CHAPTER IV

INVESTMENT POLICY DEVELOPMENTS

A. National policies

Since the mid-1980s, and in the context of rapid changes in the global economy and broader market-oriented reforms, most countries in all regions that until then had maintained widespread restrictions and controls on FDI undertook substantial revisions in their investment regimes, with a view towards incorporating FDI more fully into their economic development and growth strategies. They engaged in an unprecedented process of liberalization of previous FDI impediments and adopted a host of positive measures aimed at attracting FDI. These trends continued in 1998.

More specifically, of a total of 145 regulatory changes relating to FDI made during 1998 by 60 countries,[1] 94 per cent were in the direction of creating more favourable conditions for FDI, and 6 per cent in the direction of greater control (table IV. 1). During the period 1991-1998 as a whole, 94 per cent of the FDI regulatory changes were in the direction of creating a more favourable environment for FDI, in both developed and developing countries. The majority of liberalization measures in 1998 related to operational conditions (figure IV. 1). In contrast with previous years, fewer new industries were opened up, and these related mainly to telecommunications, retail and wholesale trading. Investment promotion efforts also intensified during 1998. In terms of regional distribution, it is worth noting that the Asian financial crisis triggered significant efforts to attract FDI by the countries in the region, both in terms of the number of measures (51) and the number of countries (16) involved.

Table IV.1. National regulatory changes, 1991-1998

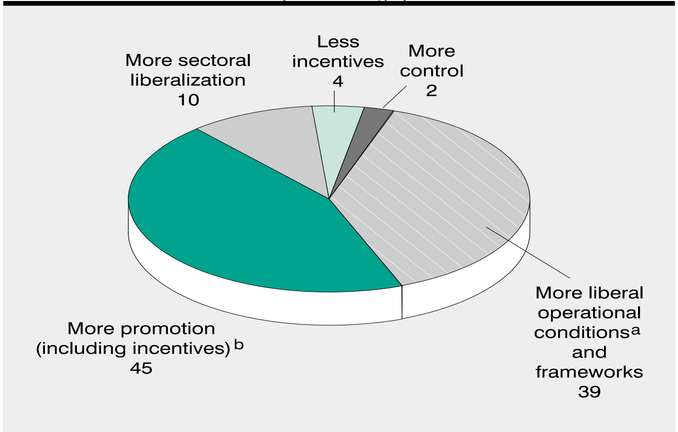
Item	1991	1992	1993	1994	1995	1996	1997	1998
Number of countries that introduced changes in their investment regimes	35	43	57	49	64	65	76	60
Number of regulatory changes	82	79	102	110	112	114	151	145
of which:								
More favourable to FDI [a]	80	79	101	108	106	98	135	136
Less favourable to FDI [b]	2	-	1	2	6	16	16	9

Source: UNCTAD, based on national sources.

[a] Including liberalizing changes or changes aimed at strengthening market functioning, as well as increased incentives.
[b] Including changes aimed at increasing control as well as reducing incentives.

Figure IV.1. Types of changes in FDI laws and regulations, 1998

(Percentage)



Source: UNCTAD, based on national sources.

[a] Includes performance requirements as well as other operational measures.
[b] Includes free-zone regulations.

These trends at the national level have been complemented and reinforced through developments at the international level. Indeed, international investment and investment-related treaty-making activity at all levels has continued to be intense (table IV. 2), primarily in the direction of investment protection and liberalization.

Table IV.2. International investment policy trends: developments in 1997-1998 [a]

Title	Status
Regional	
Asia	
Framework Agreement on the ASEAN Investment Area	Concluded
SAARC Agreement on Regional Investment Promotion and Protection	Under negotiation
Free Trade Arrangement between BIMSTEC Countries [b]	Under discussion
Indian Ocean Rim Association for Regional Cooperation Trade and Investment Agreement	Under discussion
Agreement on Promotion and Protection of Investments among ECO member States	Under negotiation
Sub-Saharan Africa	
CEMAC Community Charter on Investment	Under negotiation
UEMOA Community Code on Investment	Under negotiation
SADC Protocol on Finance and Investment	Under negotiation
Agreement for the Creation of a Free Trade Area between the COMESA member countries [b]	Under discussion
Treaty Establishing the East African Community (EAC) [b]	Under negotiation
North Africa and West Asia	
Unified Agreement for the Investment of Arab Capital in Arab Countries	Under revision
Agreement on Investment and Free Movement of Arab Capital among Arab Countries	Under revision
Western Hemisphere	
Protocol Amending the Treaty Establishing the Caribbean Community Protocol III: Industrial Policy	Concluded
Memorandum of Understanding on Trade and Investment between the Governments of Canada, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua	Concluded
Free Trade Agreement between Central American countries and the Dominican Republic [b]	Concluded
Framework Agreement for the Creation of a Free Trade Area between the Andean Community and MERCOSUR [b]	Concluded
Trade and Investment Cooperation Arrangements between Canada and MERCOSUR	Concluded
Protocol Amending the Treaty Establishing the Caribbean Community. Protocol II: Establishment, Services, Capital	Concluded
Agreement Between the Governments of Bolivia, Colombia, Ecuador, Peru and Venezuela, Member Countries of the Andean Community, and the United States of America Concerning the Establishment of a Trade and Investment Council	Concluded
Trade and Investment Cooperation Arrangements between Canada and MERCOSUR	Concluded
Free Trade Area of the Americas (FTAA) [b]	Under negotiation
Free Trade and Investment Agreement between Mexico, on the one hand, and Guatemala, Honduras and El Salvador, on the other	Under negotiation

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Table IV.2. International investment policy trends: developments in 1997-1998 [a] (concluded)

Title	Status
Europe	
Resolution on EU Standards for European Enterprises Operating in Developing Countries Towards a European Code of Conduct	Adopted
Council of Europe Criminal Law Convention on Corruption	Concluded
Interregional	
ACP-EU Fifth Convention of Lomé	Under negotiation
OECD	
OECD Council Recommendation on Counteracting Harmful Tax Competition	Adopted
OECD Council Recommendation Concerning Effective Action Against "Hard Core Cartels"	Adopted
OECD Multilateral Agreement on Investment (MAI)	Discontinued
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	Entered into force
OECD Principles of Corporate Governance	Adopted
OECD Guidelines for Multinational Enterprises	Under review
Multilateral	
ILO Declaration on Fundamental Principles and Rights at Work	Adopted
WTO Working Group on the Relationship between Trade and Investment	Ongoing
Civil society	
International Agreement on Investment (draft of 10 June 1998) (CUTS)	Adopted
Making Investment Work for People (Regulation Paper) (WDM)	Adopted
ICC [Revised] Rules on Conduct to Combat Extortion and Bribery	Reviewed

Source: UNCTAD.

[a] Not including bilateral treaties.
[b] Including rules on investment.

B. Developments at the international level

1. Bilateral treaties

At the bilateral level, the network of bilateral investment treaties (BITs) has expanded further, the total number of treaties having reached 1,726 by the end of 1998 (compared to 1,556 by the end of 1997). Of these, 434 were concluded between developing countries. In 1998 alone, 39 per cent of the 170 treaties concluded were between developing countries (figure IV. 2). The number of countries that have signed BITs has increased from 169 in 1997, to 174 in 1998. BITs have traditionally been seen primarily as an instrument to signal to TNCs that a country is

Figure IV.2. BITs concluded in 1998,[a] by country group

(Percentage)

Source: UNCTAD, database on BITs.

[a] A total number of 170 BITs were concluded in 1998.

"open for business", especially by protecting foreign investment (UNCTAD, 1998b). This function, including the encouragement it gives to FDI flows among developing countries, remains important (box IV.1). However, in the light of the increasing treaty-making activity in the investment area in general, these treaties are also becoming important in terms of indicating what countries expect to see in international investment agreements in general. While there is considerably commonality among BITs (UNCTAD, 1998b), some BITs go further. A recent example is the BIT between Bolivia and the United States signed in 1998 which provides, among other things, for national treatment at the pre-establishment stage (i.e. right of establishment) and prohibits certain performance requirements; the preamble also mentions "respect for internationally recognized worker rights" and that the objectives of the BIT can be achieved "without relaxing health, safety and environmental measures" (box IV. 2). Some of the features -- which are found not only in BITs but in other recent IIAs -- may put local firms at a competitive disadvantage vis à vis their foreign counter parts. For example, the prohibition to impose certain performance requirements on foreign firms might have such effect if the host country imposes these performance requirements on all other firms. Similarly, allowing foreign investors interim injuctive relief pending resolution of an investment dispute, may have the effect of preventing production or export by other firms while a claim affecting them goes through the full legal process. This may take a very long time, and when such firms are SMEs, they may be unable to rapidly find new markets for their production, and might even fail.

The number of bilateral treaties for the avoidance of double taxation (DTTs) has also increased from 1,792 at the end of 1997 to 1,871 at the end of 1998. During that year, 71 countries were involved in concluding 79 DTTs. Among these countries, 39 were developing countries (six from Africa, 26 from Asia, four from Latin America and the Caribbean and three from developing Europe) (figure IV. 3). Developing countries signed 26 DTTs with developed countries and 12 with countries in Central and Eastern Europe. They also concluded 17 DTTs between themselves.

Box IV. 1. BIT negotiations between members of the Group of Fifteen

Developing countries are increasingly viewing the conclusion of BITs among themselves as a means of enhancing South-South cooperation on foreign investment, and, in particular, of promoting FDI flows. This was the purpose sought with the initiative taken by the Group of Fifteen (G-15) [a] when it asked the Secretary-General of UNCTAD to assist members of the Group in the negotiation of BITs in order to promote economic cooperation among themselves.

The negotiations were held in Glion-sur-Montreux, Switzerland, during January 1999. Seven member countries of the G-15 participated in the bilateral negotiations, namely, Egypt, India, Indonesia, Jamaica, Malaysia, Sri Lanka and Zimbabwe, and eight bilateral negotiations were held respectively between India and Zimbabwe, Sri Lanka and Zimbabwe, Egypt and Jamaica, Jamaica and Malaysia, Jamaica and Sri Lanka, Indonesia and Jamaica, India and Jamaica, and Jamaica and Zimbabwe. These negotiations added to the BITs already concluded among participating countries.

The G-15 saw a number of advantages in bringing negotiators together in a place where they could concentrate on the task at hand and which allowed the combination of economies of scale (negotiating a BIT typically involves several trips between negotiating countries with the average cost of a negotiation having been calculated at up to $50,000) (Rich, 1991) with capacity building (the very fact that intense negotiations between countries with different approaches, combined with the possibility to exchange information among negotiators and with resource persons, helped enhance the BIT negotiating capacity of the participants).

UNCTAD – with the financial support of the Government of Switzerland and the Special Unit for Technical Cooperation among Developing Countries of UNDP – played a facilitating role by making it possible to assemble a number of chief negotiators with authority to negotiate in a place near Geneva and by facilitating preparatory consultations and providing substantive and logistic support. In the words of the Jamaican negotiator, "What we have done here in one week would otherwise have taken two years – if not more" (UNCTAD, 1999d, p. 2).

Source: UNCTAD.

[a] The members of the G-15 are Algeria, Argentina, Brazil, Chile, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Mexico, Peru, Senegal, Sri Lanka, Venezuela and Zimbabwe.

