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Working Group on the Relationship between Trade and Investment

DEVELOPMENT PROVISIONS

Note by the Secretariat

EXECUTIVE SUMMARY

"Development Provisions" is one of the seven topics that are listed in Paragraph 22 of the Doha Ministerial Declaration, and that are to be clarified by the Working Group. Paragraph 22 also cites a number of other parameters that are to be taken into account in any multilateral framework, and that are relevant to this topic. They are: the need to reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host countries, as well as their right to regulate in the public interest; the need to take into account, as an integral part of any framework, the special development, trade and financial needs of developing and least-developed countries; and, any framework should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances.

International trade and investment agreements aim to increase trade and investment flows and to raise economic welfare – higher standards of living, employment, production, real income and effective demand. This in itself can make an important contribution to economic development, but these agreements often seek to achieve broader development objectives too. Various WTO Agreements, for example, aim specifically to promote the progressive development of developing and least-developed countries (LDCs), to increase their participation in world trade and their share of trade growth, to help develop and diversify their economies and strengthen their domestic supply capacity, and to safeguard their economic and social interests.

Two of the more important categories of development provisions in the WTO Agreements are those that seek to increase the trade opportunities of developing countries and LDCs – particularly through faster and deeper liberalization of trade barriers by developed countries on products of export interest to them – and those that provide these countries with more flexible policy commitments, including through transition periods, to allow them to phase-in and sequence trade liberalization and policy reform in a manner consistent with their development needs and objectives.

In the case of investment, the majority of developing countries and LDCs are at present importers, but not exporters, of foreign investment, so that gaining overseas market access for their national investors is not a matter of immediate concern. Over time, experience suggests that more of them will have foreign investors of their own too, and one aim of international investment agreements is to facilitate this process. For the time being, however, most of these countries conclude investment agreements because they believe it will help them to attract foreign investment and to benefit from it.

Development provisions in international investment agreements focus primarily, therefore, on the needs of developing countries and LDCs as host countries. They aim to allow these countries' to balance their commitments to liberalize and protect foreign investment with flexibility to apply policies to support their national producers and investors and to pursue other development objectives. Views differ on where this balance should be struck, but there seems to be wide agreement that if development provisions are to be effective, they need to be complements to, not substitutes for, an agreement's policy disciplines that provide transparent, stable and predictable conditions for foreign investment.

The main areas in which development provisions in international investment agreements provide developing countries and LDCs with flexibility are in regulating the entry of foreign investment and foreign investors' activities in the host country, and in using policies to enhance the contribution that foreign investment makes to their economic and social development needs and objectives.

Some international investment agreements list general development objectives in their preambular paragraphs or in similar declarations of intent. Most address these objectives more meaningfully through the way in which an agreement is structured and through its operational provisions. This can involve the scope of an agreement – for example, whether it covers the pre-establishment as well as the post-establishment treatment of investment, and whether it covers all forms of foreign investment or FDI only; whether key disciplines, such as MFN and national treatment, are general rules of application or take the form of country-specific commitments; what exceptions to general obligations are available to developing countries and LDCs; what transition periods are allowed for them to implement their obligations; and, if commitments on market access are covered in an agreement, how these commitments are formulated.

I. INTRODUCTION

1. A key challenge of rules-based, multilateral economic cooperation is to find a workable balance between the policy disciplines that help create transparent, stable and predictable conditions for trade and investment to expand, and the needs of developing countries for policy flexibility to achieve their development objectives and to safeguard their economic interests. This Note describes the formulation of development provisions in the GATT, the GATS, and international investment agreements (IIAs) to meet this challenge.

2. Discussions in the Working Group[1] and experience of the operation of IIAs suggest that the main areas where developing countries seek policy flexibility in light of their development needs are: the regulation of the entry of foreign investment in general, and of different categories of foreign investment (FDI and portfolio investment) in particular; application of the rule of national treatment; the use of policies in support of their strategic development objectives, including industrialization, technological development, balance-of-payments management, and competition policy; and, to the extent that market access is covered by an investment agreement, the ability to make commitments that are commensurate with their level of development.

[1] References to discussion of development issues can be found in WT/WGTI/M/1, para. 7, M/2, para. 14, M/4, paras. 13 and 18-28, M/5, paras. 28 and 46-49, M/6, paras. 43, 51, and 66-84, M/8, paras. 9, 47, 49, 70, and 82, M/9, paras. 69 and 76-88, M/11, paras. 24-25, M/12, paras. 14-23, 36 and 46, M/14, paras. 21-39 and 64-75, and M/15, paras. 16, 23, 43-63. The following written submissions are relevant to the issue of development provisions: WT/WGTI/W/8 and Adds. 1-4, W/15, W/16, W/17, W/18, W/20, W/21, W/26, W/38, W/46, W/56, W/71, W/72, W/73, W/77, W/78, W/82, W/86, W/89, W/104 and W/105.

II. DISCUSSIONS IN THE WORKING GROUP

3. The development dimension of the relationship between trade and investment has been a core element of the Working Group's discussions. Item I of the Checklist of Issues Suggested for Study, which formed the basis for the Working Group's discussions from 1997 to 2001, was entitled "Implications of the relationship between trade and investment for development and economic growth".[2] Other elements of the Checklist also provided for a focus on development issues, among them "advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment, including from a development perspective", which led to a discussion of criteria for evaluating IIAs from a development perspective at some of the Group's meetings.

4. The Group's discussions suggest that there is no single perception of the development dimension of the relationship between trade and investment among Members. The links between foreign investment and economic development are multifaceted and complex, and trade is just one of them. Also, host countries are at different stages of development, with different development objectives and priorities. Some developing country Members have described their approach to foreign investment as based on market-based policies of openness, non-discrimination and strong legal protection of investment. Some others consider that foreign investment needs to be phased-in to a developing country's economy at a slower rate and in a more regulated way than would be dictated by market forces, and they have stressed the importance they attach to their policies to encourage FDI in priority sectors of the economy and to reduce its negative effects.

A. POSITIVE AND NEGATIVE EFFECTS OF FOREIGN INVESTMENT

5. One theme of discussion has been the distinction between positive and negative effects of foreign investment.

6. Numerous comments have been made that foreign investment can bring benefits to developing countries and can contribute importantly to their development process. Foreign investment in general, and FDI in particular, has been seen as a way of transferring capital as well as other assets, such as technology, entrepreneurship and management skills, and marketing and export know-how to host countries, particularly developing countries. These assets are often in short supply, and therefore make a particularly valuable contribution to their development. The large number of bilateral investment treaties signed by developing countries has been cited as evidence of the importance these countries attach to attracting more FDI, and the positive role that they see it playing in their development.

