIA universe and described its main characteristics as they have developed over the past decades. It follows from this analysis that the current IIA system is not a static structure of agreements, but a dynamic framework that continues to evolve. On the one hand, the progression of the IIA system and the consolidation of core investment protection principles contribute to clarity and stability of the investment climate. Moreover, the increasing variety and complexity of IIAs with regard to individual aspects of investment promotion and protection offer countries more options than ever before in terms of treaty-making and using IIAs as instruments to further their development policies. On the other hand, the latter aspect also poses unprecedented challenges, in particular for developing countries, concerning the negotiation of the "right" agreement, the proper implementation of IIA obligations, and for keeping the IIA patchwork transparent and coherent. Such challenges may be categorized as challenges of capacity and content.

A. Challenges of capacity

The rapid pace at which IIAs are concluded, their increasing complexity and diversity, the interaction between them, as well as the increase in investment disputes require considerable human resources in order to fully and effectively participate in the further development, implementation and monitoring of the IIA system. Although the challenges of capacity potentially affect every country, they are of special significance to developing countries for two reasons (UNCTAD 2007f).

First, developing countries, in general, possess fewer resources than developed countries and thus are more burdened by capacity challenges. Accordingly, many developing countries may find that their participation in the evolution of the IIA universe is adversely affected quantitatively or qualitatively. For example, a developing country may consider that it lacks the expertise to negotiate the agreements it wishes to negotiate. Alternatively, it may choose to open negotiations, but without having the knowledge needed to obtain concessions it otherwise could have obtained, or without entirely understanding all the possible consequences of the agreement, or without having the ability to fully honour the agreement once it is concluded.

Second, since capacity challenges affect developing countries more severely than developed countries, the latter may be less sensitive to the need to address them. In the end, capacity challenges may fall most heavily on those countries that are least able to steer the international investment system in the direction necessary to address those challenges.

Capacity problems are aggravated by many of the trends in and characteristics of the current international investment system as described above.[1] The hazard is not that developing countries will not be able to participate in the IIA system, because virtually all of them are already involved. The risk, rather, is that they might not be able to participate effectively and that their efforts to engage in the IIA system without sufficient resources might undermine the objectives of policy coherence, a proper balancing of private and public interests in international investment rule-making, and of ensuring that IIAs take the development dimension sufficiently into account (see below section III.B).

In the end, a lack of capacity among countries may threaten the effectiveness of the entire IIA universe. The system assumes a community of countries knowingly undertaking obligations that result in a stable and transparent framework for investment within their respective territories. If countries are unable to properly understand and assess the content of the agreements to which they have agreed because of their complexity, the risk arises that they will enter into agreements that they are unprepared to honour fully. This, in turn, would undermine the value of IIAs.

Even if capacity challenges do not undermine the effectiveness of the system, they may skew its structure. Capacity challenges, for example, may affect the content of IIAs. Countries lacking capacity might resist more complex, broader agreements. Whether this is a positive or negative development depends upon the value that contracting parties attach to more complex agreements. Independent from such individual assessment, one can, however, generalize that investment liberalization is a relatively complex issue. Thus, countries having difficulties negotiating complex agreements may find it hard to participate in the liberalization process.

Capacity challenges may also threaten the "justness" of international investment rule-making. Countries lacking the capacity to participate fully risk being marginalized and left behind in the further evolution of the IIA universe. This would be an affront to the principles on which the international community of the 21st century is constructed, and could also render the IIA system inherently unstable.

An important way to address capacity challenges is to strengthen the resources and institutions of developing countries seeking to participate more effectively in the IIA system. Various international organizations, such as the European Bank for Reconstruction and Development (EBRD), the IMF, UNCTAD or the World Bank are mandated to help countries, in particular developing countries, to strengthen their domestic capacities.[2]

While these various policy research and technical assistance activities have been of help to developing countries in international investment rule-making, the question is what kind of additional efforts could be envisaged to improve domestic capacities and enhance more multilateral consensus-seeking on IIA-related matters (see below section IV).

B. Challenges of content

Challenges of content arise from the need to ensure that IIAs meet their goal of providing a stable, transparent and coherent framework for investment, while also reserving for host countries sufficient regulatory discretion to pursue their economic development policies.

As described above, international investment rule-making has become more demanding as the IIA universe is increasingly atomized, multi-layered, and multi-faceted, as demonstrated by the growing number, breadth and complexity of overlapping agreements. Three endeavours are of primary importance in managing content challenges. The first is to promote policy coherence, the second is to balance private and public interests within IIAs, and the third is to enhance the development dimension of these agreements. The remainder of this section will deal with each of these challenges in more detail.

1. Promoting policy coherence

a. The different dimensions of policy coherence

One can distinguish different dimensions of policy coherence (UNCTAD 2007a):

Coherence between IIAs and national development policies

First, policy coherence means that the IIAs of a country should be consistent with its domestic economic and development policies. IIA commitments should increase the probability that a country's economic development objectives will be achieved. Ideally, IIA commitments should not be significantly over-inclusive – meaning that they go farther than the underlying policy requires – or significantly under-inclusive – meaning that they do not go as far as the underlying policy requires.

In that respect, the fact that recent IIA practice offers more options for negotiators can be both advantageous and disadvantageous. It provides an opportunity for developing countries to seek specific solutions for their individual development needs. However, the increasing complexity of these agreements may make it more challenging for developing countries to use them in an optimal way to pursue their development goals. For instance, enhancing the technology, skill and knowledge base is increasingly at the heart of the development efforts of many countries. This may require a complex policy mix involving trade, investment, labour and intellectual property issues.

Central governments may assume treaty obligations but remain unaware that they are inconsistent with certain regional or local laws, while regional and local governments may legislate not realizing that areas traditionally within their regulatory discretion are now the subject of IIA commitments. This problem is exacerbated in cases where, as described below, IIAs are inconsistent with each other or internally.

