THE REGULATION OF DIRECT FOREIGN INVESTMENT UNDER THE CANADA-UNITED STATES FREE TRADE AGREEMENT: LESSONS FOR DEVELOPING COUNTRIES

by

JUDE THADDEUS AMOS

LL.B., The University of Ghana, 1989

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(Faculty of Law)

We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

April 1994

Abstract

The regulation of foreign direct investment continues to feature prominently in the economic policies of most countries, both developed and developing ones.

The emphasis on the role of foreign direct investment in the economic development of developing countries raises the question as to ways in which foreign investment in such countries may be encouraged. To this end, one may ask whether they can learn anything from the treatment of foreign investment by developed countries. Such an enquiry becomes pertinent in the light of differences in the traditional attitudes of developing and developed states towards foreign investment control, especially on issues of trade related investment measures (TRIMs) and expropriation.

This is the focus of this paper. It is argued that judging from the trend regarding the treatment of these issues under the Free Trade Agreement and its successor - the North American Free Trade Agreement (NAFTA), the provisions of bilateral investment treaties, and the limited extent of Canadian and American programs designed to encourage foreign direct investment in developing countries, a modification in the traditional attitudes of developing countries on such issues appears not only to be necessary, but expedient.

Table of Contents

Acknowledgement

I wish to express my deep gratitude to Professors Pitman Potter and Robert K. Paterson under whose supervision I have carried out this research. Their suggestions and comments have been very helpful in giving my writing the requisite direction.

I must also acknowledge the assistance I received from Professor Ivan Head. His seminar on North-South Relations, which he gladly permitted me to sit in, gave me a keen sense of some of the background issues I have sought to discuss in my thesis.

Needless to say, I assume full responsibility for the thoughts and opinions expressed herein.

I cannot fail to thank the British Columbia Law Foundation, whose generous provision of financial assistance sustained me during my stay at the University.

Lastly, but by no means the least, my thanks goes to all other Professors at the Law Faculty, and my colleagues in the graduate program, who made my stay in Vancouver a fruitful and memorable one.

INTRODUCTION

1. The Need For Foreign Investment Regulation

The role of foreign direct investment[1] in the economic welfare of states, continues to receive widespread attention. Underlying such attention is the realization that foreign investment could have both positive and negative effects[2] on the host state.[3] Positive effects may include the transfer of technology to the host state,

---

[1] The term "direct foreign investment" is used here, and throughout the thesis, to refer to the process whereby foreign resources in the nature of capital, technology, and other resources are introduced into a country by a foreigner who manages it for economic ends within the host state. The term is usually contrasted with, or distinguished from "portfolio investment", which refers to the purchasing of securities in businesses within another country. There appears to be a predominant preference for the former king of investment since that is usually considered to provide added economic leverage to the host state in the form of managerial, technical and marketing resources as well as foreign capital. See IMF, *Report on the Measurement of International Capital Flows* (Washington, D.C., 1992), at 24 and IMF, *Foreign Private Investment in Developing Countries* (Washington, D.C., 1985) at 1.

[2] Dept. of Economic and Social Development, Transnational Corporations and Management Division *Formulation and Implementation of Foreign Direct Investment Policies. Selected Key Issues* (New York: United Nations, 1992) at 2. [hereinafter *Foreign Direct Investment Policies*] As a report on foreign direct investment in Canada acknowledged:

> "If foreign direct investment merely created problems, it would be a simple matter to deal with it; all foreign investments could simply be blocked. But in many cases foreign investment is a complex mix of costs and benefits, both of which are extremely difficult to quantify in economic terms - to say nothing of social, cultural and political terms -for the nation as a whole."

See The Gray Report on *Foreign Direct Investment in Canada* (Ottawa: Government of Canada, 1972) at 7.

[3] The term "host state", is used throughout this paper to refer to the state other than the one where the foreign investor is originally established. The latter is usually referred to as the "home state". Such categorization does not, however, preclude the possibility of a state being classified both as a home and host state for purposes of foreign investment, as for example, countries like the United States, France, Germany, the Netherlands and the United

increased employment and the growth of exports.[4] Negative effects may be evidenced in the disruption of social systems, values, and traditional cultures; the creation of political unrest;[5] the invasion of national sovereignty and frustration of national economic policies.[6]

The mixture of costs and benefits is accentuated by the potential conflict between the goals of the foreign investor and the host state's economic or developmental objectives. The difference in objectives is typified in cases where the foreign investor is a transnational corporation (TNC). The TNC's preoccupation is not the economic development of its host country but the making of profit on its investment. Likewise, the host Government is only desirous of ensuring that the activities of the TNC are beneficial to the country, and not whether such activities are profitable to the TNC.[7]

Kingdom. See Report of the Secretary General, United Nations Economic and Social Council, Commission on Transnational Corporations, *Recent Developments Related to Transnational Corporations and International Economic Relations* E/C.10/1990/2 pp. 5, 13-15.

[4] *Ibid.* See also D. McFetridge, ed., *Foreign Investment, Technology and Economic Growth* (Alberta: Minister of Supply and Services Canada, 1991) at 93.

[5] *Foreign Direct Investment Policies, supra* note 2 at 25.

[6] See K.W. Grewlich, *Transnational Enterprises in a New International System* (Netherlands: Sijthoff & Noordhoff, 1980) pp. 60-62.

[7] *Ibid.*, pp. 7 & 8.

One of the main objectives for regulating foreign direct investment has therefore been to ensure that the host state reaps the benefits of such investment, while at the same time avoiding its potential adverse effects.[8]

The desire to regulate the activities of foreign investors is shared by both developed and developing countries. Direct foreign investment policies, however, vary from state to state. Significant differences may be seen in the attitudes of capital exporting or developed countries as a whole and those of capital importing or developing countries. The former, being countries where a significant number of foreign investors are based, generally tend to adopt the freest or most liberal policies toward foreign investment.[9] The rationale for this is given as follows:

> "An open international environment is of benefit to owners of capital who are then able to choose from among the greatest possible numbers of alternative investment projects, and to move their funds from one location to another with minimum cost and inconvenience. Whether we consider the investor class or the economy in which they reside as the proper `actor', it is clear that the last thing wanted by that actor is an active, effective set of capital controls by the home government, since this might prove to be an inspiration to the governments of host economies. For these societies, a liberal world economy brings significant benefits."[10]

---

[8] Transnational Corporations and Management Division, United Nations Department of Economic and Social Development, *Formulation and Implementation of Foreign Investment Policies* (New York: United Nations, 1992) at 5.

[9] See P.K. Kresl, "Canadian and American Approaches to Foreign Direct Investment and International Trade Policies" (1981) 4 *Comparative Social Research* 135 at 143.

[10] *Ibid.* The writer notes, however, that Canada offers a "curious counter example" to this, in that it is home to a disproportionately small number of multinational corporations, and yet maintains a liberal investment policy. The view as to the

Thus, while the former is said to be generally in favour of the establishment of a relatively liberal regulatory investment climate, the latter, though recognizing the potential benefits of FDI, are very wary of its potentially adverse economic, social and political consequences and are thus inclined to establish a regime of strict regulation.

There is, however, some basis for thinking that the fear of the harmful effects of unrestricted FDI is not only confined to developing countries but persists in developed states as well.[11] The Gray Report[12] reveals this wariness on the part of Canada, and as is argued below, similar attitudes presently exist in the United States. It would seem then, that at the domestic level, issues pertaining to foreign direct investment are strongly influenced by national concerns.

2. Public International Law and Foreign Investment Regulation

Under public international law, a state has a virtually absolute discretion in determining whether or not to admit foreign nationals onto its territory, and under

---

liberality of the Canadian investment policy would, however, seem not to be accurate in the light of the time period in which it was expressed. The much criticised pre-1985 Canadian FDI regulatory mechanism was still in place and had not undergone any significant changes.

[11] *Supra* note 6, pp. 88, 93, 94.