7. There have been references also to potential drawbacks of foreign investment, particularly viewed from the perspective of a developing country. Concerns have been expressed about the impact on developing countries' economies of foreign investment in general, and certain types of foreign investment in particular, such as short-term and volatile foreign portfolio investment and FDI through merger and acquisition activity. These include concerns about the uncertain impact of foreign investment on a host country's balance-of-payments, its potential to crowd-out domestic investors, and ways in which it may limit technology transfer to developing countries. Other concerns mentioned are its impact on domestic savings and consumption patterns, human resource development, the ownership of productive and financial assets, the availability of investment capital, strategic and development policies at the sectoral level, and the sustainability of the development process. Concerns have been raised also about the impact of FDI on competition in developing countries' economies and on the effectiveness of their industrial policies, particularly those aimed at encouraging the expansion of small and medium-scale enterprises and moving manufacturing enterprise out of assembly operations into higher value-added activities. Other concerns include foreign companies engaging in restrictive business practices, for example restricting the transfer of technology between parents and affiliates or

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[2] Job 3093, attached to WT/WGTI/M/1.

suppressing exports from developing countries, and exercising undue political influence in developing countries.

B. Policies to Manage Foreign Investment

8. Some Members have suggested a key role of a country's foreign investment policies is to strike an appropriate balance between the positive and the negative effects of foreign investment, a balance that, they feel, may alter as the process of economic and social development progresses.

9. For some, the task for developing countries is to maximize the positive effects and minimize the negative effects of foreign investment. In this regard, they have suggested that industrial policy, including sectoral targeting, needs to be pursued alongside a policy of openness to FDI, not only to optimize the net benefits of FDI, but also as an exercise of the right of each country to pursue development policies in accordance with its individual domestic needs and priorities. In their view, sectoral targeting can be effective in achieving national as well as regional, locational and sector-specific objectives in developing countries.

10. Some Members have suggested that policies to build-up domestic entrepreneurial, industrial and technological capability are essential not only to cope with, but also to realize the full benefits from FDI and foreign technology. In their view, developing countries need to employ incentives and performance requirements if FDI is to achieve specific developmental, political and social objectives.

C. Development Provisions in International Investment Agreements

11. This has led to discussion of the extent to which flexibility to use national policies such as these can be compatible with a country's participation in an IIA.

12. One view has been that the pursuit of developmental objectives in the light of the needs and circumstances of individual developing countries requires freedom and flexibility for them to pursue their own policies towards foreign investment. International policy disciplines inherently limit their freedom in this respect. Nonetheless, bilateral investment treaties have found favour with developing countries as a way of balancing flexibility with discipline. Most of these treaties aim at the protection and fair and equitable treatment of foreign investment only after it has been admitted to a host country. Also, they normally focus on the promotion and protection of foreign investment in accordance with a host country's national laws and regulations, and so provide flexibility for host countries to pursue locational, sectoral and developmental objectives. In contrast to this, some have doubted that the notion of a multilateral framework of rules on investment is at all compatible with the need to preserve the ability of developing countries to actively pursue development policies and strategies suited to their specific and individual needs and problems.

13. Another view has been that policy flexibility to meet developing countries' needs and concerns can be provided under multilateral investment rules. Ensuring the ability of governments to regulate economic activities is a shared concern of all countries, but this does not constitute an argument against the benefits of establishing collective disciplines over the exercise of regulatory authority in certain areas. Indeed, some measures might result not so much from pro-development policy formulation as from reaction to pressures from various special interest groups that can undermine the development process, and policy disciplines in IIAs can help host country governments to resist such pressures. Some have stressed that flexibility should not be equated with discriminatory policies against foreign investment. While it might be justifiable for regulatory purposes to make a distinction between investments on the basis of objective characteristics, there is no rationale for making a distinction solely on the grounds of foreign ownership. The key is to incorporate an appropriate degree of flexibility, so developing countries are neither subject to an unqualified application of the rules nor exempt totally from policy disciplines. The notion of flexibility needs to be defined carefully and applied through clear and precise provisions, so as not to undermine the

value of an agreement's binding obligations in guaranteeing predictability and stability for foreign investment. A point made in this regard has been that in order to be development-friendly, foreign investment policies must in the first place be investment-friendly, although some have doubted that this is necessarily the case.

14. Whatever form an IIA might take – bilateral, regional, or multilateral – many have said that the development dimension cannot be taken care of satisfactorily by preambular statements of principle and best-endeavour undertakings, although some have suggested that such provisions can nonetheless add value to an agreement. Some have said also that the use of transition periods for developing countries is not a satisfactory approach either, although, again, some have suggested these might usefully be included to address certain kinds of difficulty that developing countries may encounter in implementing an agreement's obligations.

15. Many have felt that the development dimension should be an integral part of the design and structure of any investment agreement, and manifest in each of its elements. Concrete, substantive, legally binding development provisions are needed, that address also the social dimension of development.

16. For some Members, freedom to regulate the entry of foreign investment, while at the same time providing predictable policies, laws and regulations once it has established in the host country, is a fundamental development provision of any IIA. In their view, including rules governing the pre-establishment stage of investment inevitably removes flexibility and discretion for developing countries to pursue development policies tailored to their specific needs. Developing countries need to retain the ability to screen FDI, and admit only those investments that suit their industrial policies and developmental needs, and will not stifle national investment and development.

17. Some felt that allowing the use of performance requirements and investment incentives was another key development provision in an investment agreement. Developing countries should be able to use measures such as technology transfer requirements, export performance requirements, and manufacturing requirements to attain their development objectives, such as protecting domestic producers and encouraging the establishment of ancillary industries, upstream and downstream. Performance requirements can help ensure a level playing field between foreign and domestic investors and enhance the benefits of FDI. This, in particular, is an area where they felt that the use of transition periods did not provide an adequate response to developing countries' needs for policy flexibility.

18. Some others expressed the view that the use of performance requirements can hamper a country's development by limiting competition. Nonetheless, it was suggested that flexibility for developing countries to use performance requirements could be possible as long as the measures were applied in a transparent and predictable manner. It would be necessary to clarify whether any possible disciplines on performance requirements should be of a horizontal nature or be sector-specific. Some considered it relevant that certain IIAs permit the use of performance requirements if linked to the granting of incentives.