Another potential difficulty arises from the fact that national development policies are not always fully embedded in domestic law. Thus, the issue of incoherence has a broader scope than mere inconsistency between specific legal obligations. It also may arise where IIA commitments interfere with a host country's discretion to make future decisions to further its economic development policy. Coherence in that sense has a time dimension. It relates not only to consistency in respect of current policies, but also between existing agreements and future rule-making.

Coherence between national development policies and IIA obligations need to be addressed not only at the stage at which IIA obligations are assumed, but also at the stage of their implementation – a stage that for all practical purposes lasts for as long as the IIA remains in force. The implementation of an IIA may require formal changes in host country law; at the least it necessitates a continuous course of conduct in conformity with IIA obligations at the national, regional and local levels. As a result, maintaining coherence in the implementation stage may be seen as requiring more resources and presenting a greater challenge to a country than implementation at the stage at which obligations are assumed. On the other hand, the problems at the implementation stage may be diminished to the extent that the host country had the capacity to make informed and well considered choices when the obligations were assumed.

All of these sources of potential inconsistency may impose substantial burdens on countries seeking to develop an IIA programme that is consistent within itself and consistent with national, regional and local regulatory policies. The burden becomes greater as the number of IIAs increases and agreements become more complex, diverse, multi-layered and multi-faceted.

Coherence within the IIA system of individual countries

Second, policy coherence is at stake with regard to the IIA network of individual countries (box 1). Negotiators of investment agreements need to avoid – as far as possible – inconsistencies in their country's IIA network. This is not always possible, since no country has such a strong bargaining power as to impose its own treaty terms on each and every negotiation partner. The issue of treaty coherence has become more pronounced by some recent developments in international investment rule-making, particularly for developing countries. For instance, while most BITs contain a straightforward provision on fair and equitable treatment, some more recent agreements elaborate in more detail on the content of this article. This raises the question as to whether the substantive content of both variations differs.

Inconsistencies may appear with regard to virtually any IIA provision. One especially likely source of inconsistency arises from a general divide in investment rule-making – the divide between IIAs that protect established investment and those that also liberalize investment flows. Thus, depending on which treaty model IIA negotiations are based, developing countries may end up with a patchwork of diverging agreements, with some of them including liberalization obligations and others not. And the risk of establishing an inconsistent IIA network does not stop there. As explained above, IIA provisions, while uniform in their scope and content, are considerably varied with regard to individual aspects of treaty making. Accordingly, it is very common that countries, in particular developing countries, conclude agreements that differ from one another with respect to the precise language on one and the same core IIA provision.

A look into UNCTAD's online database of more than 2,000 BITs confirms that, in the case of many countries, incoherence is the rule rather than the exception.[3] In many instances, one and the same country has concluded BITs with divergences on such substantial issues as pre-establishment commitments, national treatment and exceptions to it, the coverage of the umbrella clause, performance requirements or investor-State dispute settlement – to mention but a few examples.

Box 1. Incoherence between IIAs

The expansion of the IIA network has given rise to various instances of potential incoherence between different agreements, for example:

- While most BITs leave it to the discretion of the host country to decide whether foreign investment should be admitted or not, FTAs often include establishment rights for foreign investors.
- Different modes of investment liberalization in IIAs may affect coherence. For instance, regional economic integration agreements (such as NAFTA) may establish an upfront liberalization based on a "top-down" approach, whereas the multilateral GATS provides for gradual market access on the basis of a "bottom-up" strategy. As a result, the degree of liberalization may be unclear for an economic activity covered by both agreements in the same host country.
- The Energy Charter Treaty includes an exception clause concerning the protection of the essential security interests of contracting parties. Many BITs do not contain similar provisions.

There may also be cases of "unintended coherence" between treaties concluded by a country. For instance, the MFN clause may, against the intention of a contracting party, incorporate into the IIA containing this clause certain procedural or substantive rights from other IIAs. This problem has been exacerbated by some recent contradictory interpretations of the scope of the MFN clause by arbitration tribunals.[a/]

Another example is the so-called "umbrella" clause, which extends the protection by the IIA to "any other obligation" of the contracting parties in respect of an investment. As a result, a breach

/…

(Box 1 continued)

by a host country of such other obligations (e.g. one deriving from a contract with a foreign investor) may be a violation of the IIA, and the latter's dispute settlement mechanism applies – an outcome that a contracting party to the IIA may not wish to see.

The risk of incoherence is particularly high for countries that lack expertise and bargaining power. In particular, they may have to conduct negotiations on the basis of divergent model agreements of negotiating partners with stronger bargaining power.

[a/] See, for instance, the following cases: "Maffezini" (Emilio Agustin Maffezini vs. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000; Award, 13 November 2000, Rectification of Award, 31 January 2001); "Salini" (Salini Costruttori S.p.A. and Italstrade S.p.A. vs. Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004); "Siemens" (Siemens vs. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004); and "Plama" (Plama Consortium Limited vs. Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005).

Source: UNCTAD.

Incoherence can also occur *within the same agreement*. This may particularly be the case in a multi-faceted IIA including chapters on such diverse types of economic arrangements as trade in goods, trade in services, investment and intellectual property. Not only may different chapters of the IIA impose different obligations with respect to the same transaction, but alleged violations of obligations of different chapters may be within the jurisdiction of different dispute resolution mechanism. For example, violations of investment provisions are generally submitted to investor-State arbitration, while violations of trade provisions – including possibly those on TRIMS – are generally submitted to a State-State dispute resolution procedure (UNCTAD 2003b). As a result, there is a risk of multiple proceedings and inconsistent results.

Experience has shown that divisions among agreements may be created even by unintentional means. Particular language drafted with stylistic concerns in mind, or to achieve a particular purpose may be found to have unanticipated consequences. A detail seemingly of little importance at the time an IIA was concluded, or regarded only as important with respect to a particular issue, may later be treated as decisive concerning an issue unforeseen when the detail was inserted in the IIA. A host country that believed that its IIAs were consistent with each other may find that they are not.