[12] *Supra* note 2.

what conditions such admission is to be allowed. Such a discretion is generally considered to be an attribute of the state's sovereignty.[13]

The general principle therefore is that under customary international law, a state is not required to accord foreigners, in the field of business regulation, the same measure of treatment as it accords to its own nationals. Such issues are essentially determined by the state's own economic or foreign policy.[14] In fact, the preferential treatment accorded by a state to its nationals in their activities, appears to be the norm, whether the state is capital-exporting or capital-importing.[15]

The obligation to accord national treatment to foreigners, and the precise limits of such an obligation, may thus arise only by an undertaking of the host state, usually under the terms of bilateral or multilateral treaty. It is in this wise that a national treatment principle has come to be accepted in certain aspects of state economic regulation. The prime example here is the regulation of international trade. National treatment remains the basic principle of the legal regime for the regulation of world trade established under the General Agreement on Tariffs and Trade

---

[13] See L. Oppenheim, *International Law, a Treatise*, H. Lauterpacht, ed., (London: Longmans, 1955).

[14] See I. Brownlie, *Principles of Public International Law*, 4th. ed., (Oxford, Clarendon Press, 1990) at 519.

[15] Such preferential treatment appears to be grounded on considerations of national security and the preservation of cultural identity, as the examples of Canada and the United States, discussed below, shows.

(GATT). The principle generally requires member states not to discriminate in the treatment of goods leaving and entering their countries.[16]

Thus, no general norms of international law have crystallized on the issue of foreign investment regulation, either regarding the standard of treatment by the host state, or the standard of behaviour of foreign investors. In the latter case, however, attempts have been made within the framework of multilateral arrangements to adopt codes of conduct for transnational corporations. None of these appear to have been designed to have legally binding force.[17]

It is the uncertainty in public international law on the issue of foreign investment regulation that has bolstered efforts towards the provision of detailed investment regulatory mechanisms within the framework of investment treaties.[18] The

---

[16] GATT, articles I(1), II(2) & (4). B.I.S.D. vol. 4 (1969).

[17] These include the International Labour Office's (I.L.O.) "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy [International Labour Office, Geneva, 16 Nov., 1977 reprinted in XVII I.L.M., 423 (1978)]; the "Declaration of O.E.C.D. Member Governments on International Investment and Multinational Enterprises", [O.E.C.D., Paris, 21 June 1976, revised in "Review of the 1976 Declaration and Decisions", O.E.C.D., Paris, 1979]; and the U.N.C.T.A.D.'s "The Set of Agreed Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" [Adopted by the General Assembly on 5 Dec., 1980, TN/RBP/CONF/REV, reprinted in XIX I.L.M. 813 (1980). For an overview of these codes, see R. Grosse, "Codes of Conduct for Multinational Enterprises" (1982) 16 J. W. T. L. 414-433.

[18] M. Sornarajah, "State Responsibility and Bilateral Investment Treaties" J. W. T. L. 79, pp. 80-81.

Canada-United States Free Trade Agreement[19] is unique in being the first free trade agreement of its kind to embody comprehensive provisions on both the regulation of trade and foreign direct investment.

3. Foreign Investment and The Free Trade Agreement

The foreign investment provisions of the Free Trade Agreement occupy an important place in what may otherwise be thought to be an agreement concluded purely for the liberalization of trade between the state parties. There is clear recognition by the parties that the regulation of foreign direct investment ought to play a crucial role in the fulfilment of the objectives of the Agreement.

The Preamble to the Agreement offers perhaps the first indication as to the significance the Parties attach to the issue of foreign investment regulation. It states that the conclusion of the Agreement was motivated, inter alia, by the desire "to ensure a predictable commercial environment for business planning and investment".[20] In other words, the Agreement was meant to establish a legal regime which would be free from shifts in respective state policies. It is obvious then, that

---

[19] *The Free Trade Agreement between Canada and the United States of America*, (Ottawa: Minister of Supply and Services Canada,1988), *reprinted* in 27 I.L.M. 281 (1988), [hereinafter referred to as the *Free Trade Agreement.]*

[20] See Preamble to the *Free Trade Agreement*.

the element of predictability guaranteed by a stable legal commercial environment was considered to be a significant factor in achieving the goals of the Agreement.

The interest in investment is conveyed more forcefully in article 102 of the Agreement which expresses the desire of both parties to "liberalize significantly conditions for investment within this free-trade area."[21] It is apparent from this provision that the intention of the parties is to make the regulation of foreign investment in their respective countries less stringent that they presently are. Thus, the Agreement is meant to significantly reduce the restrictions on foreign investment within both state parties.

The significant liberalization of investment regulation within the state parties is sought to be achieved by "freezing" the respective state legislations on foreign investment and prohibiting the imposition of any further restrictions in that area. This is accompanied by the endorsement of a national treatment principle, under which each country is obliged to afford to investors from the other state treatment which is no less favourable than what it confers on its own investors. The other investment provisions define the extent to which the state parties may regulate the activities of foreign investors. These provisions mainly limit the state parties' otherwise extensive discretionary powers in the area of foreign direct investment regulation.

---

[21] *Ibid.*

4. The Agreement and Developing Countries

Reviews of the Agreement have mostly been confined to its effect for the state parties to it and the rest of the world from the trade perspective.[22] The objective of this thesis is, however, to examine the foreign investment provisions of the Agreement and ascertain its implications for developing countries.

One of the main features of the developmental policies of developing countries has been the encouragement of direct foreign investment within their territories through the attraction of investors with certain incentive packages.[23] There is, however, no general consensus regarding the beneficial effects of foreign direct investment in developing countries. The potential effect of direct foreign investment as a tool of economic development in developing countries has been widely acknowledged.[24] Direct foreign investment has been seen by some as a reliable means by which developing countries could attain the requisite development.[25] Other literature have gone to great lengths to point out the negative effects of foreign

---

[22] See for example, P. Morici, "The Canada-U.S. Free Trade Agreement: A Laboratory for the World Trading System" (1991) 21:2-3 Am. Rev. Can. Studs. 305-313.

[23] See S.E. Guisinger, *Investment Incentives and Performance Requirements: Patterns of International Trade, Production and Investment* (New York: Praeger Publishers, 1985).

[24] See G.A. Petrochilos, *Foreign Investment and the Development Process* (London: Gower Publishing, 1989).

[25] *Foreign Private Investment in Developing Countries*, *supra* note 1, *ibid.*

investment on host developing countries.[26] The greater consensus, however, appears to be that foreign investment has a mixture of both negative and positive effects on the host country.[27]

It would seem however, that the nature of the regulatory mechanism in place in the host country may to a large extent determine the type of effects which would flow from the investment in question. It could also influence the decision of foreign investors whether or not to invest within the particular country. Investors would undoubtedly choose to invest in the country or region with a more attractive investment climate. To the extent that the investment regulatory mechanism in place in the potential host country creates a conducive environment for foreign investment, the flow of investment is likely to increase. Conversely, a decline in the flow may be triggered by a stringent regulatory mechanism.[28]

It is in this light that an attempt to liberalize investment regulations under the Free Trade Agreement ought to attract interest. Having been concluded with the objective of enhancing foreign investment within both state parties, these provisions

---

[26] See for example, Lanning, C. & M. Muller, *Africa Undermined: Mining Companies and the Underdevelopment of Africa* (London: Penguin, 1979), who demonstrate the adverse economic effects of foreign investment within the mining industry in Africa.

[27] *Supra,* pp. 1-3.

[28] G.S. Trisciuzzi, "Multilateral Regulation of Foreign Direct Investment" in *Regulating the Multinational Enterprise. National and International Challenges,* B.S. Fisher & J. Turner, ed., (New York: Praeger Publishers, 1983) 143 at 145.

portray regulatory standards which are considered to be crucial for the effective utilization of foreign investment by the host states, as well as providing an attractive investment climate for investors.