Box IV. 2. The BIT between Bolivia and the United States

Signed in April 1998, the BIT between Bolivia and the United States reflects recent practice of the United States with respect to BITs. Some provisions that are seldom found in BITs in general include the following:

1. The Preamble provides as follows:

   "Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;
   Recognizing that the development of economic and business ties can promote respect for internationally recognized worker rights;
   Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application."

2. A broad asset-based definition that covers virtually every type of investment (although this approach can be found in many BITs). Article I (d) defines "investment" as:

   "every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of:

   (i) a company;
   (ii) shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests, in a company;
   (iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;
   (iv) tangible property, including real property; and intangible property, including rights, such as leases, mortgages, liens and pledges;
   (v) intellectual property, including:
   copyrights and related rights,
   patents,
   rights in plant varieties,
   industrial designs,
   rights in semiconductor layout designs,
   trade secrets, including know-how and
   confidential business information, trade and service marks, and trade names; and
   (vi) rights conferred pursuant to law, such as licenses and permits. (The list of items in (i) through (vi) above is illustrative and not exhaustive.)"

3. Unlike most other BITs, United States BITs clauses on national and most-favoured-nation treatment cover not only post-establishment but also pre-establishment, with a number of exceptions. Article II.1 states:

   "With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter "national treatment") or to investments in its territory of nationals or companies of a third country (hereinafter "most favored nation treatment"), whichever is most favorable (hereinafter "national and most favored nation treatment")."

4. A number of performance requirements are prohibited by Article VI of the treaty:

   "Neither Party shall mandate or enforce, as a condition for the establishment, acquisition, expansion, management, conduct or operation of a covered investment, any requirement (including any commitment or undertaking in connection with the receipt of a governmental permission or authorization):

   (a) to achieve a particular level or percentage of local content, or to purchase, use or otherwise give a preference to products or services of domestic origin or from any domestic source;

   (b) to restrict imports by the investment of products or services in relation to a particular volume or value of production, exports or foreign exchange earnings;

   (c) to export a particular type, level or percentage of products or services, either generally or to a specific market region;

/…

(Box IV. 2, concluded)

(d) to restrict sales by the investment of products or services in the Party's territory in relation to a particular volume or value of production, exports or foreign exchange earnings;

(e) to transfer technology, a production process or other proprietary knowledge to a national or company in the Party's territory, except pursuant to an order, commitment or undertaking that is enforced by a court, administrative tribunal or competition authority to remedy an alleged or adjudicated violation of competition laws; or

(f) to carry out a particular type, level or percentage of research and development in the Party's territory.

Such requirements do not include conditions for the receipt or continued receipt of an advantage."

5. Although under the BIT investors have to choose between the courts or administrative tribunals of the host country and international arbitration, the investor-State dispute settlement clause nevertheless gives investors an additional protection tool by allowing an investor that has submitted a dispute to arbitration to seek interim injunctive relief in the host country tribunals. Article IX 3.(b) provides as follows:

"A national or company, notwithstanding that it may have submitted a dispute to binding arbitration under paragraph 3 (a), may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Party that is a party to the dispute, prior to the institution of the arbitral proceeding or during the proceeding, for the preservation of its rights and interests."

6. The treaty is not applicable to taxes except in the case of expropriation. Article XIII. 1 provides that:

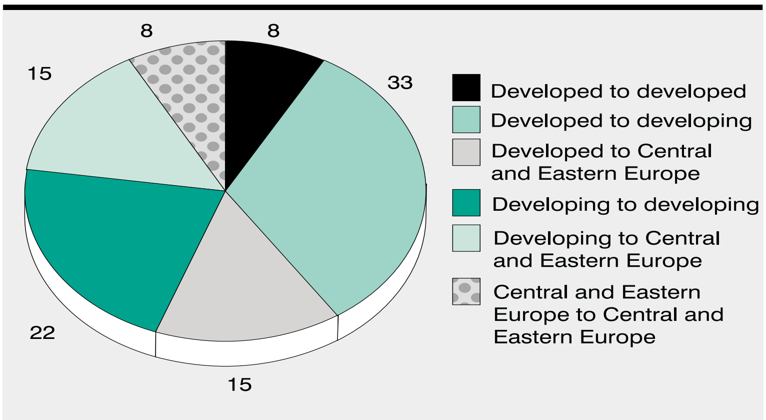
"1. No provision of this Treaty shall impose obligations with respect to tax matters, except that:

(a) Articles III, IX and X will apply with respect to expropriation; and
(b) Article IX will apply with respect to an investment agreement or an investment authorization."

Source: OAS, 1998a.

Figure IV.3. DTTs concluded in 1998, by country group[a]

(Percentage)



Source: UNCTAD, FDI/TNC database.

[a] A total number of 79 DTTs were concluded in 1998.

2. Regional developments

At the regional level, a number of discussions and negotiations on investment and investment-related instruments were initiated during 1998 and early 1999, others that had started in previous years continued, and several new instruments were concluded or came into force. The most significant developments are summarized below.

• In **Asia** the members of ASEAN concluded, on 7 October 1998, the Framework Agreement on the ASEAN Investment Area (UNCTAD, forthcoming d).[2] The purpose of this instrument is to create a competitive investment area within ASEAN with a more liberal and transparent investment environment and thus increase substantially the flow of investment into ASEAN from both ASEAN and non-ASEAN sources (ASEAN, 1998) (box IV. 3). Moreover, at the sixth ASEAN Summit held on 14-15 December 1998 in Hanoi, Viet Nam, the ASEAN leaders announced a package of "bold measures" to help enhance the attractiveness of the region for investment. These included the acceleration of the AFTA (box IV. 3), a package of incentives in the manufacturing sector which each ASEAN country agreed to extend in addition to new incentives offered by individual ASEAN countries; a waiver of the 30 per cent national equity requirement under the ASEAN Industrial Cooperation Scheme, to provide for greater scope for industrial cooperation in the region; and the launching of a second round of services negotiations, to cover all services sectors and all modes of supply (ASEAN, 1998).

At the seventh meeting of the Committee on Economic Cooperation of the South Asian Association for Regional Cooperation,[3] held in 1996, the Council of Ministers agreed to initiate specific steps to promote and protect investment and joint venture efforts. Pursuant to that decision, a meeting on Promotion and Protection of Investment was held in New Delhi on 29-30 September 1997 during which modalities for increasing intra-regional investment were considered and a draft "SAARC Agreement on Regional Investment Promotion and Protection" was circulated. At the eleventh meeting of the Committee (Dhaka, February 1999) it was decided to convene a second meeting on Promotion and Protection of Investment in India to examine the draft investment agreement and deliberate on the possibility of establishing a SAARC Arbitration Council. The meeting was expected to take place in 1999.[4]

Box IV. 3. Main features of Framework Agreement on the ASEAN Investment Area

The main elements of the ASEAN Investment Area (AIA) include the following (article 4):

- development of a coordinated ASEAN investment cooperation and promotion programme that will generate increased investments from ASEAN and non-ASEAN sources;
- provision of national treatment to ASEAN investors by the year 2010 and to all investors by the year 2020,[a] subject to the exceptions provided for in the agreement;
- opening all industries to ASEAN investors by the year 2010 and to all investors by the year 2020, subject to the exceptions provided for in the agreement;[b]
- assigning a larger role to the business sector in the cooperation efforts in relation to investment and investment-related activities; and
- ensuring a freer flow of capital, skilled labour and professionals, and technology among ASEAN members.

These broad undertakings are given effect in a number of provisions, key among which are:

Definition of investment: the agreement covers direct investment[c] and excludes explicitly portfolio investments as well as matters relating to investments covered by other ASEAN agreements, such as the ASEAN Framework Agreement on Services (articles 1 and 2).

General obligations: these include commitments to ensure that measures under the agreement are undertaken on a fair and mutually beneficial basis; to provide for transparency and consistency in the application and interpretation of investment laws and administrative practices, in order to create a

/...

In the context of the Bangladesh, India, Myanmar, Sri Lanka and Thailand Economic Cooperation (BIMSTEC) a Business Forum was created in order to enhance private sector cooperation among the countries of the region. A its second ministerial meeting held in Dhaka in December 1998, investment was identified as one of the areas for cooperation and, in addressing the future directions of BIMSTEC, the ministers resolved to strive to develop BIMSTEC into a free trade arrangement and to focus, among others, on activities that increase investment (including the removal of constraints) and faciliate trade in services (BIMSTEC, 1998).

The Indian Ocean Rim Association for Regional Cooperation (IOR-ARC) held discussions at the third meeting of the Committee of Senior Officials (Maputo, Mozambique, March 1999) on the need for IOR-ARC to develop a coherent trade and investment policy agenda. A Sub-

(Box IV. 3, concluded)

predictable investment regime in ASEAN; to take appropriate measures to enhance the attractiveness of the investment environment in ASEAN; and to take reasonable actions to ensure observance of the AIA provisions by the regional and local governmental authorities (article 5).

Opening up of industries and national treatment: the agreement provides for the immediate opening up of all its industries to ASEAN investors and to accord immediately national treatment to all ASEAN investors and investments in all industries and measures affecting investment, including its admission, establishment and acquisition. This provision is of special interest in that it grants a right of establishment to ASEAN investors in all industries as well as rights of entry on the basis of national treatment (article 7).

Negative lists: the agreement allows for exceptions to the obligations on right of establishment and national treatment, with regard to industries or measures on which the relevant host country is unable to grant such rights. These industries or measures are to be submitted in a “temporary exclusion list” and in a “sensitive list” within six months after the date of signing the agreement. The temporary exclusion list is to be reviewed every two years and to be phased out by the year 2010 by all members (except the least developed countries of ASEAN).

Most-favoured-nation treatment is to be granted unconditionally to all member countries of ASEAN (article 8).

Transparency: all relevant measures that affect the operation of the agreement are to be made available through publication or any other means to the AIA Council (article 11).

General exceptions apply for reasons of national security, public morals, protection of life and health, safety, prevention of fraudulent practices and protection of privacy of individuals (article 13).

Emergency safeguard measures and measures to safeguard the balance of payments in the event of serious external financial difficulties are permitted (articles 14 and 15).

The Protocol on Dispute Settlement Mechanism for ASEAN applies in relation to disputes or differences between the member States concerning the interpretation or application of this agreement (article 17); there is no provision in the agreement for the settlement of investor-to-State disputes (article 17).[d]

Source: UNCTAD.

[a] At the first ASEAN Investment Area Ministerial Council Meeting on 5 March 1999, in Phuket, Thailand, the ministers agreed that the timeframe for opening up industries and granting national treatment to all investors should be shortened from the original date of 2020. The Council asked senior officials to look into this matter and make recommendations to the next Council Meeting in late September 1999 in Singapore.

[b] Among the “bold measures” announced in December 1998, there was a decision to shorten the timeframe on the implementation of the Agreement from 2010 to 2003 for the manufacturing sector. This included the progressive phasing out of the exclusions by the year 2003. Myanmar would join the six ASEAN countries to phase out progressively the exclusions by the year 2003 instead of 2015. Viet Nam and Lao People’s Democratic Republic would make best efforts to do so by no later than 2010, instead of 2013 and 2015, respectively.

[c] The sectors covered include manufacturing, mining, agriculture, fishery, forestry and (currently under negotiation) services incidental to manufacturing operations (e.g. electroplating, printing).

[d] Under the 1996 Protocol Amending the 1987 ASEAN Agreement for the Promotion and Protection of Investments, a provision was made to cover investor-to-State dispute settlement.