19. Some Members focused particularly on the use of performance requirements and incentives by developing countries to improve the transfer of technology to their economies. They felt that FDI was a major channel for the transfer of technology, but that there was no automatic mechanism involved and host country policies were needed to promote an appropriate transfer. Developing countries needed therefore to retain the right to regulate the entry and activities of foreign investment. Otherwise, foreign investors would often prefer to use less advanced forms of technology, for example in the case of captive markets.

20. Some other Members doubted that binding obligations on technology transfer could be effective, given that this was primarily a matter for private enterprise. They suggested instead that in

order to realize the potential of FDI to contribute to transfer of technology, host countries needed to develop a capacity to absorb and benefit from imported technology. Also, effective transfer of technology could be impeded by certain market conditions; for example, lack of competition in a protected market reduced the incentive for investors to use their best technology. However, the imposition of a technology transfer requirement in such an environment was not an efficient policy instrument, and was unlikely to be successful.

21. With reference to providing flexibility to developing countries to use investment incentives, some cautioned that incentives did not appear to be an efficient means of achieving regional or sectoral objectives, yet they could provoke harmful fiscal and regulatory competition between countries to attract FDI. This could lead to lowering regulatory standards and weakening the regulatory capacity of governments in various areas of national policy. International cooperation could usefully limit competition for FDI through this means, and it should be addressed as a key aspect of the relationship between flexibility and development.

22. An issue raised by some Members has been the asymmetry of economic power between developing countries and multinational corporations. For some, there was an important link between the development dimension of an IIA and rules on the conduct of foreign investors, notably in the field of competition policy, to balance rules on the treatment to be accorded to private firms by governments. Restrictive business practices of foreign investors and the relationship between investment and competition policy need to be addressed in an agreement's development provisions. In this connection, one suggestion was that account should be taken of relevant OECD and UN instruments. Another was that the way to achieve a balance of interests in this area is through transparent and predictable domestic competition laws in host countries.

23. The GATS has been cited by some as an example of successfully incorporating the development dimension into the structure of an international agreement, particularly GATS Article IV and Article XIX. The GATS allows countries to undertake commitments on market access and national treatment commensurate with their level of development, and subject to conditions and qualifications that reflect their national development objectives. Also, it does not limit the ability of governments to regulate in pursuit of their development policies, so that they can ensure, for example, their continued use of performance requirements through their schedules of commitments. However, it does provides a framework within which these policies can be applied in a transparent and predictable manner.

24. Some others have raised doubts about the GATS approach as a possible model for multilateral investment rules, noting that the GATS is essentially a trade agreement and that as such it may not provide the kind of flexibility needed by developing countries in the area of foreign investment. One example given was that it would be necessary to envisage the possibility of permanent carve-outs from international investment rules in order to accommodate flexibility for developing countries' policies. The GATS approach, however, generated pressure on countries over time to assume broader and deeper commitments, building on their initial obligations and narrowing down the flexibility available to them. It was acknowledged that the GATS allowed Members to renegotiate their commitments if they found subsequently that these were not compatible with their development policies, but it was considered hard to see how such a mechanism could be applied in the area of foreign investment.

25. To the extent that commitments on the entry of foreign investment are to be included in an IIA, there has been discussion of whether a positive or negative list approach should be taken, and whether national treatment should be applied to investment approval, particularly in the light of the experience that had been gained in the negotiation and implementation of the GATS. Some have taken the view that the GATS-style, positive list approach offers the most potential for accommodating flexibility for developing countries in this context.

III. SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS IN WTO AGREEMENTS

26. The WTO Committee on Trade and Development has identified 155 separate special and differential (S&D) treatment provisions in the WTO Agreements and Ministerial Decisions, and classified them into six categories[3]: (i) fourteen provisions that aim to increase the trade opportunities of developing country Members; (ii) fifty provisions under which WTO Members should safeguard the interests of developing country Members; (iii) thirty-three provisions that allow flexibility of commitments, of actions, and use of policy instruments by developing countries; (iv) nineteen provisions that allow transitional time periods; (v) fourteen provisions on technical assistance; and (vi) twenty-four provisions relating specifically to LDC Members.

A. Safeguarding The Interests of Developing and Least-Developed Countries, Increasing their Trade Opportunities, and Providing Them With Technical Assistance

27. S&D provisions aimed at safeguarding the interests of developing countries and LDCs, increasing their trade opportunities, and providing them with technical assistance, mostly involve actions to be taken (or avoided) by developed country Members. The bulk of the S&D provisions applicable specifically to LDC Members fall into these categories.

28. Provisions aimed at safeguarding the interests of developing countries and LDCs are the largest category, and more than half of them are mandatory. Examples are: ensuring that agricultural trade reform under the WTO does not adversely affect the availability of sufficient food aid to help meet the food needs of developing countries, especially LDCs and net food-importing countries; taking account of the special needs of developing countries and LDCs, and avoiding unnecessary obstacles to their exports, when preparing and applying sanitary and phytosanitary measures, technical regulations, standards and conformity assessment procedures; exploring the possibility of constructive remedies before applying anti-dumping duties against their exports; favouring the situation of small suppliers and cottage industries when applying restrictions on imports of textiles and clothing; and providing for the flexible use of subsidies in development programmes of developing countries in the area of services.

29. Provisions to increase the trade opportunities of developing countries and LDCs aim, in particular, to avoid or liberalize restrictions on products of particular export interest to them, and to assist them to promote and expand their exports into developed country markets. Many of these involve best endeavour undertakings by their trading partners, although two of the more important (Article 2.18 of the Agreement on Textiles and Clothing and Article IV of the GATS) are mandatory.

30. Provisions offering technical assistance usually relate to situations where it is recognized that developing countries and LDCs need to enhance their human and institutional capacity in order to be able to implement WTO Agreements: examples are establishing regulatory and conformity assessment bodies, and developing customs valuation methodology.

B. Policy Flexibility and Transition Periods for Developing and Least-Developed Countries

31. S&D provisions offering policy flexibility and transition periods for developing countries and LDCs provide exceptions from generally applicable WTO obligations; the exceptions are temporary and time-limited in the case of transition periods, and otherwise are available usually in specific circumstances and/or subject to specific conditions. The majority are to be found in the Uruguay

[3] WT/COMTD/W/77 and Rev.1 and Adds. 1-4.