The investment provisions thus provide a touchstone with which to examine the general attitudes of developing countries towards the issue of foreign investment regulation. Although the economic factors determinative of foreign investment within these countries may widely differ, state attitudes towards the issue is also important and should not be discounted.

This is all the more important in the light of the differences which have persisted between developing and developed countries on attitudes towards foreign investment issues. Indeed, it is these differences that largely account `for the uncertainty of public international law on such issues.[29] The discussion in this thesis will centre on some of these issues under the following themes.

a. The Relationship Between Investment Regulation and Trade Liberalization

There has been considerable debate over the interface between trade and investment regulation. It has been argued that measures taken within a foreign

[29] *Supra* note 18.

investment regulatory scheme could have an adverse effect on international trade.[30] Examples include local equity requirements, remittance restrictions, foreign exchange restrictions, local content requirements, export requirements and import substitution requirements.[31] Such measures are usually referred to as Trade Related Investment Measures (TRIMs).[32]

The attempt to have resort to such measures curtailed and brought under some form of international supervision has been spearheaded by developed countries, most notably the United States. It was largely at their insistence that TRIMs were placed on the agenda of the recently concluded Uruguay round of the GATT multilateral trade talks. Although significant progress was made towards a general consensus on the extent to which such measures may be taken,[33] the issue

---

[30] United Nations Centre for Transnational Corporations/United Nations Commission on Trade and Development *The Impact of Trade Related Investment Measures on Trade and Development. Theory, Evidence and Policy Implications* (New York:United Nations, 1991) at 1.

[31] *Ibid.*, at 2.

[32] *Ibid.*, at 1.

[33] See Annex 1A of the Agreement Establishing the Multilateral Trade Organization (1993), titled *Agreement on Trade-Related Investment Measures.* Under the Agreement, member states of GATT are generally prohibited from applying TRIMs which are inconsistent with their obligations under the GATT. The Annex to the Agreement lists measures which would be treated as falling within the proscribed category. For example, measures considered as inconsistent with article III:4 of the GATT include requirements concerning:

"(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or of TRIMs cannot be said to have been conclusively resolved.[34]

TRIMs are utilised by both host developed and developing countries, but more frequently in the latter, for the purpose of ensuring significant benefit to the country out of the investment.[35] The imposition of such measures have mainly been justified on the grounds that they are necessary for addressing developmental concerns.[36]

The Free Trade Agreement, by embodying provisions on such measures in its investment chapter, clearly typifies the position maintained by developed countries about the close link between trade and investment issues. Given the general difference in attitudes between developed and developing countries on this issue, it is pertinent then to examine the extent to which the argument as to the link between trade and investment is carried in the Free Trade Agreement, and what lessons it ought to convey to developing countries.

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports."

[34] For example, the Agreement's coverage of trade related investment measures is restricted to trade in goods. See *ibid.*, art. 1.

[35] *Supra* note 30, pp. 4-10.

[36] *Ibid.*

b. Expropriation

The next issue to be addressed is that of expropriation. This has to do with the power of the host state to appropriate the property of the foreign investor. Although such power is recognised as a natural extension of a state's sovereignty, the principles regarding the manner in which expropriation may be carried out are far from settled. Sharp differences exist in the respective attitudes of developed and developing countries. While the former maintain that expropriation ought to be for a public purpose, be non-discriminatory and followed by prompt, adequate and effective compensation, developing countries advocate a standard which gives prior attention to the economic exigencies of the country. Given the generally unfavourable economic circumstances they face, this means that it would be inexpedient for them to seek to meet the standard set by developed western countries.

This research places the discussion of the lessons of the Canada-United States Free Trade Agreement within the context of this debate, and seeks to ascertain to what extent the difference in attitudes is mirrored through the investment provisions of the Agreement and the investment laws of developing countries.

c. Canadian and United States Promotion of Foreign Investment in Developing Countries

The next issue relates to the possible effect of the Free Trade Agreement on the state parties' policies in respect of the encouragement of foreign investment in developing countries. Canada and the United States, like other industrial countries, encourage investment by their nationals in developing countries.[37] Measures to this end include the conclusion of Bilateral Investment Treaties (BITs) with a host of developing countries, and the institutionalization of investment insurance and guaranty schemes to cover anticipated political and other non-commercial risks associated with dealings between foreign investors and such countries.

Home countries of investors, it has been noted, "usually prefer, whenever possible, that their firms export, rather than invest, abroad."[38] Moreover, it is well established that foreign investment could have either a positive or negative effect on the home country of the foreign investor.[39] With a heightened interest in encouraging

---

[37] See Organization for Economic Cooperation and Development, *Promoting Private Enterprises in Developing Countries* (Paris: O.E.C.D., 1990) and United Nations Centre for Transnational Corporations, *Foreign Direct Investment, Debt and Home Country Policies* (New York: United Nations, 1990).

[38] A.E. Safarian, "The Canada-U.S. Free Trade Agreement and Foreign Direct Investment" (1988) 3 Trade Monitor 5.

[39] Organisation for Economic Cooperation and Development, *International Investment and Multinational Enterprises: Recent Trends in International Direct Investment* (Paris: O.E.C.D., 1987) pp. 48-51.

investment within their own borders, as the Free Trade Agreement amply manifests, it would be pertinent to ascertain the impact, if any, this would have in shaping the policies of Canada and the United States regarding continued encouragement of investment within developing countries. An answer to this is sought mainly by an examination of the investment promotion programs themselves, particularly as regards investment insurance.

The utilization of the bilateral investment treaty mechanism as a means of encouraging investment in developing countries is also examined, especially in the light of the traditional differences between developing and developed states highlighted above.

5. Investment Regulation and Economic Development

A fundamental assumption of this thesis is the important role of law as a tool for economic development. It is therefore premised on the belief that the law as an instrument of regulation, could be utilized by developing countries in the area of direct foreign investment in order to bring about economic development.[40]

---

[40] See T.M. Ocran, *Law in Aid of Development: Issues in Legal Theory, Institution Building and Economic Development in Africa* (Tema, Ghana: Ghana Publishing Corporation, 1978). This assumption draws from the Weberian approach to law, under which law is viewed as an instrument for achieving, among other things, the advancement of the economic goals of the state. See M. Weber, *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1966), and D. Trubek, "Max Weber on Law and the Rise of Capitalism" 1972 3 Wisconsin L. Rev. 720-753.

This perspective of law has had its critics. As a writer observes from a study of Ethiopia:

> "modern laws by themselves are not sufficient to attract foreign investment: the existence of a modern legal system will not produce investment unless there are economic reasons for such investment, reasons that investment laws attempt to enhance."[41]

It is true that the activity of foreign direct investment is quintessentially an economic activity. Many of the factors considered by the foreign investor in deciding whether or not to invest within a particular country are very much determined not by legal provisions, but by economic factors within the potential host country.[42] Thus

---

[41] L.J. Theberge, "Law and Economic Development" (1980) 2 Denv. J. Intl. L. Pol., 231 at 236. The author goes on to state that:

> "the astonishing success in economic development exhibited by Taiwan, Japan, Hong Kong, Korea, and Singapore may have some instructive value for development lawyers elsewhere. With the possible exception of Singapore, the economic booms experienced were unaccompanied by rapid changes in law. The lesson to be learned from this experience is not that law is unimportant in development. Order and obedience to authority, two of the hoped-for consequences of a rule of law, have been fundamental precepts in East Asia since the time of Confucius. Rather, the lesson is that law can be a useful tool in development as long as it makes use of the popular senses of fairness and stability that already exist in a society."

See also D.F. Greenberg, "Law and Development in Light of Dependency Theory" (1980) 3 Res. L. & Soc. 129, at 133, where he states: "it is implausible that legal change is the critical variable in development." For a general critique of the Weberian approach, see Trubek, *supra* note 40, especially pp. 752-3.