Committee was created to prepare a set of recommendations on the question. In this respect, the importance was stressed of developing a modest, practical and outcome-focused trade and investment policy action plan, incorporating the three pillars of liberalization, facilitation and techical cooperation (Indian Ocean Rim Association for Regional Cooperation, 1999).[5]

• In **Central and West Asia**, the Economic Cooperation Organization[6] prepared a draft regional agreement for the promotion and protection of investment within the the ECO region which was proposed for signature by all member States (Economic Cooperation Organization, 1999). The proposed provisions are intended as minimum standards to be used in dealing with investments coming from members States and in order to stimulate the mobilization and optimum utilization of their economic resources to serve the development of the region. The substantive provisions of the draft agreement are contained in two chapters, the first chapter dealing with general provisions (including safe transfer of capital, investment opportunities, investment incentives, most-favoured-nation treatment and public order) and the second with investment guarantees (ownership, free transfer of capital, freedom of sale, compensation for damage, equality with national investors, resort to national judicial systems and conciliation and arbitration).

• In **sub-Saharan Africa**, the Central African Economic Community and Monetary Union (CEMAC)[7] in 1998 began work on a Community Charter on Investment which, by May 1999, had reached an advanced state (CEMAC, 1999). The Charter is intended to replace the previous Common Convention on Investment, which had been in force since 1965 and became obsolete since the member countries decided to implement a programme of regional reforms in 1993. Planned as a general investment framework for the region, the draft Charter sets out policy measures aimed at improving the investment climate, and promoting the development of the private sector through local and foreign investment. It defines the new role of the State in facilitating FDI and sets out the basis for the provision of guarantees for a stable and secure business environment, including national treatment; a common fiscal regime, including incentives; and the creation of support services and special treatment for priority industries. The Charter was expected to be concluded by July 1999 and was identified as one of the key elements of the common market to be launched in January 2000.

The West African Economic and Monetary Union (UEMOA)[8] completed a draft of a Community Code on Investment in early 1999 which is intended to replace the individual codes of its member countries and thus harmonize the diversity of national rules. The draft Community Code guarantees, among other things, the legal protection of private property and the transfer of capital and payments; provides for special incentives and support services; and states a number of general obligations for all enterprises, including the protection of the environment (UEMOA, 1998).

The Southern African Development Community (SADC)[9] drafted a Protocol in March 1998 setting out basic principles on investment policy on the basis of the conclusions and recommendations of a study prepared for that purpose. These included, inter alia, a recognition that the pace of privatization in the region should be increased, and private-public parterships encouraged; that foreign and domestic investors should have equal access in the relevant areas; that simple, transparent and non-discriminatory procedures for the approval, entry, and operation of investments needed to be established; and that investment promotion agencies should shift attention from incentives measures towards policy and administrative reform in order to attract investment. At the ministerial meeting in July 1998 it was decided that the Protocol will be a framework document setting out basic principles. In recognition of the fact that more difficult and controversial issues will take time to negotiate, additions to the Protocol will be made in the form of annexes and memoranda of understanding. The former will be legally binding while the latter will not. The draft Protocol was expected to be completed by July 1999, when it would be submitted to SADC finance ministers for approval (SADC, 1999). In the meanwhile, trade and investment cooperation contacts between SADC and the United States intensified. The two parties agreed to explore negotiations on a regional trade and investment framework agreement between them. The framework agreement (which would be non-binding), should facilitate mutual understanding between the two parties regarding ways to deal with investment issues, including the protection of intellectual property rights (Panafrican News Agency, 1999).

Discussions were also under way for a Trade and Investment Framework Agreement between ECOWAS and the United States, as part of several recent United States initiatives with various regional and subregional African groupings aimed at stimulating FDI in Africa.

In the Common Market for Eastern and Southern Africa (COMESA)[10] deliberations started on June 1999 with a view towards creating a free trade area in the region by October 2000, as a step towards attaining COMESA's common goals regarding free movement of capital and people and rights of establisment (Africa News online, 1999).

A treaty establishing the new East African Community (EAC)[11] was drafted in 1998 and was expected to be ratified in July 1999. The EAC Treaty should establish a single market and investment area for the region, with the main objectives of providing for free movement of capital and services, promotion of economic growth and development and attracting increasing flows of FDI. If ratified, the Treaty would bring about the revival of the Community, which collapsed in 1977 (Panafrican News Agency, 1998).

Finally, substantial progress was made in the business law harmonization process undertaken under the Treaty on the Harmonization of Business Law in Africa (OHADA)[12] – which calls for the development of simplified and modern common business laws adapted to the economic situation of the countries involved, and for the promotion of arbitration as a means of settlement of business disputes.[13] As of May 1999, uniform laws had been adopted on general commercial law, law on commercial companies, securities, simplified procedures for recovery and enforcement of claims, insolvency and arbitration. Uniform regulations relating to labour, accounting system, sale and transportation are under preparation. These efforts are expected to contribute to the creation of a stable and predictable legal environment to encourage business confidence in the region (OHADA, 1998).

- In **North Africa and West Asia**, the Unified Agreement for the Investment of Arab Capital in Arab Countries adopted in 1980, was being revised to make it more effective and responsive to the needs of the Great Arab Free Trade Area (GAFTA), under the auspices of the League of Arab States.[14] The Agreement on Investment and Free Trade Movement of Arab Capital among Arab Countries, adopted in 1970, is also being looked into and discussions have started in the Council of Arab Economic Unity to revise the current text.[15]

- In the **Western Hemisphere**, the negotiations to create the Free Trade Area of the Americas (FTAA), which were launched in April 1998, moved on. The Negotiating Group on Investment held an organizational meeting in September 1998 and its second and third meetings in February and April 1999, respectively. During these meetings, the Group discussed the items that had been identified for possible discussion in an investment chapter (UNCTAD, 1998a, box III.3). Other issues identified by individual countries or groups of countries were also on the agenda for discussion, without prejudice to their possible inclusion in an investment chapter. These included transparency, the relationship between investment and environment and between investment liberalization and core labour standards; technology transfer; the relationship between investment and competition policy; investment promotion; investment incentives; measures to promote the growth of small and medium-sized enterprises; and conditions to level the "playing field" for smaller countries. The Group was to meet again in August 1999 with a view towards drafting the annotated outline to be presented to ministers in Toronto in November 1999.[16]

In addition, several free trade agreements were concluded during 1998 and early 1999 containing rules for the liberalization, protection and promotion of investment, thus expanding the network of trade agreements already in existence. A free trade agreement was signed by the Central American countries and the Dominican Republic on 16 April 1998 (OAS, 1998b). The free trade agreement between Chile and Mexico was expanded into new areas, including investment rules (OAS, 1998c). The Andean Community decided, at its last Presidencial Council (May 1999), to work towards new common rules regarding foreign investment as well as double and indirect taxation (Andean Community, 1999). Moreover, the Andean Community and MERCOSUR signed on 21 April 1998 a Framework Agreement for the Creation of a Free Trade Area, which includes, among its main objectives, the establishment of a normative framework for the promotion of investment between the two subregions (UNCTAD, forthcoming d). Free trade and investment agreements presently under negotiation, such as between Mexico on the one hand and Guatemala, Honduras and El Salvador on the other, are also meant to address investment issues (Mexico, Office of the President, 1998). Moreover, on 30 October 1998 the countries members of the Andean Community and the United States agreed to establish a Trade and Investment Council with the purpose, among other things, of identifying and proposing mechanisms to facilitate trade and investment, identifying and working towards the elimination of restrictions on trade and investment, and exchanging and reviewing information on investment relations and conducting periodical evaluations (UNCTAD, forthcoming d). On 31 May 1999, a "trade and investment cooperation arrangement" was signed between Canada and the Andean Community (Canada, 1999); a similar arrangement was signed with MERCOSUR on 16 June 1998 (Canada, 1998a). Moreover, the Governments of Canada, Costa Rica, Nicaragua, El Salvador, Honduras and Guatemala signed a memorandum of understanding on trade and investment on 18 March 1998 (Canada, 1998b). The Caribbean Community for its part amended the CARICOM Agreement with the adoption of two new Protocols: the Protocol on Establishment, Services and Capital (24 June 1997) strengthened rights of establishment, the provision of services and capital movement within the Community; and the Protocol on Industrial Policy (30 June 1998) gave effect to the new objectives and market orientation of the Community's industrial policy (UNCTAD, forthcoming d).

- In **Europe**, The European Parliament adopted a resolution on 15 January 1999 on a European Union Code of Conduct for European Enterprises Operating in Developing Countries (UNCTAD, forthcoming d). The resolution includes the following main elements: encouragement of voluntary codes of conduct by business and industry, trade unions and coalitions of NGOs, while emphasizing that such voluntary codes of conduct cannot replace national or international rules (see chapter XII); a proposal for the development of a European multilateral framework governing company operations worldwide and comprising minimum existing international standards; a proposal for the provision of development cooperation and technical and financial assistance to developing countries to help ensure that international standards are incorporated in their laws; suggestions for the improvement of consultation and monitoring mechanisms of European company operations in third countries, and the development of a system of incentives for companies complying with the relevant international standards; and a recommendation that, in the negotiation of investment agreements, the European Union should contribute to establishing not only rights for TNCs but also duties in the field of environment, labour and human rights. This resolution can be expected to make an input into the review of the OECD Guidelines for Multinational Enterprises being undertaken by the OECD.

Another significant development took place on 27 January 1999, when the Council of Europe opened for signature the Criminal Law Convention on Corruption. The Convention aims at a coordinated criminalization of a wide range of corrupt practices, including bribery of foreign public officials in international business transactions (UNCTAD, forthcoming d).

- Regarding **negotiations between developed and developing countries** an important development was the initiation of negotiations, in September 1998, for a new relationship between the European Union (EU) and its 15 country members on the one hand, and the 71 African, Caribbean and Pacific (ACP) countries on the other, to succeed the present Fourth Convention of Lomé (Lomé IV) which expires on 29 February 2000. In preparation for the negotiations, the European Commission issued its Green Paper "Relations between the European Union and the ACP countries on the eve of the 21st century: challenges and options for a new partnership" (European Commission, 1996), setting out its goals for the negotiations. In respect to investment, the mandate for the negotiations included the strengthening of commitments of the Community in favour of ACP countries in order to improve the attractiveness of countries that have not received sufficient FDI flows in spite of the IV Lomé Convention investment promotion provisions. It was also contemplated that the provisions of IV Lomé Convention dealing with foreign investment promotion, protection, financing and support, current payments, capital transfers and treatment of business entities would be strengthened (European Commission, 1996). As for the ACP countries, their negotiating objectives and mandate were reflected in the Libreville Declaration (ACP General Secretariat, 1998). As regards FDI, the Declaration asserted the ACP countries' commitment to enforce macro-economic policies that could stimulate intra-regional investment and attract FDI flows. However, specific cooperation mechanisms were needed for improving the competitiveness of their economies. EU assistance was sought in particular for the development of services industries and possibly for the creation of an investment guarantee agency which could operate in synergy with the Multilateral Investment Guarantee Agency (MIGA). With respect to investment, the negotiating mandate given on 30 September 1998 to the ACP negotiatiors focused mainly on the provision of incentives to stimulate FDI flows, including investment guarantees; private sector development through linkages with European firms; and harmonization of investment rules. An ACP-EU Joint Assembly Resolution on the future of ACP-EU, reflecting a harmonized approach on the negotiating objectives of ACP and European Union countries, called inter alia for "an investment protection mechanism, which will encourage foreign investment while providing for environmental impact assessments and promoting acceptable social standards" (European Commission, 1999, paragraph 31). Civil society groups have also expressed their views on the future Lomé agreement both in the European Parliament (Liaison Committee of Development NGOs to the European Union, 1997) and in ACP countries (ACP NGO Conference on Future EU-ACP Cooperation, 1997). In general, they have called for the new agreement to respect the sovereignty of States in the regulation of business activities, and to take into account the need to enhance both domestic and foreign investments as a key source for sustainable development in ACP countries.