Coherence may also be at stake as a result of interactions between IIA provisions from *overlapping agreements between the same contracting parties*. In some cases, multiple provisions from different agreements may apply to the same transaction, with the complexity of the interaction creating unexpected or uncertain results. For example, contracting parties may have subsequently concluded a BIT limited to the protection of established investments, and a FTA including a right of establishment for foreign investor. The combined effect of these two agreements is that any investor covered by the establishment right can claim investment protection. However, when signing the BIT, the contracting parties might have conditioned the granting of investment protection to their prerogative to decide in each individual case whether to admit a foreign investor or not.

Likewise, overlapping IIAs may have the result that multiple dispute resolution provisions apply to the same dispute, causing uncertainty as to which method of dispute resolution will be used or creating the possibility of multiple, inconsistent proceedings.

In some cases, the combined effect of two provisions may be to expand treaty obligations beyond the circumstances contemplated when either provision was negotiated separately. Such an outcome is especially likely as a result of the inclusion in most IIAs of MFN treatment provisions that allow investment protected under one agreement to claim the protection afforded by the provisions of a different agreement that was negotiated in a different context.

Provisions in different agreements may even be contradictory, leading to the result that a right or obligation that appears to exist on the face of a specific treaty provision, because of another provision, either does not exist or applies in a different way than initially anticipated. For instance, while a BIT might establish an unconditional transfer guarantee concerning payments in connection with an investment, another IIA covering the same contracting parties may stipulate the host country's right to impose temporary transfer restrictions under certain circumstances.

Another potential source of inconsistency has to do with diverging interpretations that arbitration tribunals give to identical IIA provisions. IIA language is often broad and may be silent as to its application in a concrete situation. A tribunal faced with such a dispute must resolve it. There have been some inconsistent awards with regard to such core IIA provisions as the definition of investment, the principle of national treatment, the MFN principle, the principle of fair and equitable treatment, the scope of dispute settlement, the so-called "umbrella clause", and the issue of regulatory takings (Schreuer 2006). With the number of investment disputes rising, it is likely that still more inconsistent awards will be rendered in years to come.

Finally, inconsistencies may exist not only with respect to substantive provisions and their interpretation by arbitration tribunals, but also with respect to procedural provisions. Existing international arbitration systems, such as the ICSID Convention, the UNCITRAL Arbitration Rule, or those of the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC), differ from one another. While these differences offer disputing parties various procedural options, there is also a risk that they are not fully aware of all existing divergences and their implications for dispute settlement. In addition, there is a risk that such differences contribute to the inconsistency of awards. This raises the question of whether IIAs should include more detailed procedural arbitration provisions in order to reduce this risk (see sub-section c below).

<u>Coherence within the global IIA universe</u>

Policy coherence has yet another, broader dimension. Incoherence exists not only within the IIA network of individual countries, but also in respect of the entire IIA universe. As a result of the atomization of the IIA system, countries continue negotiating agreements individually. It is therefore no surprise that their approaches are often different.

Despite the considerable degree of commonality that has been achieved concerning some core elements of investment protection, there is a risk that the system eventually degenerates into an increasingly non-transparent hotchpotch of diverging individual treaty provision that capacity-constrained developing countries find more and more difficult to cope with. The patchwork of diverging treaties runs counter to the principles of clarity, stability and transparency that should apply to international investment relations. This raises the question of what could be done to promote more multilateral consensus-building on IIA issues (see below section IV).

b. The relevance of policy coherence

Why is policy coherence in international investment rule-making an issue? Why should it matter if country A concludes an IIA with country B that is different from the treaty it concludes with country C? For example, if country A grants national treatment to investors from country B, which it does not give to investors from country C, then all it would have to do is to ensure that all investors from country B receive national treatment, while it would not have to worry whether investors from country C also get national treatment or not. And the same reasoning would apply with regard to practically any other IIA provision in respect of which there are some inconsistencies in a country's network of investment treaties.

However, matters are more complicated than they might appear at first sight:

- First, there is the question of *awareness*. Since the building up of an IIA network often takes many years, countries may not be aware of the specific content of treaties that they concluded a long time ago and to what extent they may differ from more recent agreements. They might only find out when it is too late, that is, when a dispute arises in connection with inconsistent commitments that may have been made.

- Second, national laws tend to *treat foreign investors equally* amongst themselves, irrespective of their nationality. Domestic laws on a great variety of issues, such as company law, real estate law, or environmental legislation usually apply to investors across the board, and thus do not distinguish between IIA commitments made with regard to investors of a specific nationality. In other words, differences in treatment embodied in different IIAs may not be reflected in the underlying domestic legislation. For instance, if the national law allows capital transfers in connection with an investment only under certain conditions, such a clause might be in accordance with some, but not all of that country's IIAs. In addition, the civil servant applying these domestic laws in a local administration might not even be aware that international commitments exist in respect of the investment at stake. All this has the potential of resulting in a dispute.

- Third, an incoherent IIA network may pose problems in connection with a country's *development policy* (see above). For instance, if the country basically pursues an interventionist policy with considerable regulatory interference in investment matters, the existence of a single IIA prohibiting such interference might be sufficient to jeopardize that country's overall policy in this area.

- Fourth, *recent developments in investment rule-making* have further increased the likelihood of treaty inconsistencies. Investment rule-making is evolving towards more bilateralism and regionalism – which is the opposite of a harmonized, collective approach. In addition to the already existing well-known divide in investment rule-making – whether to include investment liberalization or not – one can now discern the emergence of further diverging paths, namely with regard to the degree with which individual treaty provisions are specified; the perceived need to include exceptions and reservations into the agreement; and the question of whether to combine investment and trade issues in IIAs. In this connection, one also needs to mention the inconsistent interpretations that some arbitration awards have given to specific IIA provisions in recent years.