Round Agreements, although some of the most important flexibility provisions are GATT Articles XVIII and XXXVI and the Enabling Clause, which long pre-date the Uruguay Round.

32. The main purpose of most of these provisions is to provide developing countries and LDCs with more flexible terms and conditions in meeting their WTO obligations. In the case of one element of the Enabling Clause, it is the developed countries to which the flexibility applies, to enable them to offer trade preferences to developing countries and LDCs. Examples of policy flexibility available to developing countries and LDCs are: not expecting them, in multilateral trade negotiations, to reduce their trade restrictions on a reciprocal basis or as deeply as other Members; being able to participate in preferential trade arrangements on less stringent conditions than normally apply; and being able to maintain or apply trade and trade-related measures that otherwise would not be available to them under WTO rules in pursuit of objectives such as agricultural and industrial development, safeguarding their balance-of-payments, and preserving indigenous technology and production methods and processes compatible with their development needs – for example, certain import and export restrictions, domestic and export subsidies, and technical regulations and standards.

33. Provisions on transition periods aim to allow developing countries and LDCs to implement and sequence their trade and trade-related policy reforms at a pace consistent with their trade, development and financial needs, to help them weather more easily the adjustment costs that are involved, and to provide them with time to build up the human and institutional capacity needed to implement their WTO obligations in full.

C. Development Provisions in The GATS

34. It has been suggested in the Working Group's discussions that the development provisions contained in the GATS may be of particular relevance to the type of approach that can be taken to incorporate the development dimension into IIAs. Its structure allows Members to make commitments commensurate with their levels of development, while at the same time finding an appropriate balance between flexibility and exemption from general obligations. Some have cautioned, however, that sector-specific national treatment limitations permitted under the GATS may not be possible in the case of measures relating to investment in the goods sectors of an economy, in view of existing GATT national treatment obligations.

35. The main approach to development provisions in the GATS differs from that in the GATT. The GATT, as well as other Uruguay Round Agreements, relies largely on the use of exceptions to rules of general application and transition periods in order to provide policy flexibility to developing countries and LDCs. The GATS, too, provides policy flexibility to these countries within the framework of its rules of general application, for instance in the event of serious balance-of-payments and external financing difficulties. However, the GATS is structured in such a way that with regard to two of its most important policy parameters – market access and national treatment – obligations are incurred by individual Members through specific commitments rather through rules of general application. Developing countries and LDCs that wish to retain policy flexibility in particular respects are able to factor this into their decision on what specific commitments they will make. Moreover, commitments may be modified or withdrawn in accordance with the provisions of GATS Article XXI.

36. In terms of the typology described above, the GATS contains a total of fifteen development-related provisions: three provisions aimed at increasing the trade opportunities of developing country Members; four provisions under which WTO Members should safeguard the interests of developing country Members; four provisions allowing flexibility of commitments, of actions, and use of policy instruments by developing countries; two provisions on technical assistance; and two provisions relating specifically to least-developed country Members. By and large, the GATS does not provide transitional time periods for developing country Members to

implement their obligations, although flexibility can be granted to them with respect to the two-year time-limit to establish a national enquiry point (Article III:4).

37. The GATS places strong emphasis on Members' development objectives and development needs in its preambular language:

> *the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;*

38. The main operational development-related provisions in the GATS are as follows:

- GATS Article IV aims to facilitate the increasing participation of developing countries in world trade. This is to be achieved through negotiated specific commitments relating to: strengthening their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis; the improvement of their access to distribution channels and information networks; and the liberalization of market access in sectors and modes of supply of export interest to them. Developed country Members, and to the extent possible other Members too, are committed to establish contact points to facilitate the access of developing country Members' service suppliers to information related to their respective markets concerning: commercial and technical aspects of the supply of services; registration, recognition and obtaining of professional qualifications; and the availability of services technology. Special priority is to be given to least-developed country Members in implementing these provisions, and particular account is to be taken of the serious difficulty of these countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.[4]

- GATS Article XIX, relating to the negotiation of specific commitments, states that the process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. It requires that appropriate flexibility be provided to developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation, and when making access to their markets available to foreign service suppliers, for attaching to it conditions aimed at achieving the objectives referred to in Article IV.

- GATS Article V.3 provides developing country Members with flexibility to meet the GATS conditions on participation in economic integration agreements (e.g., regional agreements) in accordance with their level of development, both overall and in individual sectors and subsectors. In the case that an economic integration agreement involves only developing countries, it allows them to grant more favourable treatment to juridical persons owned or controlled by natural persons of the parties to such an agreement.

- GATS Article XXV.2 and Article 6 of the Annex on Telecommunications provide for technical cooperation with other Members in favour of developing and least-developed country Members, and technical assistance from the WTO Secretariat.

- Finally, Article IX of GATS, while not a development provision *per se*, addresses the issue of restrictive business practices, which has been raised as an issue of concern in the area of foreign investment by a number of developing country Members. It provides a mechanism for consultations with a view to eliminating such practices.

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[4] Under GATS Article XIX:3, negotiating guidelines are to establish modalities for the special treatment of least-developed country Members in this respect.

IV. DEVELOPMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS

39. This section draws on UNCTAD's work on "Flexibility for Development" in international investment agreements.[5] It describes how development provisions can be incorporated into international investment agreements (IIAs) through general declaratory statements of intent and through the ways in which an IIA's substantive provisions are structured and formulated.

A. GENERAL DECLARATIONS

40. Declarations of intent about the development objectives of an IIA can be set out in the agreement's preamble or a similar statement of its general objectives. These declarations reflect the spirit of the agreement. They do not create legally binding rights and obligations. However, they can serve as a basis for legal interpretation of whether an IIA's substantive provisions are being applied in conformity with the agreement's objectives.

41. According to UNCTAD, IIAs often address development concerns by including declaratory language referring to the promotion of development as a main objective of the agreement, or to specific ways in which it is expected the agreement will contribute to development objectives (e.g., through progressive liberalization), or a generally worded recognition of the need of developing and least-developed countries for flexibility in the application of the agreement's obligations. There are many variations in such language, and it is difficult to generalize its actual role and importance.[6]

42. Examples of declaratory statements cited by UNCTAD are:

> *Acknowledging the diversity in the level and pace of development of member economies as may be reflected in their investment regimes, ...* (Preamble of the Asia Pacific Economic Cooperation (APEC) Non-Binding Investment Principles)

> *Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties ....* (Preamble of the Bilateral Investment Treaty between Argentina and the Netherlands (1992))

B. SUBSTANTIVE DEVELOPMENT PROVISIONS

43. More comprehensive, and generally more meaningful flexibility for developing and least-developed countries can be introduced by including substantive development provisions in an IIA. This can be done through the way an IIA is structured, through the definition of its scope and coverage, and through the way in which its operational provisions are formulated and applied.