New association agreements recently concluded between the EU and a number of countries in Central and Eastern Europe and in Northern Africa combine free trade and investment objectives (UNCTAD, forthcoming d). The new wave of Northern African association agreements were the offspring of the Barcelona Declaration[17] which gave new impetus to investment relations between the EU and the countries of Northern Africa. The Declaration called inter alia for the development of a free trade area and the strengthening of economic cooperation based on the recognition that economic development must be supported by FDI. In this respect, it stressed in particular the importance of creating an environment conducive to investment through the progressive elimination of obstacles to such investment. Negotiations were under way between the European Union and Egypt for a new Euro-Mediterranean Agreement establishing a partnership between the European Union and its member countries on the one hand, and Egypt on the other hand.

3. Developments in OECD

a. Policy developments

Work in OECD proceeded on several investment-related initiatives. The OECD Convention on Combating Bribery of Foreign Public Officials (UNCTAD, forthcoming d) entered into force on 15 February 1999. The OECD members intend to monitor closely the effective implementation of the Convention and to promote its objectives worldwide (box IV. 4).

Furthermore, following the 1998 Ministerial Meeting, the Committee on International Investment and Multinational Enterprises launched a review of the Guidelines for Multilateral Enterprises with a view to update and improve them.[18] The call for a new review was prompted by a number of important developments that had taken place since the previous one, notably a widespread recognition of the role of FDI in economic and social development and growth; the liberalization of investment regimes which had reduced controls regarding the entry and operations of TNCs in host countries; and the intense negotiating activity on investment-related rules in recent years which brought to the forefront the concerns of a number of stakeholders in these negotiations – in particular, the MAI negotiating process provided a platform for NGOs and other stakeholders to call for consideration of certain standards of corporate social responsibility in devising international investment rules. These and similar considerations

Box IV.4. The OECD Convention on Combating Bribery of Foreign Officials enters into force

Ratification

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into force on 15 February 1999. The Convention will permit OECD and other countries to move in a co-ordinated manner to adopt national legislation making it a crime to bribe foreign public officials. The Convention has been signed by all 29 OECD member countries and by 5 non-members (Argentina, Brazil, Bulgaria, Chile and the Slovak Republic), and 12 countries have already deposited their instruments of acceptance, approval, or ratification.[a] Work on ratification and implementation of the Convention is advancing in other countries. Ratification is imminent in a few countries, while others have completed drafting of implementing legislation and are taking steps to complete the legislative process. In the remaining countries, the legislative process is still lagging, and approval by parliaments is not expected before the end of the year.

At the same time, significant progress has been achieved on the issue of tax deductibility of bribes. It is expected that by the end of 1999, bribes will not be deductible in any country that has signed the Convention.

Monitoring

Monitoring the Convention's ratification and implementation follows a two-stage process, as agreed by the OECD Working Group on Bribery. Phase 1 began in April 1999 with the examination of three countries that have ratified the Convention: Germany, Norway, and the United States. Its purpose is to evaluate whether the legal texts through which participants implement the Convention meet the standard set by the Convention. Phase 1 involves a self and mutual (peer review) evaluation based on replies to a questionnaire on how a country's legal system implements the Convention. Phase 2 focuses on the assessment of effective application and enforcement. In this phase, the Working Group will assess how each country, in practice, provides for the effective application and enforcement of its national laws implementing the Convention. It will also monitor more fully implementation of the non-criminal aspects of the 1997 Revised Recommendation. This phase will involve visits by the Secretariat and lead examiners in order to prepare a thorough review of the country concerned. Phase 2 should begin in the second half of 2000, in order to finish a cycle of examinations of all participants by no later than 2005.

Further work on corruption

The Working Group on Bribery has examined on a priority basis a number of issues:

- acts in relation with foreign political parties;
- advantages promised or given to any person in anticipation of that person becoming a foreign public official;
- bribery of foreign public officials as a predicate offence for money laundering legislation;
- the role of foreign subsidiaries in bribery transactions, and
- the role of offshore centres in bribery transactions.

As part of its work programme the working group will continue to examine these issues in light of the experience gained by the process of self and mutual evaluation. The Working Group also intends to conduct work on other issues relating to bribery in international business transactions, i.e. civil and administrative remedies, solicitation of bribes and bribery of commercial agents. As concerns offshore centres, the OECD will address the obstacles in international co-operation, together with other fora.

Accession of non-OECD countries

Accession of the non-OECD countries is sought. On the occasion of the signing of the Convention, Ministers of participating States declared their intention to seek to secure the accession of non-OECD countries to the Convention. The 1997 Recommendation on Combating Bribery in International Business Transactions also mandates the Working Group to carry out a programme of outreach to non-participating countries. Israel's request to join the Convention and take part in the Working Group on Bribery has been approved by the OECD Council. Other countries have requested information on conditions for joining the Convention.

In the context of its outreach programme, the Secretariat is organizing events in Paris and in non-member countries.

Source: OECD.

[a] Bulgaria (22 December 1998), Canada (17 December 1998), Finland (10 December 1998), Germany (10 November 1998), Greece (5 February 1999), Hungary (4 December 1998), Iceland (17 December 1998), Republic of Korea (4 January 1999), Japan (13 October 1998), Norway (18 December 1998), the United Kingdom (14 December 1998), and the United States (8 December 1998).

suggested that individual chapters of the Guidelines might need substantive review in order to bring them up to date with international developments and national practice, and to make them more relevant as a point of reference for foreign investment/host country relations. The Committee's discussions on the review in November 1998 and February 1999 were accompanied by consultations with member countries, as well as contributions from the OECD's Business and Industries Advisory Council and Trade Union Advisory Council. The review may be concluded by the ministerial meeting of 2000.

Also during this period a set of OECD Principles of Corporate Governance (UNCTAD, forthcoming d) were developed and endorsed by the OECD Council at ministerial level on 26-27 May 1999 (OECD, 1999e). The Principles are intended to assist members and non-member Governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries, and to provide guidance to stock exchanges, investors, corporations and other parties that have a role in the process of developing good governance practice. The issues addressed concern the rights of shareholders; the equitable treatment of shareholders; the role of shareholders in corporate governance; disclosure and transparency; and the responsibilities of the board of directors. Of particular relevance in this respect is the relationship between corporate governance practice and the increasingly international character of investment. The message of this instrument is: if countries are to reap the full benefits of the global capital market, and if they are to attract long-term capital, corporate governance arrangements must be credible and well understood across borders.

A year earlier, on 28 April 1998, the OECD Council had adopted a Recommendation Concerning Effective Action Against 'Hard Core' Cartels. In recommending a number of coordinated measures, (e.g. effective sanctions, enforcement procedures with adequate powers to detect and remedy hard core cartels, consultation, shring documents and information) the Council emphasized that effective action against hard core cartels was particularly important from an international perspective because of their distortion of world trade markets, waste, and inefficiency in countries whose markets would otherwise be competitive. Effective action in this area was particularly dependent upon cooperation because these cartels generally operated in secret, and relevant evidence may be located in many different countries (UNCTAD, forthcoming d).

Finally, a set of recommendations concerning domestic tax legislation and practices were proposed to the 1999 meeting of the Council at ministerial level, addressing the problem of harmful tax practices from various angles, and representing, together, a comprehensive approach for dealing with the problems of harmful tax competition created by tax havens and harmful preferential tax regimes, including the problem of tax evasion and avoidance (UNCTAD, forthcoming d). The Council welcomed in particular the establisment of the Forum on Harmful Tax Practices and the progress made in this area. Further work is to proceed on the identification of tax havens.

b. The MAI

Perhaps the most important development in OECD in 1998 was that the negotiations on a Multilateral Investment Agreement (MAI), which had begun in 1995, "are no longer taking place" (OECD, 1998a, p. 1). The decision not to continue the negotiations was preceded by a six-month period of assessment to reflect and consult with civil society (UNCTAD, 1998a), after it became clear during the OECD Council meeting at ministerial level in 28 April 1998 that the MAI negotiations, which had been scheduled to be concluded on that date (a year later than originally planned),[19] were encountering significant difficulties, and after France announced that it would no longer send its delegation to participate in the negotiations.[20] The following is a brief discussion of what caused the MAI to fail.

(i) Objectives of the MAI

Originally, the stated main purposes[21] of the MAI negotiations were to consolidate what the OECD had achieved so far on investment rules[22] in a single instrument, to allow for a more structured dynamic for the liberalization process, to make some of these rules legally binding (e.g. the national treatment instrument) and to make the legally-binding nature of the rules clear by adding provisions for the settlement of investment disputes arising out of the agreement.[23] The negotiations were preceeded by several years of preparations in the Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT). This allowed member countries to agree on the main elements that should feature in the negotiations (box IV.5). In May 1995, the OECD Council at the ministerial level announced "the immediate start of negotiations in the OECD aimed at reaching a Multilateral Agreement on Investment (MAI) by the Ministerial meeting of 1997" (OECD, 1995a, p. 3). According to the mandate for the negotiations the MAI was to:

- "provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures;

- be a free-standing international treaty open to all OECD members and the European Communities, and to accession by non-OECD member countries, which will be consulted as the negotiations progress" (OECD, 1995a, p. 3).

At the time the negotiations were suspended, a number of substantive issues remained to be resolved; these are discussed in section (ii).[24] The reasons for the suspension of the negotiations also had much to do with the broader political context; these are discussed in section (iii).

Box IV.5. Structure of the MAI

The MAI Negotiating Text as of 24 April 1998 was structured as follows:

I. General Provisions
Preamble

II. Scope and Application
Definitions
    Investor
    Investment
Geographical Scope of Application
Application to Overseas Territories

III. Treatment of Investors and Investments
National Treatment and Most-Favoured-Nation Treatment
Transparency
Temporary entry, stay and work of Investors and Key Personnel
Nationality Requirements for Executives, Managers and Members of Boards of Directors
Employment Requirements
Performance Requirements
Privatization
Monopolies/ State Enterprises/ Concessions
Entities with Delegated Govermental Authority
Investment Incentives
Recognition Arrangements
Authorization Procedures
Membership of Self-Regulatory Bodies
Intellectual Property
Public Debt
Corporate Practices
Technology R & D
Not Lowering Standards
Additional Clause on Labour and Environment

/...