All countries are nowadays confronted with the task of managing an increasingly complicated patchwork of IIAs. However, developing countries are more exposed to this challenge than others for a number of reasons:

- Due to capacity constraints and lack of expertise, developing countries may experience more difficulties than developed countries in establishing coherent economic and development polices and reflecting them properly in their IIA network. It is precisely because of a lack of capacity that legal infrastructures are often underdeveloped.

- Furthermore, even where policies are in place, ensuring coherence between national policies and IIA obligations requires coordination among different admininstrative branches and sometimes coordination between national and regional, or local governments. In developing countries facing shortages of highly skilled experts in the relevant areas of law and policy, the capacity for the requisite coordination may not be adequate.

- Developing countries with frequent policy changes and weak negotiation positions also face a considerable risk of concluding inconsistent IIAs. Contrary to most developed countries, they often do not have a model agreement that could constitute the basis for IIA negotiations and impact on their final outcome.

- A rapidly evolving domestic regulatory framework in many developing countries creates more occasions where such legislation or individual measure might be in conformity with some IIAs of that country, but in conflict with others.

c. Possible remedies

What could be done to enhance more policy coherence in international investment rule-making? Ideally, countries should adopt a preventive strategy and seek to avoid inconsistencies in the first place. Technical assistance programmes provided by international organizations can help developing countries to streamline their IIA network, to prevent inconsistencies from emerging, and to deal with existing incoherence. Also, further policy research can try to shed more light on how relevant the issue of policy coherence is under the development aspect, and what policy areas are mostly affected by it. However, the process of harmonization through individual IIA negotiations has its limitations. As said before, whether such a strategy is feasible and successful largely depends on the bargaining strength of individual countries. It is therefore not a "one-for-all" remedy; for many developing countries, it may not be a very promising strategy.

The effects of inconsistencies might be mitigated by the MFN clause that is a standard feature in practically all IIAs. This clause prevents a host country from according different treatment to investments of investors of different nationalities and potentially could be used to transform originally inconsistent obligations into consistent ones. It can therefore have a harmonizing effect. However, in order to play its equalizing role, there must be a common understanding under what conditions the MFN clause applies and how far-reaching its effects are. In the light of some recent contradictory awards, these questions are far from being clarified.[4] On the contrary, there are more doubts and questions than ever before concerning the scope of this core principle in investment agreements.

Efforts to promote coherence in the current IIA system have included modifications to the investor-State dispute resolution mechanism. At the bilateral level, some countries have introduced new language to their BITs and PTIAs. Some of these changes seek to promote coherence between the investment policies of countries and the interpretation of IIAs by improving the quality of investor-State arbitral awards. For example, one recent modification to some IIAs allows treaty parties to issue jointly formulated interpretations of IIA provisions that are binding on investor-State arbitral tribunals. Yet another type of provision allows parties to an IIA to make submissions to an investor-State arbitral tribunal in connection with a pending dispute. IIAs also may seek to promote policy coherence by including provisions providing for the consolidation of related claims into a single proceeding, thereby reducing the risk of inconsistent decisions. Some IIAs even include provisions that anticipate the establishment of an appellate mechanism that could review awards and resolve inconsistencies among them (see, for example, the US-Uruguay BIT (2005) Annex E).

ICSID procedures concerning the possibility of third-party submissions and their right to attend oral hearings have also been amended or other changes have been under discussion, including the possibility of introducing an appellate mechanism.[5] Also, there are considerations on whether to set up an advisory facility (similar to the existing WTO Advisory Centre) to assist countries in the first steps or even in the entire defence of a claim.[6] It has also been suggested that arbitration tribunals issue a preliminary award before the final ruling. Under this procedure, the arbitration tribunal would submit a contentious point of law to a judicial body established for that purpose (Schreuer 2006, 2007). This suggestion therefore has similarities with the procedure of preliminary rulings by the European Court of Justice. In a similar vein, consideration could also be given to the establishment of a standing appellate judicial body.[7]

As far as inconsistencies between overlapping IIAs covering the same contracting parties are concerned, Article 30(3) of the Vienna Convention on the Law of Treaties provides that the provisions included in the most recent agreement shall prevail. Another solution is to specify in the IIAs themselves which provision shall prevail in the event of any inconsistency. Yet another approach is to grant a particular party the right to determine which provision shall prevail in the event of a conflict. In some cases, the resolution of inconsistencies is deferred to a future agreement of the parties.

The above solutions can ease the problem of IIA inconsistencies only to a certain extent. This is so because incoherence constitutes a *system-immanent* deficiency of the existing IIA universe. As long as it continues to be highly atomized, there is little prospect for achieving a substantially higher degree of homogeneity, whether within the IIA universe as a whole or the IIA framework of individual countries, particularly developing countries. By definition, this deficiency could be effectively repaired only by changes to the system itself. Consistency could increase substantially the more there is a broad international consensus on IIA-related issues. Finding ways and means to enhance such consensus is therefore key to promoting more policy coherence (see below section IV).

2. Balancing private and public interests and the issue of regulatory flexibility

How to balance the rights and interests of foreign investors, on the one hand, and host countries, on the other hand, is the key issue in any IIA negotiation, and is at the core of the debate on the future development of international investment rules (UNCTAD 2007a). This is no surprise, given the fact that TNCs and host countries have potentially conflicting interests. TNCs are basically profit-oriented. By contrast, governments are primarily accountable to the public interest – their duty is to ensure that business benefits or at least does not harm society.

In legal terms, the potential conflict of interest between investor rights and government prerogatives is taken care of by the interrelationship between IIAs and the domestic legislation of the host country. While IIAs seek to protect the legitimate interests of foreign investors, national laws of a host country ensure that the investment remains subject to the latter's regulatory powers and control. Hence, provided that host countries respect their international commitments deriving from IIAs, e.g. the principle of non-discrimination, the standard of fair and equitable treatment, and the obligation to compensate in case of an expropriation, they remain free to subject TNCs in their territories to social, fiscal, environmental and other regulations that they deem necessary to meet their national development objectives.