1. Structure and participation

44. The structure of an IIA, and the ways in which developing countries can participate in it, are more likely to take on meaning from a development perspective when the agreement contains provisions that apply to developing countries as a group rather than individually. Consequently, an IIA's structure is generally a more relevant consideration for developing countries in a plurilateral or multilateral context than in bilateral investment treaties. In a bilateral context, a developing country

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[5] UNCTAD, International Investment Agreements: Flexibility for Development, Series on issues in international investment agreements (2000). See also WT/WGTI/W/77, containing one of UNCTAD's submissions to the Working Group on the Relationship between Trade and Investment.

[6] UNCTAD, *Ibid*, pp. 21-27.

can aim to achieve its development objectives directly through the treaty's operational provisions on scope and coverage, scheduling of commitments, the use of particular policy measures, and so on.

45. A first consideration in creating the structure of a plurilateral or multilateral agreement is to establish that developing countries as a group, and/or sub-groups of developing countries, are to be distinguished from the other parties as having special rights or obligations of one kind or another under the agreement's provisions. It is common practice in international economic agreements to distinguish developing countries as a group, and very often LDCs too. Beyond that, the practice varies from one agreement to another, often according to its specific objectives. In the WTO, for example, the net food-importing developing countries constitute a recognized sub-group of developing countries requiring special attention in the context of certain provisions of the Agreement on Agriculture. The Fourth ACP-EEC Convention of Lomé provided special provisions for the least-developed, landlocked and island ACP countries. The possibility of singling out "small economies" for special treatment has been discussed in the context of the negotiations of a Free-Trade Area for the Americas, and a Working Group on Small Economies has been set up recently in the WTO, although with a mandate that expressly excludes the objective of creating a sub-category of WTO Members.

46. UNCTAD notes that a variant of this approach in the context of IIAs, including bilateral investment treaties, is to treat "small and medium-sized enterprises" (SMEs) as a special category of companies under an agreement's provisions.[7] These enterprises often constitute the most important part of a developing country's industrial sector, and one that can be particularly vulnerable to foreign competition from large-scale multinational enterprises. SMEs can be singled-out in an IIA and provided with special treatment, for example by allowing a developing country to exempt these enterprises from certain of its obligations in the area of competition law and policy, or in offering them special investment incentives.

47. A second consideration is through what means will special rights and obligations (in GATT terminology "special and differential treatment") be accorded to developing countries under the agreement. In other words, in what circumstances can a developing country invoke its status so as to vary the general rights and obligations that apply to it?

48. Following UNCTAD[8], the four most important ways in which developing countries may receive special and differential treatment in IIAs are:

- <u>Flexibility over the terms and conditions of acceding to an agreement</u>, or of participating in other ways such as through association or cooperation arrangements, with or without the expectation of gradually moving towards full accession. Association status can allow developing countries to share in certain benefits of an agreement (such as the dismantling of barriers to investment) without them having to adopt in full its obligations.

- <u>Flexibility under an agreement's generally applicable obligations</u>. All IIAs contain exceptions to generally applicable rules and obligations.[9] Some are available equally to any party (e.g., excluding taxation matters from the MFN rule of an IIA). Some are available to any party, but may be invoked more flexibly by developing countries (e.g., exceptions to the MFN rule when participating in a regional integration agreement). Some are available to developing countries only (e.g., exceptions to apply infant industry protection). Usually, these exceptions have to be explicitly invoked on a country-specific basis, and they fall, broadly speaking, into two categories.

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[7] UNCTAD, *Ibid*, p. 35.
[8] UNCTAD, *Ibid*, pp. 38-68.
[9] For a discussion of the use of reservations, derogations, waivers and separate protocols in this context, see UNCTAD, *Ibid*, pp. 44-56.

- One category covers safeguards or "escape clauses" that can be invoked as exceptions to a wide range of provisions in an IIA, including a developing country's specific commitments. These are generally available in specific circumstances, and are subject to specific conditions. They provide temporary exceptions, for as long as the circumstances continue, and are used to allow developing countries to cope with unforeseen circumstances that affect their ability to fulfil their obligations. An example common to many IIAs is a safeguard provision allowing the imposition of investment restrictions for balance-of-payments purposes.[10]

- A second category allows parties to select sectors, industries or measures covered by the IIA in respect of which they choose to exempt themselves from certain of the agreement's obligations through a "top-down", negative list approach. This approach is used in a number of IIAs, notably those that include obligations on the pre-establishment as well as the post-establishment treatment of investment, and it can be applied to all types of obligations. For example, in the NAFTA it is used by parties to take exemptions from the agreement's obligations *inter alia* on MFN and national treatment and on performance requirements. The Framework Agreement on the ASEAN Investment Area uses it to allow parties to take exemptions from the agreement's national treatment and full market access obligations.[11]

- Flexibility in the way in which developing countries undertake specific commitments, commensurate with their individual needs and circumstances. This can relate to market-access commitments as well as to commitments under one or more of an agreement's substantive disciplines, such as national treatment, where these are drafted as specific commitments rather than as rules of general application. Whereas exceptions in IIAs are typically taken using a "top-down", negative list approach, specific commitments are taken "bottom-up" using a positive list approach. A prime example of the use of this approach is the GATS. It is also used on a "best endeavours" basis in the Energy Charter Treaty and in the APEC Non-Binding Investment Principles.

- Flexibility in respect to the time given to developing countries to implement their obligations. Transitional periods are used to allow developing countries extra time to complete the necessary preparations to assume fully the obligations of an agreement. They do not reduce a developing country's level of obligations, nor do they create permanent rights. They can assist developing countries to weather the adjustment process that is involved in reforming investment policies, and allow them time to build up their human, institutional and infrastructural capacity to fully implement an agreement's obligations.

49. Borrowing from the practice of international trade agreements, there are a number of other ways in which an IIA might be structured so as to provide more favourable treatment to developing countries.

- One is through the inclusion of a dedicated development provision in the substantive part of the agreement, that carries more weight than declaratory, preambular language and that aims to ensure an agreement addresses broader development objectives along with its primary commercial purpose. Examples are Part IV of the GATT (Articles XXXVI to XXXVIII) and Article IV of the GATS.