[42] United Nations Centre on Transnational Corporations *The Determinants of Foreign Direct Investment. A Survey of the Evidence* (New York: United Nations, 1992) esp. at 15-23. See also Petrochilos, *supra* note 24, at 12, where he categorises these factors into macro, micro, and strategic. The macro determinants deal with "the size of the host country market, factor prices, interest rates, profitability and the protection afforded to investing

an attempt to improve foreign investment within developing countries ought necessarily to entail an improvement in economic conditions within their countries. Nevertheless, the significance of the law as a means of shaping and presenting a state's policy in this area for the purposes of attracting foreign investment, should not be underestimated. Law has played, and continues to play a significant role as an instrument of state policy, especially in the economic sector.[43]

6. Chapter Outlines

Chapter One is devoted to a brief examination of the regulation of direct foreign investment within Canada and the United States. The chapter gives a brief outline of the respective policies of the two countries on direct foreign investment and how these are reflected in their legislations. Although such policies are conveyed through a variety of legislations, the review in this chapter would be confined to statutes which mirror most sharply the states' attitudes towards the entry and treatment of foreign investment, and reveal the exigent need to control the activities of foreign investors. More importantly, it would seek to show that the apprehension

---

firms
by tariffs and/or other measures." The micro factors relate to the advantages that accrue to the firm out of its peculiar characteristics, mainly in relation to its size and specialization within a particular area of production. Strategic factors would embrace "various other strategic and long term factors, which have mainly indirect effects on the decision to invest abroad but are directly relevant of the profitability of the venture."

[43] T. Daintith, ed., *Law as an Instrument of Economic Policy: Comparative and Critical Approaches* (Berlin: Walter de Gruyter, 1988).

of the adverse effects of foreign direct investment is equally strong even in the case of developed countries.

Chapter Two examines the regulation of foreign direct investment under the Free Trade Agreement. The significant provisions are outlined and the discussion focuses mainly on the provisions dealing with performance requirements and expropriation. It seeks to demonstrate how treatment of these issues accord with, and entrenches, the traditional western attitude towards them. Then follows a discussion of the impact of such provisions on the respective regulatory policies of both state parties.

Chapter Three reviews the position of developing countries, in the light of the issues covered under the Agreement, with the view to showing the implications or lessons the Free Trade Agreement has for them. As in the previous Chapter, attention is focused primarily on issues of performance requirements and expropriation. For this purpose, the general policies and regulatory provisions of developing countries in these areas would be examined. Illustrations are drawn from state laws on the issues discussed. While these are not intended to be an exclusive representation of the position of developing countries on the issues discussed, they are cited as general examples of some of the main features of foreign investment regulation in these countries.

Secondly, the Chapter examines recent developments in the promotion of foreign investment within developing countries, notably the conclusion of Bilateral Investment Treaties (BITs) with developed countries. The discussion here focuses mainly on the United States Bilateral Treaty mechanism. It will be argued that the provisions of BITs, especially on issues of expropriation and performance requirements, being essentially embodiments of the western standards on such issues, demonstrate the unlikelihood that developing country positions on such issues would govern the regulation of foreign investment within their territories. The need for a modification in state attitudes on such issues may therefore be necessary, to remove the uncertainty which the different simultaneous postures create.

Chapter Four focuses on the efforts being made by both Canada and the United States to encourage investment within developing countries, and the direct measures taken by both in that direction. The main focus would be on the United States guaranty program and the investment insurance scheme implemented under the Canadian export insurance programme.

It will be argued here that, to begin with, the investment insurance and guaranty programs are inherently limited in terms of their statutory or administrative restrictions, and may thus be only of limited assistance to developing countries. Again, the main features of BITs concluded with developing countries appear to maintain a certain consistency regarding the enunciation of regulatory standards which are more in line with developed country perspectives. Hence, for as long as these mechanisms remain the foundational pillars of Canadian and United States attitudes towards foreign direct investment in developing countries, the latter may need to change the perspectives from which they have viewed issues of foreign direct investment regulation.

The free trade area established under the Free Trade Agreement has, as from January 1, 1994, been broadened to include Mexico, under a North American Free Trade Agreement (NAFTA).[44] The NAFTA represents the first free trade agreement of its kind between two developed countries and a developing country. Its provisions on foreign direct investment therefore deserve particular attention in the light of the discussion in the previous Chapters. Chapter Five is devoted to an examination of the main features of the investment provisions of the NAFTA, and the major differences between them and those under the Free Trade Agreement.

The NAFTA makes significant improvements upon the legal regime established under the Free Trade Agreement. This Chapter seeks to shown how the provisions on foreign direct investment, especially those dealing with performance requirements and expropriation, depart markedly from those under the Free Trade Agreement. This, it is submitted presents strong basis for the view that direct inter-

---

[44] *Supra* note 44, art. 2203. It is worth noting, however, that the Free Trade Agreement has not been terminated. Neither the NAFTA nor the Free Trade Agreement itself purport to endorse such an effect. Instead, it appears that the Free Trade Agreement is to be presently considered as suspended for as long as NAFTA is in operation.

state agreements between developing and developed countries on the issue of foreign direct investment regulation, are unlikely to endorse the claims collectively maintained by developing countries pertaining to the extent of host state control over foreign investment.

The Conclusion highlights some of the essential points which emerge from the discussion in the previous Chapters.

In sum, the objective of the thesis is thus to examine the investment provisions of the Free Trade Agreement in general and to focus especially on the issues over which developed and developing countries are divided, mainly that of trade related investment requirements and expropriation. It then seeks to draw from this the implications of the regulatory mechanism and standards under the Agreement for developing countries. The discussion is strengthened by a review of the Bilateral Investment Treaty (BIT) mechanism as a means of encouraging foreign investment within developing countries. Attention is then focused on Canadian and United States investment promotion activities directed at developing countries, and how these, given their limitations are likely to be affected by the State Parties' desire to promote, under the Free Trade Agreement, foreign investment within their own territories.

CHAPTER ONE: FOREIGN INVESTMENT REGULATION IN CANADA AND THE UNITED STATES

1. The Regulation of Foreign Investment in Canada

a. Canadian Foreign Investment Policy

Two main considerations have shaped Canadian investment policy over the years: the need to attract foreign capital and expertise, and the promotion of Canadian independence and cultural sovereignty.[45] Canada's initial active promotion of direct foreign investment within its borders gave way in the post Second World War era to a concern about the possible deleterious effects of direct foreign investment on the economy and the consequential loss of national identity.[46]

The desire to maintain a greater degree of regulation of the entry of foreign investors into Canada and their activities subsequent to entry, necessitated the

---

[45] R.B. Ross, ed., "*A Summary*" (Ottawa: The International Business Research Centre of the Conference Board of Canada, 1985) at 8. The report goes on to indicate that the issue of sovereignty entailed other considerations, including the need to balance regional needs against national objectives; the division of economic jurisdiction between the federal and provincial governments; cultural autonomy and national security; financial and energy security ; economic nationalism; regional economic development; and the need for policy coordination.

[46] *Ibid.*

promulgation of the Federal Investment Review Act,[47] under which the Federal Investment Review Agency (FIRA) was established to oversee foreign investment within the country.[48] It is evident, from the wording of the Act, that the enactment of the legislation had been primarily motivated by the need to ensure that Canada did not lose its hold over its economy nor suffer the adverse effects of the activities of foreign investors.[49]

---

[47] S.C. 1973-74, c. 46, amended by S.C. 1976-77, c. 52, s. 128(2), S.C. 1980-81-82, c. 107, s. 63, and S.C. 1984, c. 31, s. 14.

[48] It is to be noted that prior to the enactment of FIRA, a series of measures had been taken to regulate foreign direct investment. For an overview of these measures, see K.A. Donaldson, "Foreign Investment Review and Canadianization" in Graham & Hughes, *Legal Aspects of Doing Business in Canada*. (Practising Law Institute, 1983) 471, pp. 483-487. See also J.J. Tennier, "Canada's Foreign Investment Act" *ibid.*, 439-442.