All discussions about the potential benefits and risks of IIAs boil down to the fundamental question as to whether the interplay between international treaty protection and domestic regulation achieves an appropriate balance between investor rights and obligations. Negotiators have different drafting options at hand with regard to any IIA provision, giving them the choice as to what degree they wish to protect foreign investors. For instance, they can agree on a broad or narrow definition of the terms "investor" and "investment", opt for a comprehensive or limited prohibition of discrimination, include bans on certain performance requirements or not, grant an unrestricted guarantee of capital transfers or make it subject to reservations, or provide extensive or partial access to international arbitration.

Recently, the issue of how to balance private and public interests in IIAs has gained new momentum in response to the substantial increase in the number of investor-State disputes. As more and more foreign investors go to arbitration, concerns about the possible negative effects of IIAs for host countries have become more pronounced. In particular, it has been argued that certain IIA provisions are vague and ambiguous, thereby increasing the risk that an arbitral tribunal could interpret them very broadly, and that IIAs do not do enough to protect the public interest. It would therefore be necessary to reduce the risk of an over-extensive judicial treaty arbitration by clarifying the meaning of certain IIA provision. Another approach addressing public concerns with regard to foreign investment is to emphasize corporate responsibility. Both aspects will be discussed below.

The balancing of private and public interests in IIAs is also a dynamic issue, which means that these interests may change over time, resulting in the need for further adjustments in future IIAs. What is of special public concern today – for instance, national security considerations – may not be of particular interest tomorrow, and what is currently a non-issue may cause unforeseen problems in the future. There is thus no uniform and "once and for all" response to these challenges. Countries may have different views on what is the "right" balance between private and public concerns, they may have divergent priorities concerning the protection of their own interests, and they may use different legal techniques to incorporate them in IIAs.

a. Changes to existing treaty language

Up to now, only a few countries have found it necessary to respond to these concerns by introducing amendments to their IIAs. As will be seen, these approaches have in common that they seek to preserve the host state's regulatory flexibility and, in that way, allow the host state to use its domestic regulations to preserve the public interests. Three developments need to be mentioned in this respect:

- Canada and the United States have revised their model BITs in order to clarify individual BIT provisions. Responding to the technical intricacies faced in the implementation of the investment chapter of NAFTA and the numerous investor-State disputes the two countries have been party to, these treaties spell out in more detail the content of some core provisions, in particular the principle of fair and equitable treatment and its relationship to the international minimum standard of treatment, and the scope of the concept of indirect expropriation. These innovations can also be found in recent BITs signed by Japan and the Republic of Korea. Some recent IIAs also clarify the scope of the MFN clause by stating that this provision does not extend to treatment of investment generally, but only to certain aspects of treatment, such as that relating to the management, operation, or sale of an investment (UNCTAD, 2007e).

- Another important new development is that some recent BITs emphasize in a stronger manner that *investment protection must not be pursued at the expense of other legitimate public interests*. To this end, more frequent recourse is made to general treaty exceptions. In addition to the "traditional" areas where such exceptions have been a common feature of BITs for many years – namely taxation and regional economic integration – more agreements now also exempt host-country measures related to such diverse fields as essential security and public order, protection of health, safety and natural resources, cultural diversity, and prudential measures for financial services fully or partially from the scope of the BIT. These exceptions clarify the scale of values in the policymaking of contracting parties, and subordinate investment protection to these other key policy objectives (UNCTAD, 2007c).

The proliferation of general exceptions does not respond to a particular regional pattern. Rather, the increase in general treaty exceptions in BITs is a *worldwide trend*. However, some countries emphasize the protection of certain policy objectives more than others. For example, the use of the exception for the protection of cultural diversity is limited almost entirely to BITs negotiated by Canada and France.

Some IIAs also include provisions calling upon host states not to depart from internationally recognized labour standards or environmental standards in attracting foreign investment, although these provisions often impose no binding obligation. Such treaty language differs from the general exceptions in that they actually seek to limit regulatory discretion, albeit in the name of protecting the public interest in areas such as environmental protection and labour rights (UNCTAD, 2007c).

- Very few recent BITs, e.g. those concluded by Canada and the United States, have introduced *innovations with regard to investor-State dispute settlement*. This includes greater and more substantial transparency in arbitral proceedings, open hearings, publication of related legal documents, and the possibility for representatives of civil society to submit *amicus curiae* briefs to arbitral tribunals. Such submissions are most likely to come from NGOs representing environmental, labour or other interests and are therefore likely to argue in favour of preserving regulatory flexibility of the host states. One concern is that provisions for public participation could increase the cost of the proceedings through higher fees for attorneys and arbitrators, and may thus not always represent an unmixed blessing for developing countries. Other new detailed clauses provide for a more law-oriented, predictable and orderly conduct at the different stages of the investor-State dispute settlement process, and envisage the possibility of setting up an appellate mechanism to foster a more consistent and rigorous application of international law in arbitral awards. These IIAs have also taken steps to improve transparency.

It remains to be seen whether the future development of IIAs will result in a gradual convergence of the different models. To a considerable extent this will depend on the further evolution of investment disputes. Much of the recent changes introduced into BITs reflect arbitration experience. If ever more countries become defendants in investment disputes and if they consider that arbitration tribunals have too much discretion in interpreting IIA provisions, they might wish to follow this approach. However, it is also possible that the substantial increase in arbitral awards will result in a consolidation of case law that makes the outcome of future arbitration more predictable – although arbitral tribunals are not necessarily bound to follow any case law in this regard. Such possible consolidation would reduce the need for amendments in IIAs.

b. Corporate social responsibility

There is another issue that is usually brought up in discussions on how to balance the interests of foreign investors and host countries – the question of whether IIAs should include obligations for foreign investors as a counterweight to the granting of rights to them. Such obligations could be merely passive, that is, they could take the form of an obligation to refrain from activity of a certain type, e.g. activities that violate human or labour rights, damage the environment, or constitute corruption. Such obligations, however, could also be active in nature, such as an obligation to make a development contribution. An instrument that imposed obligations on an investor might also grant to the host country recourse to the same arbitral mechanisms that only investors can invoke at the present time.