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[10] For example, the Framework Agreement on the ASEAN Investment Area allows a Member State to adopt or maintain restrictions on which it has undertaken specific commitments in the event of serious balance-of-payments and external financial difficulties, subject to certain conditions.

[11] The Framework Agreement on the ASEAN Investment Area allows each member State to submit a Temporary Exclusion List and a Sensitive List "… of any industries or measures affecting investment with regard to which it is unable to open up or to accord national treatment to ASEAN investors ...". The Temporary Exclusion List is to be reviewed every 2 years and phased out for most ASEAN Members by 2010; the Sensitive List is subject to regular review.

- A second is to include provisions on steps that can be taken by developed countries, in their capacity as home countries to foreign investors, in favour of the interests of developing countries as host countries in attracting foreign investment.[12]

- A third is through inclusion of the principle of non-reciprocity in negotiations on market access, where these are provided for in an IIA.

2. Scope and definitions

50. Two issues that have been raised repeatedly in the Working Group's discussions, as having a important bearing on the development dimension of an IIA, are whether the IIA covers the pre-establishment and post-establishment stages of investment, or the post-establishment stage only, and whether it covers FDI and foreign portfolio investment, or FDI only. Some developing country Members have expressed a strong preference for limiting the coverage of an IIA to the post-establishment stage of investment and to FDI, in the interests of preserving a developing host country's ability to pursue its domestic development policies and priorities.

51. One way of doing that is directly through an IIA's provisions on scope and definitions. Another approach is to leave open an IIA's scope and definitions, and allow its operational provisions and specific commitments to be applied differentially to the pre-and post-establishment stages of investment, and to FDI and other forms of foreign investment. In that way, those parties wishing to accept obligations across-the-board are able to do so, while others can limit their obligations only to post-establishment treatment and FDI.

(a) Admission and establishment

52. Few countries are willing to provide an unqualified right to entry to foreign investment. Regulating the entry of foreign investment can reflect a variety of considerations on the part of a developing host country, among the most important of which is likely to be concern to protect certain domestic industries, or small and medium-scale enterprises, against foreign competition. Many also screen the entry of foreign investment with a view to selecting those projects which best meet their development needs and priorities; for example, those that will contribute most to their technological development, or to other strategic aspects of their development. Screening can also take place on the grounds of national security, protection of cultural heritage, or control over key natural resources or activities.

53. Most bilateral investment treaties accommodate a host country's regulation and screening of foreign investment, since they do not impose obligations at the pre-establishment stage of investment. Typically, they allow investment originating in the other party to be admitted in accordance with the host country's laws and regulations. Some bilateral investment treaties go further and describe the conditions, procedures and criteria under which investment proposals can be approved. A few contain clauses requiring that an investment must fit into a host country's national development plan.[13]

54. Some bilateral investment treaties, notably those of the United States and recently also Canada, with their partner countries, as well as the NAFTA, the MERCOSUR Protocol on Investments from other MERCOSUR Member Countries, the Framework Agreement on the ASEAN Investment Area, and the APEC Non-Binding Investment Principles, cover also the pre-establishment stage of investment and provide MFN and national treatment to the entry of foreign investment. These agreements provide flexibility to parties by allowing them to designate in annexes specific sectors, industries and measures to which MFN and/or national treatment obligations do not apply.

[12] For further information on this, see UNCTAD, Home Country Measures, Series on Issues in International Investment Agreements, (2001).

[13] This is the case of Germany's bilateral treaties with Thailand, Mali and Rwanda.

These exemptions may result from negotiation between the parties, or simply reproduce prohibitions set out in the parties' domestic legislation. The list may be subject to phase-out provisions.[14] These agreements provide examples of how a treaty's coverage can be circumscribed through its substantive obligations rather than through its scope. However, UNCTAD suggests that for developing countries compiling and negotiating a "negative" list of exemptions of this kind can be complex, since developing countries may not readily have the information necessary to be able to make a full and informed judgement of the nature, scale and scope of their comparative advantage.[15]

(b) Definitions of investment

55. Three different approaches can be used in IIAs to define the investments that they cover: a broad, "asset-based" definition, which views investment in terms of the separate assets involved, an "enterprise-based" definition, which is often associated with the concept of FDI, and a "transaction-based" approach, which focuses on the cross-border flow of direct investment. As noted in the most recent discussion of the Working Group on this issue, the three approaches can be made to converge when account is taken of both stocks and flows of foreign investment, and when the asset-based definition is narrowed down through exclusions to it.[16]

56. The coverage of different categories of foreign investment in an IIA can have important development implications. Discussions in the Working Group suggest there is no common view of what constitutes "good" foreign investment for a developing country, or even that this is a sensible distinction to make; the implications for development of different categories of foreign investment need to be evaluated by each country in light of its particular needs and circumstances. On the one hand, it is recognized that FDI usually constitutes the most stable and directly productive form of foreign investment, and that typically it brings with it other assets that can be of particular value for developing countries (technology, entrepreneurship, management skills, etc). Foreign portfolio investment, particularly short-term investment, can involve a higher element of risk for a developing country's balance-of-payments situation. Nonetheless, it can play an important role in supplementing investment and foreign exchange resources in developing countries, and often it is necessary for FDI in a host country to have access on an ongoing basis to portfolio capital inflows.

57. The purpose of most bilateral investment treaties is to offer legal protection to foreign investment once it has been established in the host country. To do that as comprehensively as possible, these treaties typically use an asset-based definition of investment covering both FDI and portfolio investment. Where concerns arise about the development implications of protecting certain kinds of investment assets – for example, potentially volatile forms of foreign investment – two possibilities exist. One is to specifically exclude these assets from the definition of covered investments. An example is the Framework Agreement on the ASEAN Investment Area, which covers all direct investments other than portfolio investments. Another is the NAFTA, which covers portfolio investment generally but excludes certain types of debt securities and loans. The second possibility is to treat them as covered investments, but to allow host countries flexibility to regulate them through the treaty's substantive obligations. Most IIAs adopt the second approach.[17]

58. With regard to the pre-establishment treatment and liberalization of investment, some IIAs that cover this stage of investment (as well as some host countries in their national legislation) restrict the definition of investment to that of an enterprise, with the aim of providing legal protection to the

[14] For example, in the BIT between the United States and Poland, there is language indicating that industries would be removed from the exclusion list as these industries were being privatized.