[49] The words of the Act, setting out its purpose, are revealing:

> "This Act is enacted by Parliament of Canada in recognition by Parliament that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern, and that it is therefore expedient to establish a means by which measures may be taken under the authority of Parliament to ensure that in so far as is practicable after the enactment of this Act, control of Canadian business enterprises may be acquired by persons other than Canadians, and new businesses may be established in Canada by persons, other than Canadians, who are not already carrying on business in Canada or whose new businesses in Canada would be unrelated to the business already being carried on by them in Canada, only if it has been assessed that the acquisition of control of these enterprises or the establishment of those new businesses, as the case may be, by those persons is or is likely to be of significant benefit to Canada, having regard to all of the factors to be taken into account under this Act for that purpose." *Foreign Investment Review Act*, s. 2(1).

Thus, a notable introduction of the Act was the requirement that any proposed investment be or be likely to be "of significant benefit to Canada".[50]

The FIRA was charged with the responsibility of screening on a case-by-case basis both the establishment of new businesses by foreigners in Canada as well as takeovers of Canadian assets by foreign controlled organizations,[51] with final approval resting with the Federal Cabinet.[52] It was to the Agency therefore, that the potential foreign investor had to prove the element of "significant benefit".[53]

---

[50] *Ibid.*

[51] *Ibid.*, ss. 8-13.

[52] *Ibid.*, s. 12.

[53] *Id.*, s. 2(2). In determining whether this requirement had been met, the Agency was to take into consideration the following criteria:

"(a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing on the utilization of parts, components and services produced in Canada, and on exports from Canada;

(b) the degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;

(c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

(d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and

(e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or

For purposes of meeting the law's requirements and gaining approval from FIRA to proceed with their proposed investments, investors were encouraged to enter into undertakings regarding, *inter alia*, the use of Canadian sources of supply in their business activities and the export of minimum percentages of their products.[54]

The stringent measures taken to regulate foreign investment in Canada became highly unpopular and were subject to sharp criticism. Perhaps the strongest challenge to such measures came from the United States, which argued that the undertakings given by investors were extracted in violation of Canada's obligations under the General Agreement on Tariffs and Trade.[55]

---

legislature of any province likely to be significantly affected by the acquisition or establishment."

[54] Donaldson, *supra* note 48 at 509-515.

[55] This challenge took the form of a petition by the United States to the GATT dispute resolution panel alleging that such undertakings conflicted inter alia, with Article III:4 of the Agreement. [55 UNTS 194; 55 UNTS 308; BISD IV (1969)]. That Article provides:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the applications of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

The Panel upheld the United States' position and ruled that the undertakings to purchase goods of Canadian origin were inconsistent with the said Article. For a detailed examination of the case, see R.K. Paterson, "The GATT and Restriction on Foreign Investment: The United States Challenge to Canada's Foreign Investment Law (1982)1 U.C.L.A. Pacific Basin L.J. 224-46.

b. Policy Change

The scarcity of investment following the world recession in the early 1980s, the increasing unemployment rate in Canada, the criticisms levelled against the regulatory mechanism under the FIRA, together with the realization that it was losing its economic attraction and competitive edge to other countries as a result of its stringent stance on foreign investment, compelled Canada to liberalize her laws and policies regarding foreign direct investment.[56]

A significant step in the liberalization effort was the promulgation in 1985 of a new investment law[57] which substantially cut down on the stringent rules and procedures for the review of foreign investment within the country. The Foreign Investment Review Agency was replaced by a new agency - "Investment Canada".[58]

The statement of purpose behind the promulgation of the new Act was significantly couched in a tone different from that of its predecessor:

---

[56] R.B. Leckow & I.A. Mallory, "The Relaxation of Foreign Investment Restrictions in Canada." (1991) 6 ICSID REVIEW. For.Inv. L.J. 1, at 8. See also J. Raby, "The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective." (1990) 84 A.J.I.L. 394, at 396.

[57] *The Investment Canada Act*, S.C. 1985, c. 28.

[58] *Ibid.*, s. 6.

> "Recognizing that increased capital and technology would benefit Canada, the purpose of this Act is to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada."[59]

Thus, the encouragement of foreign investment in Canada was now the predominant objective, and the review of foreign investments was now to be confined only to "significant investments".

The usual practice whereby all acquisitions of Canadian corporations were subject to review[60] was modified to streamline the number of acquisitions reviewable. All acquisitions by non-Canadians of corporations with an asset value below $5 million are now exempted from the review process.[61] Under the new legislation, the acquisition and control of a Canadian business is reviewable in only three instances: direct acquisition of control of a Canadian business with assets valuing Can.$5 million or more;[62] indirect acquisition of control of a Canadian business where the assets' value is Can.$50 million or more;[63] indirect acquisition of control of a Canadian business with assets of Can.$5 million or more, where the Canadian assets acquired

---

[59] *Ibid.*, s. 2.

[60] FIRA, ss. 8-13.

[61] *Investment Canada Act*, s. 11.

[62] *Ibid.*, articles 14(1)(a)&(b), 14(3) and 28(1).

[63] *Id.* arts. 14(1)(d), 14(4) and 28(1)(d)(ii).

represent more than 50 percent of the aggregate gross asset value of all domestic and international business acquired, directly and indirectly, in connection with the transaction.[64]

Again, apparently in answer to the concerns of foreign investors about FIRA's review of corporate transfers of control which take place offshore, the new legislation eliminated the review of indirect takeovers, except those involving assets in excess of $50 million.[65] Furthermore, proposals to establish new businesses in Canada by non-Canadians are generally not subject to review.[66]

The requirement that FIRA be satisfied as to a "significant benefit" to the country from the proposed investment was replaced by the requirement for proof of a "net benefit"[67]; it would seem, however, that apart from a slight modification of the former criteria by the addition of two new ones, the test remains essentially the same.[68]

---

[64] *Id.* arts. 14(1)(c), 14(2), 14(3) and 28(1)(d)(ii).

[65] *Id.*

[66] *Id.* The Act rather requires notification of such establishment to the Agency, thus permitting the Agency to determine whether or not the new business is related to Canada's cultural and national identity, in which case it would be subject to the review process set out under the law. See *Investment Canada Act*, s.15. The new Agency has thus been described as more of a monitoring agency than a controlling one. *Supra* note 45, at 18.

[67] *Ibid.*, s. 21(1).

[68] These are firstly, that the foreign investment should be found compatible with national or provincial cultural policies, and secondly, that the investment contributes to Canada's ability to compete in world markets. *Ibid.*, s. 20(e) and (f).

In spite of the drive to liberalize the regulation of direct foreign investment in Canada, considerations of national interest have continued to remain paramount. Thus, even under the new law, a proposed establishment or acquisition of a business in Canada by a foreign investor would be subject to review if the business is considered to be one related to "Canada's cultural heritage or national identity".[69] Other restrictions on foreign control of certain types of businesses continue to apply, and do not appear to have been affected by the change in government policy.[70]

The desire to check the influx of foreign investors has been matched by the need to regulate their conduct within the country. Hence, efforts have also been made to prescribe standards to be complied with by foreign business enterprises in Canada. The most notable of Canadian measures in this direction is in the form of the recommendations made by the Canadian government in 1975.[71] Although these standards do not appear to carry the weight of legally enforceable provisions, it is not

---

[69] *Investment Canada Act*, s. 15(a). Under regulations adopted by the Cabinet, a number of business activities have been so labelled, including the publication, distribution or sale of books, magazines, periodicals, or newspapers in print or machine readable form; the production, distribution sale or exhibition of film or video music products; the production distribution, sale or exhibition of audio or video music recordings; and the publication, distribution or sale of music in print or machine readable form. See *Investment Canada Regulations*, SOR/DORS/85-611, sched. IV, 119 Can. Gaz. II 3027, 3032-33 (1985), amended by SOR/DORS/89-69, 123 Can. Gaz. II 130 (1989).