Attempts to establish such obligations were for the last time undertaken in the 1980s in connection with the negotiations on a United Nations Code of Conduct for Transnational Corporations. Since then, the prevailing trend has been to deal with this issue in the context of voluntary guidelines for foreign investors, such as the OECD Guidelines for Multinational Enterprises. These do not subject foreign investors to international obligations in the IIA; however, foreign investors are expected to behave in a certain manner. The question then arises whether it would be useful, for example, to develop guidelines on corporate economic development contributions to specifically address economic development concerns. This issue becomes all the more important in view of the increased use of public-private partnerships as a means of investing in and operating major projects in developing countries. In this scenario a private investor would become directly involved in the provision of public services and infrastructure.

Another interesting question in this context is whether in future IIA negotiations, a reference to existing international instruments on investor responsibility should be made. And third, there are continuous demands of establishing binding obligations for foreign investors in IIAs. This would be a considerable challenge, not least because voluntary guidelines, as they currently exist, are formulated in a much too vague manner as to make them usable as a legally binding instrument.

Further, the imposition of affirmative international obligations on investors may be regarded by host states as inconsistent with a policy of promoting inward investment flows. For example, the requirement of a development contribution could undercut a host state's efforts to attract foreign investment through tax incentives. Developing countries have sometimes been reluctant to abandon costly incentives, believing that to do so would place them at a competitive disadvantage relative to developing countries, particularly in the same region, that continue to offer them. A similar concern could arise in the case of investor obligations. A developing country may believe that it cannot impose them unless other developing countries with which it competes for investment do the same. Thus, the question of investor obligations may be one that is best addressed at the multilateral level.

c. Implications

One important consequence of these developments is a growing need for policy research and analysis, as well as capacity-building to help developing countries assess the implications of different policy options for balancing private and public interests in IIAs and preserving regulatory flexibility. This is in the interest of all countries, because an unbalanced IIA system will not be sustainable over the long run. A number of questions deserve particular attention. Among them are whether existing "flexibility" mechanisms provided for in IIAs (e.g. exceptions, waivers, transition periods, safeguards) are sufficient to enable host developing countries to pursue their development strategies and benefit most from foreign investment. Also, is there a need to further strengthen public interests vis-à-vis private interest in IIAs? If so, in what areas – substantive IIA provisions, dispute settlement – would it be appropriate and how could this be achieved? And how could IIAs increase the contribution of foreign investors to economic and social development?

3. Enhancing the development dimension of IIAs

A final critical issue is how best to incorporate a development dimension into IIAs. Current IIA mechanisms designed to address development concerns include reservations, exceptions, temporary derogations, transitional arrangements, and institutionalized monitoring and consultation procedures. The question is whether more could be done in IIAs to help developing countries achieve their development objectives.[8]

a. Development dimension in current IIA practice

The great majority of IIAs does not expressly deal with development issues, or only does so at the margins or in passing. The development purpose of these treaties is primarily a political goal.

A substantial number of IIAs have provisions that allow for sector-specific carve-outs from treaty obligations, or that include general exceptions relating to the protection of national security, public health, safety or the environment – to mention just the most important ones. These exceptions and reservations may apply to all substantive provisions and may be used for development purposes; however, they are not explicitly designed for that purpose (UNCTAD, 2006g). Any country, irrespective of its level of development, may have recourse to them. Hence, in principle, every treaty provision could potentially reflect development concerns, could be tailor-made to the needs of the participating parties, and, in particular, could reflect existing asymmetries between countries at different levels of development.

The development dimension could also be reflected in the modes of application of agreements. For example, there could be transition periods for the implementation of treaty obligations. Although a development-specific instrument, it is hardly ever included in IIAs.[9] This is understandable when one keeps in mind the investment protection aspect of IIAs – the more one allows for transition periods and other kinds of flexibility, the less the IIA contributes to legal stability and to fulfilling its purpose of attracting foreign investment.

In conclusion, one can say that the development dimension does not figure high on the agenda of current international investment rule-making. To the extent that it is addressed, it is done in an indirect manner and in a primarily defensive mode. This means that the approach of taking exceptions, reservations and the like seeks to shield contracting parties permanently or temporarily from assuming their full responsibilities under the IIA. One can ask whether this protective approach is sufficient for development purposes.

b. Options to enhance the development dimension in future IIAs

Enhancing the development dimension may necessitate adding new kinds of provisions not often seen in IIAs. As has been noted, IIAs in the past have usually only indirectly sought to promote investment by protecting it. The question arises as to whether IIAs should promote investment through more direct means, including home-country measures (UNCTAD 2001). Such means could, for instance, include more transparency and exchange of investment-related information, fostering linkages between foreign investors and domestic companies, capacity-building and technical assistance, granting of investment insurance, encouragement of transfer of technology, easing informal investment obstacles, or the setting up of an institutional mechanism to coordinate investment promotion activities. Rather than leaving such measures to the discretion of each country, future IIAs could include a mutual commitment of the contracting parties to take such action. These kinds of measures could become important additional tools to enhance the development dimension of IIAs.

The idea to include specific investment promotion provisions in IIAs is not entirely new. Some existing IIAs already contain examples of the kinds mentioned above. However, this group of agreements remains a small minority among the total number of existing IIAs (UNCTAD 2008e).

A more frequent use of investment promotion provisions in IIAs could have several advantages. First, and probably most importantly, in contrast to the more passive IIA obligations concerning investment protection, investment promotion provisions could establish a commitment of contracting parties to *actively do something* to encourage foreign investment. Thus, their promotional effect might be felt more rapidly and stronger. Second, investment promotion provisions could be used in the context of strategic investment policies of developing countries aimed at steering foreign investment into particular sectors, activities or regions.