[15] UNCTAD, Flexibility for Development, *op cit*, p. 64.

[16] WT/WGTI/M/17.

[17] In this respect, UNCTAD has concluded that development policy objectives and concerns are not necessarily incompatible with the broad approach to definition given the scope that exists to narrow the coverage of an IIA through its substantive obligations and the specific commitments of individual parties. (WT/WGTI/W/108, pp. 13-14).

entry of FDI only. Some others, however, use the asset-based approach to define covered investments. In this case, the same two options apply with regard to ways of addressing particularly sensitive kinds of assets; to exclude them up-front from coverage by the agreement, or to treat them as covered investments but allow host countries flexibility to regulate them through the treaty's substantive obligations. Examples of the second approach are to allow screening of the entry of foreign investment to ensure that it complies with a host country's development needs and objectives, or capital restrictions to be imposed to safeguard the balance-of-payments. In this regard, the Framework Agreement on the ASEAN Investment Area regulates certain assets through screening processes and applies only to investments whose entry is specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of the Agreement. Chile's bilateral investment treaties use the asset-based definition of investment and incorporate flexibility to regulate for balance-of-payments purposes.[18]

59. One possibility that has been discussed in the Working Group is to use different definitions of covered investments for the pre-establishment and post-establishment stages of investment; for example, covering a broad range of investment assets at the post-establishment stage in order to provide comprehensive protection to investment once it has established locally, and a narrower range of investment assets (only FDI, for example) at the pre-establishment stage where the issue is market access and liberalization of cross-border investment flows.

3. Operational provisions

60. Development considerations can play an important role in the way that an IIA's operational provisions are formulated. This section looks at issues of transparency, non-discrimination, and incentives and performance requirements.

(a) Transparency

61. Lack of transparency of a host country's applicable laws and regulations can pose an important deterrent to foreign investment. The Working Group has reviewed various formulations of transparency provisions in IIAs, and the way in which transparency is provided for in the WTO Agreements.[19] Different levels of transparency can be sought, using publication requirements, notification requirements, and at a higher level the establishment of enquiry points responsible for answering *ad hoc* requests for information on a country's legislation and administration of investment-related measures. The breadth of the transparency provisions in an IIA depends not only on what level of ambition is sought, but also on the scope of investment-related legislation covered by the IIA's substantive obligations. Implementing transparency obligations can mean establishing new publication and notification procedures and instruments, and improving internal coordination among regulatory authorities with responsibilities in the area of investment-related legislation and administration.

62. Improving the transparency of developing countries and LDCs' foreign investment laws and regulations can be of particular value to them in improving their attractiveness to foreign investors as host countries. At the same time, they often face significant capacity and technical constraints and financial costs in complying with the transparency requirements of an IIA. This points to the need for development provisions that tailor the transparency obligations of these countries to their capacity to

[18] For example, the Canada-Chile Free Trade Agreement states: "For the purposes of preserving the stability of its currency, Chile reserves the right: (a) to maintain existing requirements that transfers from Chile of proceeds from the sale of all or any part of an investment of an investor of Canada or from the partial or complete liquidation of the investment may not take place until a period not to exceed [five years from the date of transfer to Chile in the case of an investment made pursuant to Chile's *Foreign Capital Investment Fund Law*, or otherwise one year]".

[19] WT/WGTI/W/109.

implement, including through longer transition periods than are normally allowed for[20], and for providing technical and capacity-building assistance to help them progressively improve the transparency of their foreign investment regimes.

(b) Non-discrimination

63. Non-discrimination is a core policy-making principles of IIAs, and a valuable means of improving the attractiveness of a host country in the eyes of foreign investors. At the same time, for some developing countries it strikes at the heart of their development policies to encourage domestic investment and production by favouring domestic businesses. This is an area, therefore, where the need for balance between flexibility and discipline for developing countries is paramount.

(i) MFN treatment

64. Virtually all IIAs, including bilateral investment treaties, contain an obligation to apply MFN treatment to the investments and/or investors of the parties.[21] Applying MFN treatment does not interfere with a developing country's ability to impose measures that give a competitive advantage to national producers over their foreign competitors, and in this respect it does not impede the country's ability to pursue its strategic development objectives. When applied to the post-establishment treatment of foreign investment, therefore, most IIAs do not provide for exceptions to the MFN obligation for specific development purposes, although they do provide for exceptions to create space for the involvement of parties in regional integration agreements and to allow governments to regulate for a variety of causes in the public interest. One matter of concern to developing countries arises out of the inclusion of MFN obligations in separate bilateral investment treaties, which can interact with each other in ways that may have been unforeseen at the time of negotiation of one or more of the treaties. This is less of a concern, however, in a plurilateral or multilateral context.

65. The MFN obligation is more sensitive from the developing countries' point of view when it is applied to the pre-establishment treatment of investment, since it will then impinge on any measures they may wish to use to select those foreign investments which they are prepared to admit into their territories, and on what terms they are to be admitted. In principle, selection through screening foreign investment projects can be undertaken in a manner consistent with the MFN obligation, where it is based on fixed, objectively comparable and transparent criteria and where all foreign investment projects (in "like" circumstances) that meet these criteria are admitted. In fact, however, a developing country may wish to undertake the screening process in a more *ad hoc* way, that responds, for example, to its desire to limit absolutely the number of foreign investments admitted to compete in its economy or in particular sectors of it, to select only those foreign investments which it considers to be compatible with its development policies, to offer certain foreign investments, but not others, investment incentives and other benefits, and to its desire to adjust the criteria used for screening over time as its development needs and priorities change. In such circumstances, application of full MFN treatment at the pre-establishment stage of investment will not be possible. To address this, IIAs that apply the MFN obligation to pre-establishment treatment of investment allow exceptions to be taken on an individual country-basis, typically using a "top-down", negative list approach whereby countries designate sectors, industries or measures to which they will not apply MFN treatment. An example is the NAFTA (see paragraph 54).