[70] G. Hughes, *Foreign Investment Law in Canada* 64.1-41-44 in Graham, *supra* note 48 "Types of Regulation of Foreign Investment in Canada Apart From the Foreign Investment Review Act." at 589.

[71] Department of Trade and Commerce, *Foreign-Owned Subsidiaries in Canada* (Ottawa: Queen's Printer, 1967), at 40-41: "Some Guiding Principles of Good Corporate Behaviour for Subsidiaries in Canada of Foreign Companies."

difficult to realise that they must have been intended to place on foreign investors some responsibility for ensuring that their activities within the country confer real economic benefit upon Canada. Thus, notable among the recommendations is the requirement that such corporations:

> "-develop as an integral part of the Canadian operation an autonomous capability for technological innovation, including research, development, engineering, industrial design and preproduction activities; and for production, marketing, purchasing and accounting:
>
> -retain in Canada a sufficient share of earnings to give strong financial support to the growth and entrepreneurial potential of the Canadian operation, having in mind a fair return to shareholders on capital invested; and
>
> - give appropriate support to recognized national objectives and established government programs, while resisting any direct or indirect pressure from foreign governments or associated companies to act in a contrary manner.[72]

Canadian foreign investment regulation thus presents us with a mechanism shaped by an interplay of economic, political and cultural factors. In sum, one can see in the considerations which have shaped Canadian attitudes towards foreign direct investment regulation, the realisation identified earlier, that is, the fact that foreign investment offers a mixture of costs and benefits to the host state and regulation ought to be directed at minimising its costs, while maximising the benefits.

---

[72] *Ibid.*

While the conclusion of the Free Trade Agreement indicates the desire to further liberalize the Canadian investment regulatory mechanism, it cannot be definitely seen as having thereby quelled the apprehension about the loss of Canadian economic and cultural sovereignty to the activities of foreign investors, particularly those based in the United States. The intense debate which had preceded the ratification of the Agreement by Canada was substantially dominated by expressions of such apprehension.[73] The conclusion of the Free Trade Agreement, despite this apprehension of the loss of Canadian sovereignty to its stronger partner,[74] reveals an overriding desire to improve the economic position of the country from, among other things, an improved investment climate.[75] To that extent, Canadian attitude toward foreign direct investment has undergone some change, albeit change limited to its treatment of foreign investors from the United States.

---

[73] See for example, M.M. Bowker, *On Guard for Thee: An Independent Analysis, Based on the Actual Text of the Canada-U.S. Free Trade Agreement* (Hull, Quebec: Voyageur, 1988)

[74] M. Leman, *Canadian-American Relations* (Ottawa: Minister of Supply and Services Canada, 1992) at 6.

[75] See for example the statement of the Hon. Tom Hockin, Minister of State Finance in the debate in the House of Commons,preceding the enactment of the Canada-United States Free Trade Agreement Implementation Act, in which he identifies the benefits accruing to Canada under the Agreement as including reduction in over-all consumer prices in Canada, increased opportunities for employment, protection of existing jobs, more competitive Canadian industries, and growth in Canadian manufacturing output. *House of Commons Debates. Official Report*, Vol. XIII, 1988, pp. 16673-77.

2. United States Foreign Investment Regulation

a. Foreign Investment Policy

The United States has traditionally maintained a liberal attitude towards the regulation of direct foreign investment.[76] In the words President George Bush:

> "The United States provides foreign investors fair, equitable, and nondiscriminatory treatment as a matter of both law and practice. While there are exceptions, generally related to national security, such exceptions are few; they limit foreign investment only in certain sectors, such as atomic energy, air and water transport and telecommunications. These exceptions are consistent with our international obligations".[77]

The impression then, is that, apart from a few exceptions, no significant restrictions exist on the entry of foreign investors into the United States and their activities subsequent to entry.[78] A closer look at foreign investment controls in the

---

[76] H.E. Bale, "The United States Policy Toward Inward Foreign Direct Investment" (1985) 18:2 Vand. J.T.L. 199, at 207. See also Deloitte, Haskins & Sells, *Doing Business in the United States of America - A Guide for the Foreign Investor* (Aug., 1981) at 2.

[77] President's Statement announcing United States Foreign Direct Investment Policy, December 26, 1991. Reprinted in 31 I.L.M. 488 (1992). The relatively liberal attitude has been attributed to three main factors: "(1) the fundamental market orientation of the United States economy and the absence of pervasive national governmental controls over the economy; (2) the historical experience of the United States in developing its economy through the early part of this century on the basis of foreign capital and immigration; and (3) the vast size of the United States economy in which foreign ownership of United States assets, albeit growing, is relatively small." *Supra* note 76 at 200.

[78] *Supra* note 76 at 206.

United States, however, reveals a picture which is quite different. This is evident from the restrictions on the entry of foreign investors into certain sectors of the United States economy, as well as reporting requirements after entry. It is clear from these that there has, since the mid-1970s, been a growing desire to check the inflow of foreign direct investment into the United States, as well as to monitor the activities of foreign investors upon entry.[79]

b. Foreign Investment Restrictions

To begin with, the United States, like any other country, has for a long time reserved certain sectors of its economy exclusively for its nationals. The national treatment of foreign investors, to the extent that it has existed, has therefore not been extended to these areas. Entry by foreign investors into such areas has either been severely restricted or prohibited; these include communications, aviation, shipping, energy resources, minerals, lands, banking, and defense contracting.[80] Thus, although national treatment is lauded as one of the pillars of United States' policy toward foreign direct investment,[81] exceptions to this rule are conceded.[82]

---

[79] W.H. Lash, "The Buck Stops Here: The Assault on Foreign Direct Investment in The United States" (1991) St. Louis Univ. L.J. 83-118.

[80] see G. Turner, "Exon-Florio: the Little Statute That Could Become a Big Headache for Foreign Investors" (1991) 4:2 Transnational Lawyer 701, pp. 708-711.

[81] Bale, *supra* note 76 at 207, where he states that "foreign nationals and companies are treated as favourably as nationals or companies of the United States with respect to the establishment and operation of enterprises in this country. Thus, with regard to antitrust, security, environmental, trade or other regulations, there is no differentiation between United

It is significant to note that in 1975, as part of the efforts to monitor the activities of foreign investors, the Committee on Foreign Investment in the United States (CFIUS) was established and charged with monitoring the impact of foreign direct and portfolio investment in the United States.[83] The Committee, among other things, is to review investments in the United States which, in its judgment, might have major implications for United States national interests.[84]

The CFIUS may therefore be seen as a review agency, and it is difficult to distinguish its essential function from that of a review agency like Canada's FIRA or Investment Canada. The impression then is that in the United States too, the same concerns necessitating the institutionalization of restrictions on foreign investment exist.

This observation becomes stronger when one observes other measures that have been taken to monitor the activities of foreign investors within the United States has mainly taken the form of reporting requirements which all investors within the country are to meet. Notable among the legislations imposing such requirements

---

States or foreign ownership in their application to business activities."

[82] *Ibid.* 209-213. These exceptions comprise "national security related exceptions", "state restrictions" and "federal reciprocity".

[83] *Ibid.*

[84] *Id.* subpara. 1(b)(3). It also has the responsibility of consulting with foreign governments on prospective major governmental investments in the United States and to make proposals for appropriate legislation to address pertinent issues. *Id.*, subpara. 2.

are the International Investment Survey Act of 1976 ("IISA")[85] and the Agricultural Foreign Investment Disclosure Act ("AFIDA").[86]

The promulgation of the IISA had been prompted by the desire to protect the country's lands and businesses; the fear ostensibly being that "the dollars being exported to purchase oil and foreign-produced consumer goods were being used to buy control of American lands and businesses".[87] What the law did was to confer

---

[85] P.L. 94-472, 90 Stat. 2059 (1976), 22 U.S.C. arts. 3101-8.