(Box IV.5, concluded)

IV. Investment Protection
General Treatment
Expropriation and Compensation
Protection from Strife
Transfers
Information Transfer and Data Processing
Subrogation
Protecting Existing Investments

V. Dispute Settlement
State-State Procedures
Investor-State Procedures

VI. Exceptions and Safeguards
General Exceptions
Transactions in Pursuit of Monetary and Exchange Rate Policies
Temporary Safeguards

VII. Financial Services
Prudential Measures
Recognition Arrangements
Authorization Procedures
Transparency
Information Transfer and Data Processsing
Membership of Self-regulatory Bodies and Associations
Payments and Clearing Systems/ Lender of
Last Resort
Dispute Settlement
Definition of Financial Services

VIII. Taxation

IX. Country-Specific Exceptions
Lodging of Country-Specific Exceptions

X. Relationship to Other International Agreements
Obligations under the Articles of Agreement of the International Monetary Fund
The OECD Guidelines for Multinational Enteprises

XI. Implementation and Operation
The Preparatory Group
The Parties Group

XII. Final Provisions
Signature
Acceptance and Entry Into Force
Accession
Non-Applicability
Review
Amendment
Revisions to the OECD Guidelines for Multinational Enterprises
Withdrawal
Depositary
Status of Annexes
Authentic Texts
Denial of Benefits

Source: OECD, 1998b; reprinted in UNCTAD, forthcoming d.

(ii) Main outstanding substantive issues[25]

Definition of investment

The MAI Negotiating Text envisaged an asset-based broad and open-ended definition of investment covering every kind of asset. The definition included an illustrative list of assets covered.

Although there was broad support for an asset-based definition of investment, a few delegations argued for the exclusion of portfolio investment from the MAI coverage and a few others found it difficult to accept an open definition. To deal with such difficulties, it was generally agreed that a broad definition called for appropriate safeguard provisions (e.g. a balance-of-payments derogation). Moreover, a number of issues were identified whose appropriate treatment in the MAI needed further consideration, namely, indirect investment, intellectual property, concessions, public debt and real estate. With respect to the inclusion of intellectual property rights, the prevailing view was that the provisions of the MAI should not interfere with the provisions of the relevant WIPO Agreements (see below).

National and most-favoured nation treatment

The MAI Negotiating Text provided for rights of entry and establishment on the basis of national and most-favoured-nation (MFN) treatment. These standards would apply also to all aspects of the operation of an investment after entry in a host country.
The contracting parties were allowed to lodge country-specific exceptions to the application of national treatment, MFN and other provisions of the MAI to be determined. List A was intended to include any existing non-conforming measures that a country would wish to maintain and any amendments thereto, provided these did not increase the restrictive nature of the measure. The MAI Negotiating Text did not impose rollback obligations, although future rounds of negotiations on liberalization were envisaged.

A provision in brackets contemplated the inclusion of a second list of specific country-exceptions (list B) which would include a number of limited but as yet unspecified matters (among those being discussed were, for example, the question of preferential economic policies for aboriginal people and minorities, culture and incentives) to be excepted from the application of national and MFN treatment.

The formulation of the standards of national and MFN treatment covering pre- and post-establishment were agreed upon, except for a few aspects. The negative list approach to exceptions on these standards and other provisions of the MAI was not controversial *per se*. But one delegation insisted that the schedules of country exceptions that parties would wish to file should be discussed and negotiated before the completion of the Agreement. Its position was that "up-front liberalization" would offer greater opportunities for increased investment flows than an as yet unspecified rollback mechanism. Most other delegations were sceptical about negotiating away proposed exceptions before an agreement on the text would have been reached. But they agreed to a proposal by the Chairperson in early 1997 to table their exceptions. This produced a considerable number of exceptions, with the quantity and the character of the exceptions varying greatly between countries, raising the question of the balance of commitments. A number of them may have been of a tactical nature, i.e. they were meant to be removed in exchange for concessions. Other exceptions were added for prudential reasons, reflecting uncertainty as to the actual effect of some of the agreed provisions. More generally, agreeing on a common methodology for scheduling negative lists remained an open question until the end. The wide differences in the character of the exceptions listed made it difficult to compare them and raised questions of legal certainty.

The fact that even otherwise liberal countries had tabled many exceptions to liberalization commitments suggested the possibility that the liberalization process under MAI would not go beyond what had already been achieved through the OECD Liberalisation Codes; for delegations seeking better market access, this was discouraging. Others found the current level of liberalization under the OECD Codes sufficient since they sought to establish a framework within which further liberalization could be achieved progressively.

Another outstanding matter related to the inclusion of a list B of exceptions. There were different views with respect to this draft article which would allow new non-conforming measures to be introduced after the Agreement came into force. One view was that the unspecified and potentially open-ended nature of the exceptions allowed in such provision might undermine the MAI disciplines. Another view was that such a provision would allow for flexibility and thus would make it easier to preserve the high standards in the Agreement.

During the last stages of the negotiations before they were suspended, several proposals were made with a view towards easing the strict application of the standstill principle while maintaining the overall level of liberalization. One such proposal called for the imposition of compensatory adjustments on an MFN basis with respect to non-conforming measures.

Subnational authorities

Regarding the question of the application of the MAI to subnational authorities, the lists of exceptions tabled by one delegation appeared to exclude sub-national authorities in practice from many MAI obligations. Another delegation made the question of binding subnational authorities conditional upon a satisfactory balance of rights and obligations. A potential solution of this matter lay along the GATT lines which imposes an obligation upon federal States to take all reasonable measures to ensure compliance with its terms by sub-national authorities.

Moreover, the application of the MAI to subnational authorities raised the question of whether the standard would be met if the investor would be accorded “in state” treatment, or it would be sufficient to apply the treatment accorded to investors in any other state or province. A proposal was made that foreign investors should be accorded “in state” treatment.

The REIO clause

A regional economic integration organization exception (REIO clause), as proposed by the European Union, would have provided for the possibility of granting preferential treatment to some partners without having to extend it to all the parties to the MAI. It would apply to measures taken in the context of such regional economic integration organizations.

Some delegations argued that the REIO clause ran counter to some of the main objectives of the MAI which was to achieve non-discriminatory market access and post entry treatment within the MAI area. Indeed, one of their main negotiating purposes was to ensure for their investors market access to regional economic integration organizations on a par with access by investors of these organizations to their countries. In defence of their proposed REIO clause, the European Union argued, however, that the treatment extended by members of an integration group to each other depended on their acceptance of far-reaching decision-making mechanisms, including majority voting, which other countries had not accepted. In addition, the mutually accorded treatment within the REIO extended to fields not covered by the MAI non-discrimination clauses, such as the mutual recognition of diplomas or standards, or positive discrimination (i.e. the better treatment of other member States operators compared with a member State’s own investors). According the benefits of such a regional integration schemes fully and automatically to countries not committed to those principles of integration would be very difficult.

A compromise on this matter was explored along the approach taken in other agreements, notably GATT Article XXIV / GATS article V.[26] However, the divergence of views remained to the end, in particular over how broad or narrow a REIO clause, if at all acceptable, should be. The broader such a clause, the more it was perceived as upsetting the balance of obligations.

Intellectual property[27]

At the time of the discontinuation of the negotiations, the status of the discussions on intellectual property were that the MAI would include a separate provision on this subject which would explicitly exclude the application of national and MFN treatment obligations in this area beyond those in existing intellectual property agreements, notably the Paris Convention and the WTO TRIPs Agreement.

Cultural exception

A general cultural exception clause proposed by one delegation stated that "nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity."

Several delegations proposed from the outset that cultural industries should be exempted from the MAI coverage. The above-mentioned general exception clause was not discussed because the concept of a general cultural clause was not acceptable to some delegations. One possible solution might have been the inclusion of carefully defined cultural exceptions in the List B of exceptions; another might have been to adopt a bottom-up approach instead of a top-down one to cultural industries by including specific obligations for culture that the parties would accept in a separate schedule, subject to transparency commitments.[28]

Performance requirements

The MAI would have prohibited the imposition of a number of performance requirements, namely, a) trade-related: ratio of exports to total sales, domestic content, local purchases, ratio of local sales to exports; b) transfer of technology; c) location of headquarters; d) research and development; e) employment of nationals; and f) minimum and maximum level of equity participation. Trade-related investment measures listed under a) were prohibited whether mandatory or linked to incentives. All other requirements were allowed if voluntary and linked to advantages. The list was closed.

Although the issue of performance requirements was not a major controversial one for most OECD countries, its negotiation took more time than expected, mainly because negotiators realized the complexity of the obligations imposed. In particular, the fact that the MAI provision on performance requirements imposed absolute obligations, as opposed to relative obligations of national and MFN treatment, caused some delegations to take a cautious approach. Moreover, it was one of the issues NGOs identified in the MAI as having the effect of potentially eroding the regulatory capacity of host countries, and thus contributed to the public debate.

Delegations had agreed to consider a proposal that the provision on performance requirements was without prejudice to the rights and obligations of contracting parties under the WTO rules. Exceptions to protect the environment and to ensure that the parties' regional and SME policies would not be undermined, were also being considered.

Incentives

The MAI addressed incentives indirectly as part of provisions on national and MFN treatment, performance requirements and transparency. There was a preliminary understanding to include this matter in the in-built agenda of the MAI after its adoption.

After some initial discussions on whether or not incentives should be addressed explicitly in the MAI, it was decided to postpone negotiations on further disciplines on incentives aimed at avoiding excessive incentive competition. Such disciplines would have encountered opposition by subnational authorities with constitutional powers on foreign investment matters, as they continued to rely on incentives as an instrument to attract foreign investment away from other regions. Indeed, the provisions on national treatment were seen by some subnational authorities as a threat to their authority to formulate inward investment policy (see above). Some delegations argued that incentives were best dealt with on a regional or world-wide basis.

Labour and environmental issues

A labour and environmental package was proposed by the Chairperson which commanded considerable support: the preamble would make express reference to the parties' commitment to the relevant labour and environmental instruments such as the Rio and Copenhagen Declarations; in addition, the MAI would include a provision to prevent the lowering of labour, environmental or health standards as incentives in relation to a particular inward investment project.[29] *It was also agreed towards the end of the negotiations that the OECD Guidelines for Multinational Enterprises would be associated to the MAI.*

There were early discussions among delegations on including a reference in the Preamble of the MAI to sustainable development and the relevant conventions on labour and the environment, and associating the (non-binding) OECD Guidelines to the MAI in some way, as well as including provisions on labour and the environment. The idea of including provisions on not lowering labour and environmental standards developed later in the negotiations, in response to concerns for social and environmental impact raised by NGOs and trade unions. The issue remained controversial with some countries opposing any reference to lowering standards. Negotiations also focused on whether the commitment not to lower standards would be binding on governments or remain a hortatory statement. This issue remained unresolved. The above mentioned compromise package by the Chairperson which included legally-binding language on not lowering standards (with the possibility that this clause might be submitted only to State-to-State settlement of disputes) was proposed towards the end of the negotiations.

Right to regulate vs. regulatory takings

The provision of the MAI on expropriation covered not only direct but indirect takings as well. Accordingly, any measures taken by a host country having an effect equivalent to expropriation might need to be accompanied by prompt, adequate and effective compensation.

The coverage of indirect takings under expropriation provisions had been consistently followed in BITs and other international investment agreements, and it was thought to be a rather innocuous matter. However, it faced strong opposition in the MAI negotiations, especially after some cases raised under the investor-State provisions of NAFTA in the United States and Canada (e.g. the Ethyl case)[30] led NGOs to think that property rights of individuals could be given precedence over the right of society to regulate for environmental purposes.[31] More generally, NGOs argued that this provision could be interpreted to mean that any regulation that had the effect of limiting the profit-making capacity of an investment could be challeged as an act of indirect expropriation. NGOs argued that such an interpretation would effectively nullify many regulatory acts of governments. As a result, this issue provoked much debate.