If one were to put more emphasis on investment promotion in IIAs, it would be important to avoid a situation where promotion commitments are incorporated as lip service to the issue with contracting parties not paying much attention to the provisions once the agreement has been concluded. This risk exists as long as promotion commitments are not accompanied by some kind of follow-up mechanism that surveys and monitors the implementation of the specific promotion measures agreed upon, and also evaluates their success. The issue at stake is therefore not only whether IIAs should include more investment promotion provisions or not, but also what needs to be done to make these provisions effective.

c. Different types of IIAs

As explained above, the IIA universe becomes increasingly multi-faceted, that is, it consists of a considerable variety of different treaty types, such as BITs, FTAs, economic cooperation agreements, regional agreements, sectoral, plurilateral or multilateral treaties. Is one treaty type better than others when it comes to advancing development objectives? Is it possible to come to some general agreed observations? Or does the answer entirely depend on the situation of each individual country? In this context, it is worth recalling that, on the one hand, more and more bilateral and regional FTAs have been concluded, while, on the other hand, the number of BITs concluded annually has been decreasing, or has stagnated in the last couple of years. What does this mean under the development aspect of investment rule-making? Is it a good or a bad trend, or does it not matter at all?

The question of what kind of IIA best advances development objectives may not be answered in the same way for all countries. For example, a country may choose to enter into a traditional BIT focusing on investment protection, a BIT with pre-establishment commitments, a PTIA providing for comprehensive liberalization and covering issues other than investment, such as services, movement of labour, competition or intellectual property, or an economic cooperation agreement merely laying the groundwork for future rule-making through measures such as increased transparency. However, some countries, in particular developing countries, may have no choice at all, because potential treaty partners do not consider them as attractive enough for any form of more advanced economic cooperation.

Determining the type of IIA that best advances a country's development objectives also depends upon addressing the difficult question of the anticipated impact of IIAs. Empirical studies have reached somewhat inconsistent results concerning the issue of whether the conclusion of IIAs is associated with an increase in foreign direct investment (see above section II.A.5).

Also, the role of IIAs in creating a favourable investment climate may be complex. For example, IIAs may contribute to locking in domestic reforms that themselves are important in attracting foreign investment. Efforts to implement an IIA may also trigger further domestic reforms of either a substantive or procedural nature and such reforms may, over time, contribute to creating a more favourable environment for foreign as well as domestic investment. IIAs also may have unintended consequences, such as an arbitral award construing an IIA to guarantee a kind of protection against host State regulatory activity that the latter had not intended to provide. Different IIA provisions also may have different impacts, depending on the economic circumstances of a particular country. Developing countries must make their own assessments of which types of IIAs are likely to – on balance – make the greatest contribution to their development objectives.

In sum, the development dimension is a consideration that arises both in selecting the type of instrument to negotiate and in drafting each individual provision of the agreement. The development dimension should thus be reflected not only in designated, separate provisions of the IIA, but in the instrument as a whole.

d. Alternative dispute resolution

The development dimension in IIAs has yet another aspect – one related to dispute settlement. The usual means to resolve investor-State disputes that cannot be resolved through negotiation between the disputing parties is international arbitration. While this kind of dispute resolution is an important tool of fostering the rule of law and increasing investor confidence, it may also have significant drawbacks. Among the possible inconveniences are that arbitration may take a long time and involve substantial direct and indirect costs for both sides, including the risk of a rupture of an important economic relationship between them. From the host country's point of view, another inconvenience may derive from the fact that the binding arbitral award imposes constraints on it concerning the regulation of enterprises that go well beyond the limits of the individual case. Also, arbitration has the potential to affect negatively the country's investment climate as well as public support for foreign investment. In other words, arbitration is not very development-friendly – even if the developing host country ultimately prevails in the dispute.

The rise in investor-State disputes in recent years has aggravated these problems. A growing number of countries, among them numerous developing countries, are confronted with investor-State disputes (see above section II.A.3).

Efforts could be made to improve the investor-State dispute settlement system. Recently, some steps in this direction already have been undertaken (see above section III.B.1c). Another possible option is having more recourse to alternative methods of dispute resolution (ADR) in future IIAs. One such alternative is the use of non-binding third-party dispute resolution procedures, such as mediation or conciliation. In these procedures, a third party usually selected with the agreement of the disputants assists them in negotiating a settlement of their conflict. This is why ADR is sometimes also referred to as "facilitated negotiation". ICSID, for example, provides a facility for the conciliation of claims. UNCITRAL has developed conciliation rules (1980) and a model law on international commercial conciliation (2002).[10] If successful, such non-binding third-party dispute resolution procedures could be cheaper, faster and more protective of the relationship between foreign investors and the host country than formal arbitration.

At present, only very few IIAs provide for the use of non-binding, third-party dispute resolution procedures (see, for example, the BIT between Poland and the United States (1990) and the 2004 United States model BIT). Further, where IIAs have included a provision for such procedures, investors usually have chosen instead to resort to binding arbitration instead. This may reflect an investor preference for a dispute resolution procedure that will yield a final decision within a specific period of time. Often, arbitration is sought only after negotiations have failed. At that point, an investor may not believe that further negotiations, even with third party assistance, will be productive. Thus, to be effective, non-binding procedures may need to be invoked early in the dispute.

Given the potential advantages of ADR mechanisms, such as non-binding, third party dispute resolution procedures, countries may wish to give them a more prominent role in future treaty making (UNCTAD forthcoming a). Their success, however, will depend upon a policy commitment on the part of host countries to invoke them in the early stages of a dispute, before it has reached a stage in which negotiation is no longer possible. This, in turn, may require domestic policy reforms that would permit the host country government to authorize payment of a claim in the absence of a binding award against the host country. This issue underscores the interrelationship between the IIA system and national policy.