[86] 7 U.S.C. art. 3501. Other notable legislations comprise The Foreign Corrupt Practices Act of 1977, as amended by the Domestic and Foreign Investment Improved Disclosure Act of 1977 (requiring "anyone who acquires 5% or more of the equity securities of a U.S. company to register the transaction with the Securities and Exchange Commission, including such information as their citizenship and residence), and the Hart-Scott-Rodino Act (which "requires parties to a merger or acquisition that exceed certain size requirements to file with the Department of Justice and the Federal Trade Commission) 15 U.S.C. art. 18.

[87] See Congressional Record, vol. 122 Part 24, (1976) *Proceedings and Debates of the 94th Congress*, 2nd Session, (Washington: U.S. Government Printing Office, 1976) at 31594. Art. 3101(b) of the law, however, states that the purpose of the law is:

> "...to provide clear and unambiguous authority for the President to collect information on international investment and United States foreign trade in services, whether directly or by affiliates, including related information necessary for assessing the impact of such investment and trade, to authorize the collection and use of information on direct investments owned or controlled directly or indirectly by foreign governments or persons, and to provide analyses of such information to the Congress, the executive agencies, and the general public.
>
> It is the intent of the Congress, that information which is collected from the public under this Act be obtained with a minimum burden on business and other respondents and with no unnecessary duplication of effort consistent with the national interest in obtaining comprehensive and reliable information on international investment and trade in services."

power on the administrative authorities[88] to collect information on all types of foreign investments,[89] regardless of size or kind.

Regulations drawn up by the implementing authorities designated under both Acts define the precise limits and procedures for reporting.[90] Subject to exemptions expressly set out under these regulations,[91] persons affected by the legislation are

---

[88] The Treasury Department had the responsibility for gathering information relating to "portfolio" investments, while the Commerce Department collected information in respect of "direct" investments. The term "direct investment" is defined under the law to refer to investments which give the investor at least 10% over the enterprise in which the investment is made, while the term "portfolio investment" is used for all other cases. See 22 U.S.C. arts. 3102(10) & (11).

[89] The law applied only to investments that were "international", the term being defined to mean the acquisition by foreign persons of interests in U.S. property of U.S.-issued foreign property or foreign-issued securities. See *id.*, at art. 3102(9). See also 25 C.F.R. art. 806.7(i).

[90] See 31 C.F.R. art. 129.1 at et. seq. (1984).

[91] *Ibid.* Under the Treasury regulations for portfolio investments, U.S. issuers of security are exempted from filing any reports if the enterprise involved is a nonbank with assets below $1 billion, and in the case of a bank, assets below $2 billion. While companies with asset figures below $100 million are entirely exempted from the "issuer" reporting obligations, some companies with assets between $100 million and $1 billion may be required to file reports. (See 49 Fed. Reg. 48, 918 (1984)). In the case of U.S. security holders of records for foreign owners,, where the aggregate of securities being held on behalf of foreign investors is less than $10 million, such a person is also exempted from reporting under the IISA.

The exemptions under the Commerce Department Regulations are determined in accordance with three criteria concerning the business in which the reportable investment is being made: (i) the net income after taxes, whether positive or negative, (ii) total assets and (iii) sales or gross operating revenues excluding sales taxes. If, for the business involved, the figure for any one of these three criteria exceeds the stated exemption level a report must be filed. For inbound investments, the acquisition of more than a stated amount of U.S. real estate will also trigger the reporting requirements, regardless of the exemption level normally available. The exemption level for inbound investments, therefore,is the lower of the real estate limit and the normal exemption level.

required to file a series of reports regarding their business activities covering prescribed periods of time.[92]

Although no empirical investigation has been made to ascertain to what extent IISA's requirements have been perceived by foreign investors as unduly restrictive of their activities, it has been rightly opined that such requirements, in view of their complicated and demanding nature, cannot be lightly dismissed as being minimally burdensome.[93]

The controls and supervision the IISA established appear not to have quelled the concern about foreign control. The Agricultural Foreign Investment Disclosure Act ("AFIDA") was enacted two years after the IISA, out of similar concerns.[94] The new legislation imposed a system of supervision on the acquisition and transfer by

---

[92] The reports are of three main types: initial, periodic and benchmark. The initial report is required to be filed within forty-five days of a transaction that results in an inbound direct investment in a nonexempted enterprise. The periodic reports must be filed quarterly and annually for both inbound and outbound investments, while the benchmark reports are required only at five-year intervals. The exemption level for initial reports of inbound investment is $1,000,000 or 200 acres. For periodic reports concerning these investments and for reports of outbound investments, the exemption levels are $10,000,000 or $8,000,000 depending on the report involved. There is therefore a fairly low threshold for the initial report of inbound investment but levels eight to ten times greater for the periodic and outbound reports.

[93] *Ibid.*, at 73.

[94] See Congressional Record, vol. 124, Part 7, *Proceedings and Debates of the 95th Congress, 2nd Session.* (Washington: U.S. Government Printing Office, 1978), pp. 10097-10100. See also T. Schmidt, "Closing the Barndoor: A Suggested United States Response to International Restrictions on Foreign Acquisition of Agricultural Land (1980) 10 Cal. W. Intl. L.J. 536 at 539.

foreigners of United States agricultural land.[95] Thus, any acquisition or transfer by a foreigner[96] of any "nonexempted interest" in agricultural land had to be reported within 90 days of its occurrence.[97] As under IISA, exemptions are provided, but these are generally more restrictive than those under IISA.[98]

Other significant measures have been, and are being, taken to further enhance the regulation and monitoring of the activities of foreign investors within the United States. The most recent significant move in that direction took the form of the 1988 amendment to the Defense Production Act of 1950, otherwise referred to as the Exon-Florio Amendment.[99]

---

[95] The term "agricultural land" was defined to mean any land located in the United States that is currently used, or has been used in the preceding five years, for farming, ranching, forestry or timber production. The definition excludes land which is ten acres or below in the aggregate and the annual gross receipts from agricultural activities on the land do not exceed $1,000. See 7 C.F.R. art. 781.2(b).

[96] An entity is considered as foreign if it is organized or has its principal place of business outside the United States, regardless of the percentage of its ownership interests held by United States persons. But domestic entities which have their principal places of business in the United States would be considered foreign if foreign persons, in the aggregate, own 50% or more of the "interest" in the entity, or 10% or more of those interests are held by any one foreigner or group of foreigners acting in concert. (See 7 C.F.R. arts. 781.2(g)(2) & 781.3).

[97] 7 U.S.C. art. 3501(a); 7 C.F.R. art. 781.3(b).

[98] *Ibid.*, at 47. As the writer rightly observes, "the AFIDA regulations exclude only those parcels of land that, in the aggregate, are no larger than ten acres and which produce gross annual agricultural revenues of $1000 or less. For indirect interests in "reportable" parcels, the test for the reporting obligation is whether the foreigner's interest in the entity that holds the land is large enough to cause the entity itself to be considered a "foreign person" for purposes of AFIDA." See 7 C.F.R. arts. 781.2(b) & 781.3(b).

[99] *Ibid.*, at 88. See the Omnibus Trade and Competitiveness Act of 1988 50 U.S.C. App. art. 2170. The immediate catalyst for the promulgation of the amendment, was, it is

The amendment was inspired by the anxiety about the potentially harmful effects foreign investment could have on the United States, especially in the defense sector.[100] The amendment therefore empowers the U.S. President to review and block mergers, acquisitions or takeovers of U.S. firms in any industry by foreign persons, if they threaten to impair the country's "national security".[101] Under an amendment to Executive Order No. 11858,[102] the CFIUS is the institution charged with the responsibility of deciding "when a proposed acquisition or merger merits reviews, to conduct the investigation and to make formal recommendations to the President on whether a given transaction should be approved, modified or blocked."[103]

It is worthy of note that exercise of this power is not to be subject to judicial

---

believed, the attempted purchase of two United States companies with significant ties with the defense industry - Goodyear Tire and Rubber Company and Fairchild Semiconductor Corporation - by foreign investors. See *supra* note 80, pp. 712-13.