A proposal was made by the Chairperson to resolve this question, as part of his package of proposals on environment and related matters and on labour.[32] It suggested the inclusion of an interpretative note for the expropriation and general treatment articles. The proposal was in response to an agreement reached among delegations that the note should make it clear that the MAI would not inhibit the exercise of normal regulatory powers of governments and that the exercise of such powers would not amount to expropriation.

Settlement of disputes

The MAI Negotiating Text included clauses on the settlement of investment disputes that provided for consultations, conciliation, State-to-State and investor-to-State means of dispute resolution, the latter allowing for the possibility that such disputes be submitted to third-party international arbitration.

The main oustanding issue related to the settlement of investor-to-State disputes through third-party international arbitration. This means of resolving investor-to-State disputes was not a traditional feature of customary interntional law, but it has become a standard feature in international investment agreements, notably in BITs (however, out of some 1,700 BITs, less than ten per cent are between OECD countries), NAFTA,[33] MERCOSUR and the Energy Charter Treaty. Therefore, objections on this clause came as a surprise in the MAI negotiations. One delegation objected to the clause as a matter of principle, as it would give foreign investors special privileges, not available to domestic investors, to challenge host country decisions regarding compliance with the MAI outside the relevant country's jurisdiction. Moreover, the argument was taken up by some NGOs as one of their main objections to the MAI. An additional argument was that this clause would give foreign investors and their lawyers too much control over systemic policy issues and the law-making process emerging from the application of the MAI rules.

Some countries that did not object to investor-to-State dispute resolution in principle, but did raise objections regarding the extension of such a system to the pre-establishment phase, i.e. how to give non-investors the *locus standi* to file a claim against a potential host country.

Failure to resolve this matter would have thrown into question one of the main pillars of the MAI. Thus, there was a proposal for the creation of a standing appeals body to entertain both investor-to-State and State-to-State disputes, similar to the WTO appeals system. Such an appeals body would have been relatively easy to construct for State-to-State disputes. However, the issue raised technical difficulties with respect to investor-to-State, which were not examined in detail before the negotations ended.

Extraterritorial application of national laws and secondary investment boycotts

A proposal existed for a draft article on conflicting requirements which would prevent a party to prohibit outside its territory an investor from another party from acting in accordance with the latter party's laws, regulations or express policies, unless those laws, regulations or express policy were contrary to international law.

Another draft article on secondary investment boycotts was tabled which would prohibit parties from taking measures that impose liability on investors from another party, or to prohibit, or impose sanctions for, dealing with investors of another party, because of investments an investor of another party makes, owns or controls, in a third country in accordance with regulations of such third country.

This issue emerged out of the debate generated by the Helms-Burton Act (Muchlinski, 1999). It raised important long-term technical questions regarding the extraterritorial application of national laws – an issue that had been dealt with by the OECD for quite some time – and led many delegations to ask for additional safeguards against extraterritoriality.

A separate understanding was reached in 1997 between two delegations which envisaged the development of disciplines governing transactions in so-called illegally expropriated property, and on extraterritorial measures, and a provision on conflicting requirements to be eventually incorporated in the MAI.

Taxation

There were some initial discussions as to whether taxation, an issue of importance in investor location decisions, should be included in the MAI. This would have made taxation matters subject to national and MFN treatment, with country-specific exceptions. The discussions took place in a special working group of tax and investment experts and was a controversial issue during the first year. However, most delegations agreed to carve taxation out of the MAI negotiations, except for expropriation and transparency commitments, in order to avoid any potential clashes with the many bilateral agreements on the avoidance of double taxation.

(iii) The broader political context

Independently of difficulties regarding the main outstanding issues in the MAI, a number of factors of a broader political nature intervened to bring about the MAI's demise. Different opinions have been expressed as to what caused the MAI to fail, each reflecting its own side of the debate, and it is perhaps premature to draw definitive conclusions on the matter.[34] Time and perspective will write the final story. But there is one thing on which most commentators seem to agree, namely, that the fate of the MAI was the result of a convergence of forces of a political, policy, social and economic nature not all of which were forseen when the negotiations began. Some of the main reasons that have been advanced in this respect are outlined below.

One reason for the failure of the MAI was a change in the political climate during the course of the negotiations and the emergence of a backlash against globalization. The new centre / left governments in a number of influential OECD countries brought in new political priorities, while the Asian crisis and its aftermath called for new caution regarding capital mobility. In 1995, when the negotiations began, it was generally believed among negotiators that the MAI exercise was primarily a task of assembling the technical elements from various already existing international investment agreements into a rational whole and that the resulting agreement would have substantial systemic benefits which would engage their political constituencies. Three years later, a technical exercise had become a political one – and politicians tended to focus more on its costs.

Another important reason was that, although consultations with capitals and stakeholders had taken place during the preparatory process, negotiators underestimated the intensity of the public debate the MAI would provoke in some countries. (This had however been foreshadowed by public discussions in North America in connection with NAFTA, especially regarding the importance of labour and environmental issues.) Indeed, NGO influence – often through direct links to parliamentarians – brought about unexpected developments at a relatively late stage of the negotiations, which appeared to have caught negotiators by surprise. This was so, in particular, with respect to the issues of indirect expropriation and investor-to-State dispute settlement, issues that initially had been perceived to be relatively easy to deal with, as they had already been included in numerous international investment agreements. The NGOs' use of the INTERNET brought a new dynamic to the negotiating process, particularly when negotiating texts were distributed instantaneously.[35] In part, that was a reaction to what was perceived by NGOs as lack of appropriate consultations with key stakeholders in the framework of a process they considered to be closed and opaque (Dymond, 1999; Kobrin, 1998). But NGOs argued that their fears were just as much the result of real concern over the underlying philosophy and approach of the MAI, its structure and objectives, as well as a number of substantive issues; its failure to deal with competition, corruption and investor behaviour; the increase in investor rights as regards the definition of investment; pre-establishment protection; performance requirements and expropriation (WWF, 1999).

The business community (which, along with trade unions, was associated with the negotiations through their advisory committees to the OECD), was initially an important constituency behind the MAI negotiations. However, it appeared to have lost interest as negotiations progressed, especially after it became clear that taxation provisions would be carved out of the MAI,[36] provisions on the environment and labour would be added and no significant new liberalization would be gained immediately.[37]

An added difficulty (pointed out especially by NGOs) was that the developing countries were not able to make a *direct* input into the negotiations. This was all the more important as the MAI was ultimately intended to be open to accession by all countries. The concerns of these countries were therefore not brought directly to the table, except through those developing countries that had obtained observer status.[38]

Thus, on the one hand, from the perspective of national decision-makers there were no truly compelling problems of investment protection in the OECD area;[39] they needed to consider the possibility that the MAI might lower the protection standards that had already been accepted in BITs (with the possible effects that this might have on the negotiation of future BITs); they were uncertain as to whether many developing countries would join an agreement (which, considering that the OECD was already largely liberalized, was seen by some as the real payoff of an agreement); and they realized that an agreement would not necessarily lead to improved market access in the OECD area (at least in the short term). On the other hand, national decision-makers saw no strong support from the business community; faced broad opposition from NGOs, who saw the MAI as "a metaphor for all that was to be feared from globalization" (Sauvé, 1998, p. 5), and (in some countries) even expected difficulties within their own coalition governments. On balance, therefore, a political cost / benefit calculation suggested to some governments that the value-added of the MAI was limited. In an organization that decides on the basis of consensus, the declared desire of even one government not to proceed was sufficient to bring about an end to the negotiations.

4. Multilateral developments

At the multilateral level, the General Conference of the **International Labour Organization** (ILO) adopted, on 18 June 1998, the ILO Declaration on Fundamental Principles of Rights at Work and its Follow-up (UNCTAD, forthcomingd). The Declaration reaffirmed that all ILO members, even if they had not ratified the relevant Conventions, have an obligation to respect, promote and realize the principles concerning the fundamental rights of freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. These principles have been referred to in, notably, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises (UNCTAD, 1996c), as basic minimum standards governing employment and labour relations by foreign investors in their host countries. The Declaration establishes the universality of the principles set out in the relevant ILO Conventions. The follow-up measures to the Declaration are aimed at encouraging member countries to promote the principles of the Conventions.

In the **WTO**, discussions on investment-related matters took place mainly in the context of the Council for Trade in Services, the TRIMs Committee and of the Working Group on the Relationship between Trade and Investment. In the Council for Trade in Services, discussions increasingly focused on the preparation of a new round of comprehensive services negotiations. These discussions took place in light of article XIX of the GATS, which provides that members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view towards achieving a progressively higher level of liberalization. This process of liberalization is meant to take place with due respect for national policy objectives and the level of development of individual members, both overall and in individual sectors (UNCTAD, 1996c, vol. I, article XIX). The Committee on Trade-Related Investment Measures discussed issues relating to notifications submitted under Article 5.1 of the TRIMs Agreement. In addition, there has been informal consideration of when and how to initiate the review of the TRIMs Agreement pursuant to article 9 which is to take place not later than five years after the date of entry into force of the WTO Agreement, i.e. not later than 1 January 2000. As of June 1999, no formal decision to start this review had been taken. In this regard, the view was expressed by some delegations that, before considering possible steps under article 9 of the TRIMs Agreement, the outcome of the ongoing study processes in the working groups on the Relationship Between Trade and Investment and on the Interaction Between Trade and Competition Policy should be awaited.

The WTO Working Group on the Relationship between Trade and Investment on its part submitted, on 8 December 1998, a report to the General Council of WTO pursuant to paragraph 20 of the Singapore Ministerial Declaration (December 1996) that the Council will keep the work of the Group under review and will determine, after two years, how it should proceed (WTO, 1998a). The Working Group recommended to the General Council that it decide that the Working Group:

> shall continue the educational work that it has been undertaking on the basis of the mandate contained in paragraph 20 of the Singapore Ministerial Declaration. The work of the Working Group, which shall be reviewed by the General Council, shall continue to be based on issues raised by Members with respect to the subjects identified in the Checklist of Issues Suggested for Study. It is understood that this decision is without prejudice to any future decision that might be taken by the General Council, including in the context of its existing work programme (WTO, 1998a, paragraph 227).

The Council extended the mandate of the working group, and work has proceeded on the basis outlined in the recommendation (box IV. 6).

Box IV. 6. Checklist of issues suggested for study by the WTO Working Group on the Relationship between Trade and Investment

It was widely recognized that the Working Group's work programme should be open, non-prejudicial and capable of evolution as the work proceeds. It was also emphasized that all elements, not only category I, should be permeated by the development dimension. Particular attention should be paid to the situation of least-developed countries. In pursuing the items of its work programme, the Working Group should avoid unnecessary duplication of work done in UNCTAD and other organizations.

I. Implications of the relationship between trade and investment for development and economic growth, including:

- economic parameters relating to macroeconomic stability, such as domestic savings, fiscal position and the balance of payments;
- industrialization, privatization, employ-ment, income and wealth distribution, competitiveness, transfer of technology and managerial skills;
- domestic conditions of competition and market structures.

In this work, the Working Group should seek to benefit from the experience of Members at different stages of development and take account of recent trends in foreign investment flows and of the relationship between different kinds of foreign investment.

