The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties

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I. THE ADMISSION OF FOREIGN INVESTMENTS
A. INTERNATIONAL LAW AND STATE POLICIES
1. General International Law

Under general international law, in the absence of treaty obligations and contractual commitments, States are free to regulate the admission of foreigners into their territory, including the conditions and the extent of their carrying out economic activities, as a prerogative deriving from national sovereignty. Once foreigners have been admitted to enter their territory and to do business, States are bound to extend to them the protection of the law and are subject to obligations concerning the standard of treatment to be granted to them as provided by customary rules, whose exact scope is the object of well-known discussions.1

No general obligations exist as to the movement (admission) of capital and the freedom for foreigners to carry out business and to establish themselves. Indeed, the policies of different groups of countries have been substantially at variance in this respect, depending upon the principles of their economic system.2

2. Policies and Multilateral Undertakings of Industrialized Countries

Industrialized, market-economy, capital-exporting countries have tended to be liberal in the area of capital movements, especially with regard to foreign direct

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1 See the Barcelona Traction case, ICJ Reports, 1970, para. 33.

2 The freedom of States to regulate the entry of foreign capital is spelled out in such different texts as the Organisation for Economic Co-operation and Development (OECD) project of a Convention on the Treatment of Foreign Investment of 1967, Article 1(b); the UN Declaration 1803-xvii of 14 December 1962 on permanent sovereignty of States on their natural resources; para. 48 of the UN project of a code of conduct for transnational corporations (TNCs); and is generally implied by the OECD Code of Liberalisation of Capital Movements. The International Monetary Fund (IMF) commits its Members to liberalise current payments but not capital movements (Articles vi and viii), although a reform in order to also regulate capital movements is being envisaged. See generally Carreau, Flory and Juillard (1990), 596.
investment (FDI). Portfolio investments, and especially short-term capital movements of a financial nature, have been more tightly controlled up until recently by several countries. The post World War II concerted efforts of these countries in this direction have been pursued in accordance with the Organisation for Economic Co-operation and Development (OECD) Code of Liberalisation of Capital Movements of 1961, in parallel with the other Code on Liberalisation of Current Payments. Liberalisation means the elimination of restrictions to the carrying out of the various transactions and transfers listed in the Annexes to the Codes, whose scope has been progressively expanded. The current level of liberalisation is substantial, but there are sectors where FDI is restricted.

3. The Change in Policies by Developing Countries

The dramatic change of traditional attitudes of most developing countries towards foreign investment is well known. The investment regimes now in operation in most countries have virtually abolished the bulk of the previous tight controls and restrictions on the entry and establishment of foreign investment which were viewed as potentially harmful if not kept within definite bounds. Investment laws or codes which imposed limitations on the entry and establishment of foreign enterprises have been substantially amended. The requirements of preventive screening and authorization have often been replaced by provisions based upon the principle of freedom of entry, subject to sectoral exceptions. The existing requirements of registration and of using specific banking channels are rather meant to ensure the supply of information, the management of the balance of payments and the application of the standards of treatment extended to foreign investments under those laws.³

Some countries have adopted very liberal legal and economic policies in these areas in order to attract foreign capital and investment for industrial policy purposes, and in view of the increased competition for this resource in today's open world economy. The benefit of special advantages (incentives) provided under investment laws and/or obtainable through negotiation and agreement with governmental authorities, such as in respect to taxation, financing and custom duties, are often conditioned by localization and performance requirements of various types (especially as to local content of production and share of exports). The latter requirements have been criticized in recent times as counterproductive, discriminatory and inconsistent with international trade.

³ See, e.g., the new investment laws of Argentina of 2 September 1993 (Decree 1853/93); the Mexican law on foreign investments of 27 December 1993; the Tunisian investment code of 27 December 1993 (Law 93/120); and Shihata (1994), 47 et seq. Restrictions to entry and exceptions to national treatment are still widespread, although unilateral liberalisation has been substantial: see Conklin and Lecraw (1997), 1 et seq.