Notes

1. These include, in particular, the growing number of IIAs, the increasing scope, complexity and diversity of IIAs, and the acceleration in the number of disputes submitted to investor-State arbitration.
2. UNCTAD's technical assistance work programme on capacity-building in developing countries and economies in transition on issues in IIAs focuses specifically on the negotiation of IIAs, and the management of investor-State dispute settlement.
3. UNCTAD’s online database of international investment instruments can be found at www.unctad.org/iia.
4. See the citations in box 1 above.
5. ICSID Secretariat Discussion Paper, Possible Improvement of the Framework for ICSID Arbitration, Oct. 22, 2004.

[6] This issue has been discussed at a Conference on "Investor-State dispute settlement: emerging issues and challenges for Latin American countries and investors", held in Washington D.C., 11-12 October 2007 and jointly organized by the Inter-American Development Bank (IDB), the United Nations Conference on Trade and Development (UNCTAD), and the Columbia Program on International Investment (CPII) with the collaboration of the Organization of American States (OAS) and SETIC/Academia de Centroamérica.

[7] This has been suggested by the ICJ Judge Patrick Robinson in a comment on this paper.

[8] This challenge has a link to the two other challenges – policy coherence and the balancing of private and public interests – since the latter also have a development angle.

[9] An exception is the WTO-TRIMs Agreement that included transition periods for developing countries.

[10] Available at: (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html).

IV. OUTLOOK

The preceding chapter has presented the main challenges that countries, in particular developing countries, face in international investment rule-making at the beginning of the 21st century. It identified the main challenges of capacity constraints and of content concerning the maintenance of policy coherence in the IIA system, the proper balancing of private and public interests in IIAs, and ensuring that the development dimension is sufficiently taken into account.

The paper has elaborated on the main questions that arise in dealing with these challenges and has also made a number of suggestions on how to cope with them. These proposals include the provision of more policy research and analysis on IIA-related issues, more technical assistance for developing countries in treaty-making and implementation, as well as some specific ideas concerning individual IIA-related aspects.

What all these considerations have in common is that they are addressed to countries in relation to their individual IIA programmes and strategies. This takes account of the fact that the current IIA system is highly atomized and that in this situation, countries have no other choice than to seek individual solutions in their treaty-making efforts. While such an individualistic approach can to some extent be useful in addressing current challenges in international investment rule-making, it has its limits because it is unable to tackle the system-immanent deficiencies of the existing IIA universe.

The high degree of atomization of the current system – as manifested by more than 2,800 BITs and PTIAs at the end of 2007 – creates problems that cannot be solved effectively from within. It means that countries stand alone to defend their interests in IIA negotiations. This puts most developing countries in a disadvantageous position, as their bargaining power is limited. They may find it difficult – if not impossible – to establish coherence in their IIA network; to achieve a proper balancing of private and public interests in IIA rule-making; and to ensure that the development dimension is sufficiently taken into account. As long as the IIA universe continues to be highly fragmented, there is limited prospect for achieving a substantially greater degree of homogeny, transparency and recognition of legitimate development concerns. By definition, these deficiencies could only be effectively addressed by an evolution of the IIA system itself.

Also, under the current IIA system challenges of capacity can at best be eased, but not really solved. Agreements continue to grow in number and complexity, as do investment disputes. In such a situation, developing countries risk to be overwhelmed in their efforts simply to stay abreast of developments, let alone to influence them. In addition, the growing trend towards more FTAs including investment provisions could be detrimental for many developing countries, as they may not be attractive enough for such kind of agreements, and could therefore be left behind in the process of international rule-making.

In the absence of any system-wide coordination, countries continue to conclude investment treaties on an individual basis, thereby further perpetuating and accentuating the existing IIA patchwork – sometimes called a “spaghetti bowl” (UNCTAD, 2006c). As a result, international investment rule-making advances towards more bilateralism and regionalism – which is just the opposite of a harmonized, collective approach in order to enhance clarity, stability and transparency in international investment relations, and to enable developing countries to participate effectively in that system.

The increasing complexity of the IIA universe also makes it more difficult for transnational corporations to assess what international rules apply, and to what extent their investment is protected in the host country.

These considerations lead to the conclusion that multilateral consensus-seeking in IIA matters remains an important goal. While the current international policy climate is not favourable for the launching of a new initiative in this area anytime soon, it is crucial not to abandon the idea of international consensus-building for investment altogether. As long as the time is not ripe for this challenging undertaking, it is essential that countries have at least a multilateral policy forum where they can discuss the evolution of international investment rulemaking and exchange their experiences. As confirmed in April 2008 in the Accra Accord, UNCTAD stands ready to provide such a platform.

CONCLUSION

The above analysis has shown that international investment rule-making at the beginning of the 21st century is a universal and dynamic process resulting in an increasingly complex IIA universe. From a nucleus of a limited number of rather simplistic and uniform BITs, the system has expanded into an impressive patchwork of several thousand agreements with a much more elaborate, multi-faceted and multi-layered nature.

In its first and second part, this paper has sought to take stock of the existing IIA system, and to identify opportunities and challenges that its evolution presents to treaty-makers. Fundamentally, the IIA universe is under pressure from challenges of capacity and content. On the one hand, international investment rule-making in the past decades, particularly at the bilateral, regional and sectoral levels, has resulted in a considerable degree of convergence on core investment protection issues. On the other hand, the diversity of agreements is growing and continually adds new areas and dimensions. Among the most pressing challenges for IIA negotiators are to keep the IIA network coherent, to properly balance private and public interests in IIA matters so as to retain sufficient regulatory autonomy, and to ensure that development concerns are adequately taken into account.

This study has identified some ways in which the current system is responding or could respond to those challenges. However, as long as the IIA universe remains highly atomised, there is a risk that the system will eventually degenerate into an increasingly non-transparent hotchpotch of diverging rules that capacity-constrained developing countries will find more and more difficult to cope with. Therefore, and despite an unpromising current policy environment, the vision of a multilateral framework for investment should not get out of sight.

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