(ii) National Treatment

66. Application of the national treatment rule is one of the most sensitive aspects of an IIA. It is usually formulated so as to provide foreign investment with treatment that is "no less favourable" than the treatment given to investment by nationals. This can lead to more favourable treatment being

[20] E.g., GATS Article III:4.
[21] UNCTAD, Bilateral Investment Treaties in the Mid-1990's (1998).

accorded to foreign investors than to national investors. For some host countries, that may indeed be the intention – to offer positive discrimination in favour of foreign investors in order to attract foreign investment. To the extent that this is not the intended consequence, however, some IIAs specifically exclude that possibility. For example, according to a 1992 World Bank survey of 51 investment codes adopted by developing countries, many have favoured a definition of national treatment that excludes the possibility of granting more favourable treatment to foreign investors, through a test of treatment similar or equal to that given to national investors.[22]

67. When applied in full, national treatment places foreign investors on at least an equal footing to compete with national investors, and removes to a very large extent the means that a host-country government has of supporting and protecting its own national investors. At the pre-establishment stage of investment, for example, full national treatment would prevent a host-country government from reserving certain sectors or industries exclusively for national investors, or attaching special conditions to foreign investment (even on an MFN-basis) that are not applicable to national investment. At the post-establishment stage, it would prevent a host country government from subsidizing or providing other benefits exclusively to national investments, or from exercising stricter regulatory control over foreign investments than over national investments. It therefore can affect many of the development policies of developing countries, especially those that aim to provide preferential support and protection to national producers and investors. As a result, the scope of the national treatment rule in an IIA, and the type and extent of exceptions and conditions attached to it so as to allow developing countries to retain an appropriate degree of discretion in investment matters, become all important.

68. A variety of approaches are taken in IIAs in seeking to establish a workable rule of national treatment in conjunction with allowing developing host countries flexibility to apply their development policies. The possibilities range from granting no national treatment at all to granting qualified pre-establishment and post-establishment national treatment. In practice, most IIAs do apply a national treatment rule, but generally this is limited to the post-establishment treatment of investment only. Where it applies also to pre-establishment treatment, typically it is hedged with exceptions that limit the scope of its application, in some cases considerably.

- Cases of IIAs that do not contain a national treatment obligation are rare. Examples are some bilateral investment treaties of China and Sweden, and the ASEAN Agreement for the Protection and Promotion of Investment.[23]

- Most IIAs apply the national treatment principle at the post-establishment stage, which does not interfere with the ability of parties to screen foreign investment at the point of entry and impose conditions on its admission. At the same time, exceptions to national treatment are often provided for on development grounds. This can include granting privileges and benefits (such as investment incentives) to national investments exclusively.[24] The bilateral investment treaty between Switzerland and Indonesia (1974) provides for a derogation to national treatment of Swiss investors "in view of the present stage of the development of the Indonesian national economy". However, Indonesia commits, "in order to ensure fair and equitable treatment, to grant identical or compensating facilities to investments by companies and nationals of the Swiss Confederation in similar economic activities". Some IIAs allow specific activities and industries

[22] World Bank, Legal Framework for the Treatment of Foreign Investment, Volume 1: Survey of Existing Instruments, (Washington, 1992).

[23] Article 4 of the ASEAN Agreement provides that: “Any two or more of the Contracting Parties may negotiate to accord national treatment within the framework of this Agreement. Nothing herein shall entitle any other party to claim national treatment under the most-favoured-nation principle”.

[24] For example, the bilateral investment treaty between Denmark and Indonesia (Article 3) does not refer to "treatment" but to the "imposition of conditions", thereby excluding from the application of national treatment any benefits and advantages given to national investment.

to be excluded, often to respond to one of the party's development needs and objectives. Some allow parties individually to negotiate a list of sectors to which they will not apply national treatment, usually on the basis of a "top-down", negative list of exceptions.[25]

- A few IIAs apply national treatment to the pre-establishment stage of investment through the scheduling of country-specific commitments using a "bottom-up", positive list approach. Apart from the case of the GATS, the APEC Non-Binding Investment Principles and the Energy Charter Treaty apply this approach on a "best endeavours" basis, offering a non-binding invitation to member countries to extend national treatment at the pre-establishment stage. In the case of the Energy Charter Treaty, this provision was coupled with a commitment to negotiate legally binding national treatment obligations at a later stage.[26]

- Some bilateral investment treaties, as well as the NAFTA and the MERCOSUR Protocol on Investments from other MERCOSUR Member Countries, grant full national treatment to all investors at the pre-establishment stage of investment, unless the investment takes place in a sector or an industry that is specifically excluded by the Treaty. However, specific exclusions of industries, sectors or measures from national treatment can be filed through the "top-down", negative list approach to scheduling commitments, and in most cases these have proved in practice to be numerous.

(c) Investment Incentives and Performance Requirements

69. The use of incentives to attract foreign investment has been the subject of extensive discussion in the Working Group. Existing IIAs are generally silent on this issue.

70. Most IIAs are silent also on the issue of performance requirements, but some include disciplines on their use.[27] Generally, these take as their starting-point the illustrative list of performance requirements in the TRIMs Agreement, and reproduce the prohibition contained there on the use of these measures.

71. Some IIAs go further, notably certain of the bilateral investment treaties of the United States and Canada, with their bilateral partners, as well as the NAFTA, which prohibit *inter alia* the use of export performance requirements and technology transfer requirements in connection with the establishment or subsequent operation of foreign investments. In some of these agreements, however, the use of performance requirements is permitted when they are applied as a condition for the receipt of an advantage (e.g., an investment incentive) from the host country. Also, in some of these agreements, including the NAFTA, parties may avoid the prohibition on the use of some or all of these measures if the measures existed at the time of entry into force of the agreement, or if the measures are applied in sectors or activities for which the party has taken exemptions through scheduling country-specific exceptions.

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[25] Article 2.1 of the BIT between the United States and Armenia (1992) provides that: "Each Party shall permit and treat investment therewith […], on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals and companies […] subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. […] Each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum."

[26] Article 6.b of the Energy Charter Treaty stipulates that: "A Contracting Party may, furthermore, at any time make a voluntary commitment to accord to Investors of other Contracting Parties, as regards the Making of Investments in some or all Economic Activities in the Energy Sector in its Area, the Treatment described in paragraph 3 [national treatment]. Such commitments shall be notified to the Secretariat and listed in Annex and shall be binding under this Treaty".

[27] See UNCTAD, Host Country Operational Measures, Series on issues in international investment agreements, (2001).

72. Some other IIAs also go beyond the TRIMs list, particularly to encompass export performance requirements, but apply a "best-endeavours" undertaking to avoid these measures rather than prohibiting their use outright. Examples include certain bilateral investment treaties of the United States, the bilateral investment treaty between Malaysia and the United Arab Emirates (1991), and the APEC Non-Binding Investment Principles.[28]

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[28] Cited in UNCTAD, *ibid,* p. 47.