II. The economic relationship between trade and investment:

- the degree of correlation between trade and investment flows;
- the determinants of the relationship between trade and investment;
- the impact of business strategies, practices and decision-making on trade and investment, including through case studies;
- the relationship between the mobility of capital and the mobility of labour;
- the impact of trade policies and measures on investment flows, including the effect of the growing number of bilateral and regional arrangements;
- the impact of investment policies and measures on trade;
- country experiences regarding national investment policies, including investment incentives and disincentives;
- the relationship between foreign investment and competition policy.

III. Stocktaking and analysis of existing international instruments and activities regarding trade and investment:

- existing WTO provisions;
- bilateral, regional, plurilateral and multilateral agreements and initiatives;
- implications for trade and investment flows of existing international instruments.

IV. On the basis of the work above:

- identification of common features and differences, including overlaps and possible conflicts, as well as possible gaps in existing international instruments;
- advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment, including from a development perspective;
- the rights and obligations of home and host countries and of investors and host countries;
- the relationship between existing and possible future international cooperation on investment policy and existing and possible future international cooperation on competition policy.

Source: UNCTAD, forthcoming d.

As the third WTO Ministerial Meeting – scheduled to take place in Seattle from 30 November to 3 December 1999 – approaches, the question of what activities, if any, should be undertaken on investment issues in the WTO was still open in June 1999.

In **UNCTAD**, the Commission on Investment, Technology and Related Financial Issues convened an expert meeting in March 1999 to examine concepts allowing for a certain flexibility in the interest of promoting growth and development. The expert meeting reviewed the ways and means by which existing international investment agreements provide for flexibility for the purpose of promoting growth and development and discussed pertinent experiences, including various concepts applied by investment instruments at different levels. The experts concluded that flexibility, including with regard to a Government's normal ability to regulate, can be reflected, inter alia, in the objectives, content, implementation and structure of investment agreements. They noted also that a key issue involves finding the proper balance between flexiblity on the one hand, and predictability and security on the other, and thus stressed the role international investment agreements can play as one of the factors contributing to confidence-building in investment relations (UNCTAD, 1999d). There was a sense through the discussions that the potential for unravelling the possibilities of flexible mechanisms to ensure maximum benefits and minimum negative effects from international investment agreements for all parties had not yet been entirely tapped, and further study was needed on this topic in order to understand fully the various possibilities available.

Other activities of UNCTAD of an educational and consensus-building nature included the organization of regional symposia for decision-makers on key concepts and issues in international investment agreements and their implications for developing countries. Regional symposia were held for Asian countries (July 1998), the Caribbean (September 1998), the Andean Group (November 1998) and the Arab countries (May 1999); each symposium was followed by an event for representatives of civil society. The Geneva seminar series for delegates (which was undertaken in cooperation with the WTO) came to its conclusion with the organization of a seminar in April 1999. Designed for interested UNCTAD and WTO delegates in Geneva, these seminars provided an opportunity for in-depth examination of the economics of FDI and they provided a forum to discuss important concepts and issues in international investment agreements. As part of its goal to involve all stakeholders, UNCTAD continued its organization of round table events with interested groups from civil society thereby providing a forum for public-private sector dialogue on issues related to international investment agreements. Events of this nature were organized in New Delhi, Geneva, Lima, Buenos Aires and Cairo. A series of seminars on international investment agreements for representatives of non-governmental organizations is also being developed. Finally, UNCTAD released the first papers in a Series of Issues Papers on International Investment Agreements. The series examines key concepts and issues in international investment agreements and presents them in a manner that is easily accessible to end-users, with particular attention being given to the needs and concerns of developing countries. Eight papers have been published so far. They cover the topics of foreign direct investment and development (UNCTAD, 1999o); scope and definitions (UNCTAD, 1999j); admission and establishment (UNCTAD, 1999l); national treatment (UNCTAD, 1999k); most-favoured-nation treatment (UNCTAD, 1999p); fair and equitable treatment (UNCTAD, 1999q); investment-related trade measures (UNCTAD, 1999r); and transfer pricing (UNCTAD, 1999s).

5. Civil society

Civil society[40] has continued to provide inputs into investment discussions on themes of concern to it. The World Development Movement, for example, issued in early 1999 a set of "core standards" it believed should be observed by TNCs, their subsidiaries and sub-contractors in all their operations (UNCTAD, forthcoming d). The stated purpose of the standards is to give the business community a stable, agreed international framework for their operations, and enable countries and their people to maximize the benefits and minimise the costs of TNC operations. The list of standards is not exhaustive but rather provides the basis for further debate. They deal with basic human rights, working conditions, equality, consumer protection, the environment, local communities, business practices, and sovereignty and development strategies.

Given the complex nature of the issues involved in investment rule-making, the approach of the World Development Movement was to propose a regulatory framework rather than a single international agreement, trying as far as possible to strengthen existing mechanisms rather than inventing new procedures. This initiative follows another text of an international agreement on investment prepared by the Consumer Unity & Trust Society (CUTS) in 1998 (CUTS, 1998; UNCTAD, forthcoming d). Among other things, the CUTS proposal, intended as an alternative to the MAI Negotiating Text, excludes a number of assets from an otherwise broad definition of investment (notably, financial assets, public debt, derivatives, real estate movable and immovable property acquired for personal use); includes the principles of national and most-favoured-nation (MFN) treatment at the pre- and post-establishment stages of the investment, but provides for a number of broad exceptions to the effect that these standards shall not apply to measures adopted by a contracting party for compelling reasons connected with its national interest; prohibits a number of performance requirements, unless the contracting party has compelling social or economic reasons to impose them; provides for best efforts to reduce restrictive measures, including those regarding transfer of funds; and introduces provisions on human rights, consumer protection, restrictive business practices and labour relations. Other NGOs, drawing lessons from the MAI negotiating process (see section 3.b. above), elaborated a set of priorities for future negotiations on investment (WWF, 1999). In their view, the main priority for international negotiations is not liberalization, but setting a framework to ensure that international investment promotes sustainable development and real economic efficiency. Specific priority areas for rules included investor behaviour and transparency, competition and restrictive business practices, regulation of investment incentives, and support for least developed countries to enable them to attract high quality investment. At the same time, least-developed countries could potentially benefit from multilateral rules that provided for transparency of regulation, investor certainty, protection against corruption and proactive mechanisms for improving regulatory systems, technology and skill transfer.

The International Confederation of Free Trade Unions (ICFTU) – which has long advocated a comprehensive set of rules to govern the activities of TNCs and has followed closely the OECD negotiations on the MAI – reiterated the view that only a comprehensive approach, in terms of both geographical reach and issues, could command the political legitimacy to ensure an effective and balanced international regime to regulate the role of TNCs in world development. Therefore, if negotiations were to commence in WTO, they should aim at creating a strong international framework to maximize the impact of increased international trade and investment. Such a framework should incorporate binding clauses that ensure commitments to respect core labour standards, and be informed by the ILO Tripartite Declaration of Principles on Multilational Enterprises and Social Policy. Furthermore, according to ICFTU, any discussions on a "development clause" for developing countries should be backed up by a regular multilateral review process such as the one already operating in WTO. Due attention should be given also to the problems of competition and restrictive business practices, including corruption and transfer pricing by TNCs (ICFTU, 1998).

Regarding the business perspective, the Union of Industrial and Employers Confederations of Europe (UNICE) made its position clear on how WTO should deal with investment in a statement dated 6 May 1999 (UNICE, 1999). It attached high priority to the establishment of a global regime for FDI that is non-discriminatory, transparent, stable and liberal, and strongly advocated that negotiations on an investment agreement should be launched by the forthcoming WTO ministerial meeting in Seattle in late 1999. UNICE believed that appropriate provisions on FDI would be in the interests of WTO members at all levels of development and proposed a number of specific negotiating objectives. These include notably:

- a general statement of support of FDI, its contribution to sustainable development and respect for national sovereignty and applicable international law;
- the definition of investment should cover all forms of direct investment and the possibility of covering short-term capital flows to be examined with a view to setting international standards and ensuring transparency;
- a legal right for foreigners to invest on an MFN basis in those sectors of a national economy publicly recognized as being open for such investment;

- no discrimination between domestic and foreign-owned companies in the application of national laws, including taxation; the national treatment clause should be binding on all levels of government, and exceptions should be limited and transparent;
- national provisions on rights of entry and post-investment operations should be publicly available and bound, with new provisions subject to scrutiny and appeal; there should be no interference in the management and operation of investment projects (thus, restrictions on post-investment operations through TRIMs shoud be progressively eliminated);
- the scope of incentives should be reduced and there should be no lowering of standards to attract individual investors;
- expropriation provisions should cover “creeping expropriation” and provide for prompt, adequate and effective compensation;
- an effective mechanism for dispute settlement, preferably linked to the existing WTO procedures and maintaining rights under the International Centre for Settlement of Investment Disputes (ICSID), between investors and host countries; such a mechanism is seen as a basic requirement of an agreement to protect the interests of all concerned.

For UNICE, the agreement should add value to existing BITs by embodying the most comprehensive provisions they contain. It should not encroach on governments’ right to regulate on areas of policy, such as labour or environmental standards which should be, and are being, tackled on their own merits in appropriate forums.

The International Chamber of Commerce (ICC), in the context of its strategic priorities for a new round of multilateral trade negotiations, urged governments to seize the opportunities of a new round to push forward the process of creating within the WTO high-standard multilateral rules to protect and liberalize FDI (ICC, 1999a). Also in 1999, the ICC updated the 1996 version of the Rules of Conduct to Combat Extortion and Bribery (UNCTAD, 1996c; UNCTAD, forthcoming d). The Rules set out a series of principles for enterprises to follow when devising an anti-corruption policy. The first version of the Rules adopted in 1977 represented the first effort by a world business organization to prepare detailed guidelines on this issue. The Rules of Conduct were accompanied by a “Corporate Practices Manual” (ICC, 1999c) to provide practical guidance for company managers. The Manual contains case studies, texts of relevant corporate codes of conduct and recommendations for company practice, and aims at facilitating implementation of corporate codes of conduct in the light of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and other initiatives (ICC, 1999b).

C. Conclusions: lessons

Several observations emerge from the foregoing review of international policy developments. Countries have pursued various bilateral and regional negotiating initiatives. Treaty-making continues to be very active, with new elements being introduced in a number of cases. Since the effective end of the MAI negotiations in the OECD, work among developed countries has shifted towards policy related analysis of key issues for investment regimes worldwide, and the review of standards for the behaviour of firms.

At the same time, in terms of issue-specific instruments, the question of bribery of government officials in international business transactions has been a recurrent topic in recent years; they aim not only at prohibiting such transactions and making them subject to criminal action in their relevant jurisdictions, but also at preventing them by introducing improved transparency and accountability mechanisms in administrative practices and increasing co-operation among the relevant authorities; Transparency International has a leading role in this area (box IV. 7).

It must be recognized that each individual negotiation of an international investment agreement has its own dynamics; it is therefore difficult to discern general negotiating principles. However, the intense activity that has taken place in recent years regarding international co-operation and rule-making in the area of FDI allows for some lessons of a general nature to be drawn from these experiences. They include:

Box IV.7. Transparency International

Transparency International (TI) is a non-governmental organization dedicated to increasing governmental accountability and curbing international and national corruption. TI is the only global non-profit and politically non-partisan movement with an exclusive focus on corruption.

Founded in 1993, TI is active in more than 70 countries and in the international arena, with a small secretariat in Berlin. TI national chapters form the core of the global anti-corruption movement. Among other things, they monitor national developments. National chapters are financially and institutionally independent and are called upon to observe the TI guiding principles of non-investigative work and independence from government, commercial and partisan political interests.

TI defines corruption as the abuse of public office for private gain. This effectively means the taking of decisions are taken to serve private interests, rather than for the public good. TI believes that combating corruption effectively is only possible by involving all stakeholders in a society: the State, civil society and the private sector.

Corruption often transcends the national level and is beyond the reach of national governments alone. TI works to ensure that the agendas of international organizations – both governmental and non-governmental – give high priority in their programmes to curbing corruption. TI also seeks to shape public policy discussions in various fora – such as the Council of Europe, the European Union and the Organization of American States – to criminalize transnational corruption in an internationally coordinated manner. It also strives to develop coherent international norms to fight and prevent corruption, e.g., in the fields of auditing or international finance. TI national chapters promote the TI concept of "Integrity Pacts" in order to curb corruption in the area of public procurement.

During the past few years, one of the most important initiatives for tackling the problem of international corruption has been undertaken by the OECD, with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (see above).

Source: Transparency International.

Global and policy context

The processes of economic globalization and the new orientation of many governments' economic policies make international investment agreements instruments that contribute towards establishing a predictable environment for the promotion, protection and treatment of FDI. Indeed, a number of common elements may now be found among such agreements. At the same time, given that FDI issues are closely interwoven with domestic policy matters, international investment agreements are subject to particular scrutiny.

Negotiating approaches

The complexity of negotiations increases as more and more countries are involved. By the same token, the more countries are involved, the more it may be advisable to take a modest and incremental approach. This raises questions of how broad the agenda of any particular set of negotiations should be, and how ambitious parties want to be concerning the nature of commitments. Too ambitious investment negotiating agendas at the international level may have a lesser likelihood of success than more modest and incremental propositions. In any event, the success of negotiations also depends upon the clarity with which each participant perceives the aims and objectives of the negotiations as a whole, as well as the forum in which negotiations take place. Given the complexity of negotiations, pre-negotiation preparation by the parties, and careful preparatory work on the substantive provisions, is therefore important.

Moving from the bilateral to the regional level, and from the regional to the multilateral level, involves not only quantitative changes (in terms of numbers of countries involved) but also qualitative changes (in terms of the nature of the agreements involved). In particular, while investment agreements, be they bilateral, regional or multilateral, by definition are legally binding, multilateral agreements are often perceived as having a more extensive international legislative character, whereas bilateral agreements are seen more as creating special law between the parties. Therefore, the existence of a network of BITs can not be assumed to signal the preparedness of countries to move to another level, in spite of a convergence of perspectives in certain substantive areas as signified by existing BITs. At the same time, investment rule-making, which takes place in a framework that allows for broader trade-offs between the parties may prove easier, whether this is at the bilateral, regional or multilateral level. In the final analysis, the desirability and effect of any particular agreement depends on its content.

Content

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

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

Procedures

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

Notes

1 The legislative changes referred to in this chapter are not always clear-cut isolated measures of liberalization or promotion but rather are often part of a package which include liberalization and promotional measures, and can also have some requirements attached to them.

2 The present members of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Lao People’s Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

3 The South Asian Association for Regional Cooperation (SAARC), created on 8 December 1985, comprises Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. The idea of having SAARC address intra-regional investment aspects originated at the sixth meeting of the Committee on Economic Cooperation. It was then agreed to conduct a study on promotion of intra-regional investment and establishment of joint ventures catering to national and regional markets.

4 Based on information provided by the SAARC secretariat.

5 The members of the Indian Ocean Rim Association for Regional Cooperation are Australia, India, Indonesia, Kenya, Madagascar, Malaysia, Mauritius, Mozambique, Oman, Sri Lanka, Singapore, South Africa, United Republic of Tanzania and Yemen.

6 The members of the Economic Cooperation Organization are Afghanistan, Azerbaijan, Islamic Republic of Iran, Kazakhstan, Kyrgyz Republic, Pakistan, Tajikistan, Turkey, Turkmenistan and Uzbekistan.

7 The members of the Central African Economic Community and Monetary Union are Cameroon, Central African Republic, Chad, Democratic Republic of Congo, Gabon and Equatorial Guinea.

8 The members of the West African Economic and Monetary Union are Benin, Burkina Faso, Côte d' Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo.

9 The Southern African Development Community comprises fourteen countries, namely, Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

10 The 21 members of the Common Market for Eastern and Southern Africa are: Angola, Burundi, Comoros, Democratic Republic of Congo, Djiboti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, United Republic of Tanzania, Uganda, Zambia and Zimbabwe.

11 The founding members of the East African Community were Kenya, United Republic of Tanzania and Uganda.

12 The Treaty of OHADA was signed in Port-Louis (Mauritius) on 17 October 1993. The current members are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Côte d'Ivoire, Gabon, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal and Togo. However, according to article 53 of the Treaty, adhesion is open to all member States of the Organization of African Unity.

13 Pursuant to the Treaty, a "Common Court of Justice and Arbitration" was established with headquarters in Abidjan, composed of nine judges from different member countries. The Court has wide competence on disputes which may arise between member States regarding interpretation and enforcement of the provisions of the Treaty and also regarding business disputes which the parties wish to submit to the OHADA arbitration system.

14 Based on information provided informally by the League of Arab States Secretariat.

15 Based on information provided informally by the Council of Arab Economic Unity.

16 Based on information provided informally by the chairperson of the Negotiating Group on Investment.

17 The Barcelona Conference brought together the 15 member States of the EU and Mediterranean non-member countries (Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Tunisia, Turkey) and the Palestinian Authority (European Commission, 1995).

18 The Guidelines are recommendations by the OECD Governments to TNCs regarding their behaviour in their host countries. They are an integral part of the OECD Declaration on International Investment and Multinational Enterprises adopted in 1976 (UNCTAD, 1996c). Previous reviews were undertaken in 1979, 1982, 1984 and 1991.

19 The original intention was to complete the negotiations by April 1997 (OECD, 1995a).

20 In his speech to the National Assembly announcing that France was no longer taking part in the MAI negotiations in the OECD, the Prime Minister of France explained among other things that the process of consultations and evaluation of the negotiations led to the conclusion that there were some fundamental problems with the draft MAI as it placed private interests above State sovereignty. France, he noted, would propose the fresh start of new negotiations in a forum where all actors, notably the developing countries, could be associated (France, Le Premier Ministre, 1998).

21 For a detailed discussion of the rationale for the MAI, see Witherell, 1996.

22 The MAI was preceded by a number of OECD instruments on investment, notably the Codes of Liberalisation of Capital Movements and Current Invisible Transactions, the Declaration and Decisions on International Investment and Multinational Enterprises which, in turn, encompases decisions on National Treatment, Incentives and Disincentives and Conflicting Requirements, and Guidelines for Multinational Enterprises, the Convention on Combating Bribery of Foreign Officials, and the draft OECD Convention on the Protection of Private Property, which sets out standards for the treatment and protection of foreign investors in host countries (the Convention was approved by the OECD Council but never opened for signature; it had a major influence on the development of BITs which OECD countries negotiated with developing countries in order to protect their investors against non-commercial risks) (UNCTAD, 1996c).

23 Taken together, and through their various review processes, the OECD instruments presently provide for pre- and post-establishment national treatment; free repatriation of profits and capital; transparency of regulations; a mechanism for consultation to deal with problems; peer review to promote rollback of remaining restrictions; and voluntary guidelines for the behaviour of transnational corporations, notably with respect to adherence to economic and social objectives of host countries, environmental and comsumer protection, competition and restrictive business practices, corporate governance, accounting and reporting, taxation, conditions of labour, and science and technology.

24 For a brief account of the highlights of main provisions of the MAI and the MAI negotiating process, see UNCTAD, 1998a, chapter III.

25 The texts of the provisions discussed in this section are those contained in the MAI Negotiating Text, as of 24 April 1998 (OECD, 1998b; reprinted in UNCTAD, forthcoming d). There were many country proposals

for the draft text. These were included in annex 1. Annex 2 contained the Chairperson's package proposal including texts on, among other things, on environment and related matters and on labour.

26 Article V of GATS dealing with economic integration, provides that the GATS shall not prevent any of its members from being a party to or entering into an agreement liberalizing trade in services between or among the parties provided that certain conditions are met. In evaluating whether these conditions are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned (GATS, Article V, 1.2.).

27 For an in-depth discussion of the issues raised in the MAI negotiations with respect to intellectual property, see Gervais and Nicholas-Gervais, 1999.

28 On completion of the Uruguay Round, only three OECD countries (Japan, New Zealand and the United States) undertook specific commitments in the audio-visual industry; the other OECD countries, including the European Union and its members, did not agree to a standstill commitment with respect to mode 3 of the GATS – establishment and commercial presence – in this industry. In fact, out of 134 countries participating in the GATS negotiations, only 13 countries undertook specific commitments.

29 See Chairperson's Proposals, MAI Negotiating Text of 24 April 1998, annex 2, *op. cit.*.

30 The United States-based Ethyl Corporation sued the Government of Canada for damages when the Canadian parliament prohibited the importation of, and inter-trade between Canadian provinces with a fuel additive produced by Ethyl for environmental and health reasons. The Ethyl Corporation claimed that Canada had violated its NAFTA commitments on expropriation and compensation, performance requirements and national treatment (Kobrin, 1998). In the end, the parties agreed to settle the case.

31 On regulatory takings see Graham, 1998.

32 See MAI Negotiating Text, annex 2, "Chairman's proposals on environment and related matters and on labour" . There was also a contribution by one delegation on a package of additional proposals on environment, including new language for an interpretative note on "in like circumstances" in the national and MFN treatment articles (UNCTAD, forthcoming d).

33 In early 1999, Canada shought to introduce interpretative changes to the NAFTA to restrict the ability of private companies to seek compensation for government regulations that damage their business.

34 Indeed, the failure of the MAI has already inspired considerable literature. See, among others, Canner, 1998; Dymond, 1999; Gervais and Nicholas-Gervais, 1999; Graham, 1998; Henderson, 1999; Huner, 1998; Kline, 1999; Kobrin, 1998, Lalumière et al., 1998; Muchlinski, 1999; Picciotto, 1998; Sauvé, 1998, 1999; WWF, 1999. For sources of information on the MAI and arguments in favour and against it, see the OECD website on the MAI (http://www.oecd.org/daf/cmis/mai/negtext.htm); for links to other websites access (www.foreign policy.com).

35 For a discussion of the impact of an electronic global civil society on political authority and power, see Rothkopf, 1998; and Mathews, 1997.

36 The business community was interested in an additional national treatment tool and access to investor-to-State dispute settlement procedures on this issue.

37 Parts of the business community had suggested investment negotiations in the WTO; see, ICC, 1996.

38 The following non-OECD countries participated in the negotiations as observers: Argentina, Brazil, Chile, Estonia, Hong Kong (China), Latvia, Lithuania and the Slovak Republic. In addition, the OECD secretariat carried out an outreach programme.

39 According to a negotiator, for example, "the success of the negotiations would have the same result as their failure" for Canada. (Dymond, 1999).

40 For a review of the role of civil society and especially NGOs in the negotiation of international investment agreements, see UNCTAD, 1998a, ch. III.