[100] *Supra* note 79, pp. 89-91.

[101] The term "national security" is not defined in the *Defense Production Act*. Neither is it defined in the proposed rules for the implementation of the amendment. See *Ibid.*, at p. 110. [the proposed rules, 54 Fed. Reg. 29,744 (1989) are codified at 31 C.F.R.pt. 800]. The impression therefore is that the President is to have a wide discretion in determining the precise limit of the term, on the circumstances of each case. The Act, however, stipulates [see 50 U.S.C. app. art. 2170(e) and (d)(1)] that in determining the impact a particular transaction has on national security, the President must consider domestic production needs, the ability and capacity of domestic industry to meet those needs,and how foreign control of the U.S. person would affect these factors. "If any credible evidence indicates that such control would threaten to impair the national security, the President may seek to block or otherwise restructure the transaction."

[102] 54 Fed. Reg. 779 (December 28, 1988).

[103] *Ibid.*

review.[104] Moreover, the definition given to a "U.S. person" under the accompanying regulations, is so broad as to include all foreigners who are engaged in commercial activity within the United States.[105]

Other potential instruments for restricting foreign investment in the United States include the Foreign Direct Investment and International Financial Data Improvements Act of 1990,[106] Bills H.R. 3039 and S. 1796, and the proposed Foreign Investment and Economic Security Act of 1991.[107]

Foreign investment regulation in the United States therefore manifests clearly the concerns by a host state about the adverse effects of foreign direct investment on its economy. The desire to guard against the loss of national sovereignty which foreign investment might bring, is thus equally strong in the United States. This is so, although the current attitude of the United States, as the Exon-Florio amendment shows, appear to be to base its restrictions on foreign investment primarily on

---

[104] 50 U.S.C. app. art 2170(d)(2) (Determinations under art. 2170(d) are immune from judicial review).

[105] The Proposed Regulations [see art. 800.210] define a U.S. person to mean "any entity engaged in interstate commerce in the United States, irrespective of the nationality of the controlling party." It has therefore been rightly observed that "The practical implication of defining a U.S. person so broadly is that the foreign investor must not only be wary of investments made within the United States, but also those investments outside U.S. borders that affect the control of U.S. assets." *Supra* note 80 at 727.

[106] 22 U.S.C. arts. 3141-46.

[107] For a discussion of these and other measures, see *supra* note 79, pp. 110-113.

national security grounds. One may wonder, however, whether the line between investments which affect national security and those which do not is necessarily clear. This uncertainty is even increased by the failure of the amendment to define the term "national security".[108]

The fact that these laws are in place in the United States proves that even in the case of a typical developed country, the fear of loss of state sovereignty due to the activities of foreign investors persists. The push for a liberal investment climate in other countries, especially developing ones, therefore appears surprising.[109] One may, however, glean from such an attitude the desire to ensure, at least, that foreign direct investment regulatory standards in other countries are at par with those in the United States. This is a fact which the negotiation leading to the conclusion of the Free Trade Agreement would seem to support.

---

[108] See the European Community's response to the U.S. President's statement, *supra* note 77, 299, *reprinted* in 31 I.L.M. 467 (1992).

[109] Not surprisingly, this seeming inconsistency has been criticised. See for example, statement of Elliot L. Richardson, Chairman of the Association of International Investment, before the U.S. House of Representatives, reprinted in *Foreign Investment in the United States* Hearing before the subcommittee on Economic Stabilization of the Committee on Banking, Finance and Urban Affairs, House of Representatives, 101 Congress, First Session, Nov. 15, 1989 (Washington: U.S. Govt. Printing Office, 1989) at 35.

CHAPTER TWO

THE CANADA-UNITED STATES FREE TRADE AGREEMENT AND THE REGULATION OF DIRECT FOREIGN INVESTMENT

1. Background to the Free Trade Agreement

The conclusion of the Free Trade Agreement between Canada and the United States marks the stabilisation of the trading relationship between the countries. Although significant trade relations have existed between both countries for a long period of time,[110] these would seem not to have been supported by any firm legal basis.[111] Indeed, the various trade disputes which have bedeviled the countries' trade

[110] Over 70 percent of Canadian export trade is with the United States, while over 20 percent of United States trade is with Canada. See Leman, *supra* note 74, at 2. Indeed, it has been observed that approximately one in five Canadian jobs depends on trade with the United States, while one in a hundred jobs in the United States depends on trade with Canada. See Statement of William Cavitt, Coordinator, U.S.-Canada FTA Negotiations, U.S. Dept. of Commerce, before the Committee on Small Business, U.S. House of Representatives, July 8, 1987. Reprinted in B.D. Reams, Jr., & M.A. Nelson, *United States-Canada Free-Trade Act: A Legislative History of the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 100-449* (New York: William S. Hein & Co., 1990) Vol. 3 at 37.

[111] Indeed, the opinion is that the trade relationship between the two countries had been largely taken for granted. See for example, the statement of William Lilley III, President, American Business Conference, before the Committee on Small Business, United States House of Representatives, July 8, 1987, in which he notes: "What is extraordinary about the trade relationship between the United States and Canada is not its vitality but rather the extent to which it has been taken for granted.." See Reams, *supra* note 110 at 80.

The notable exception to this has been the automotive trade between both countries, which has, since 1965, been stabilised with the conclusion of an Automotive Trade Pact. See U.S.-Canada Automotive Agreement Policy Research Project/University of Texas at Austin, *The U.S.-Canadian Automotive Products Agreement of 1965: An Evaluation for Its Twentieth Year* (Texas, 1985).

relationship[112] offers a stark testimony to this. The Free Trade Agreement would therefore seem to mark the search for the requisite firm basis for continuing the trading relationship between both countries. More importantly, the Agreement is meant to establish a free trading zone within which goods and services can move across state borders without the artificial trade barriers which had hitherto existed.[113]

However, as noted above, the Agreement was intended to achieve more than merely a liberalization of bilateral trade relations between the State parties;[114] of equal significance was the liberalization of foreign direct investment regulation. This is not surprising, in view of the significant investment relationship between both countries.[115]

While both parties did come to a consensus on the extent of liberalization, the negotiations which preceded it revealed the differing sensitivities held by the state parties on the issue. The State parties are seen as having taken different positions on the issue of the regulation of foreign direct investment under the Agreement: while the United States had made the issue of direct foreign investment top on its agenda at the negotiations, the primary Canadian objective was rather to secure a wider

---

[112] See Leman, *supra* note 74.

[113] *Free Trade Agreement*, art. 102(a).

[114] *Ibid.*

[115] *Supra* note 74 at 3.

access to the United States market for Canadian products.[116] Thus Canada ostensibly did not consider foreign investment regulation as a crucial issue under the Agreement, and may well have been content to leave it in its present state. In view of the difference in the stringency of the foreign investment regulation within the two countries, with Canada reputedly maintaining a stricter mechanism, there appears to have been considerable pressure on Canada to further liberalize its investment review mechanism to be at least at the level of that of the United States.[117] This lends credence to the view that it was Canada which had to make the concessions under the Investment Chapter of the Free Trade Agreement.[118] More significantly, the importance attached to the regulation of foreign direct investment under the Free Trade Agreement, largely at the insistence of the United States, fortifies the

---

[116] *Supra* note 56 at 405.

[117] This was acknowledged by United States negotiators of the Agreement. Peter Murphy, special negotiator for U.S./Canada Affairs, Office of the U.S. Trade Representative, in his prepared statement before the United States House of Representatives, Committee on Foreign Affairs (Subcommittees on International Economic Policy and Trade and on Western Hemisphere Affairs), noted:

> "A third area which is a point of contention in U.S.-Canadian relations is the treatment of foreign investment in Canada. Under the Government of Prime Minister Mulroney a significant liberalization has taken place in the Canadian investment climate in Canada. However, some outstanding problems for U.S. policy and U.S. business still remain. We would like to see all of these particular issues as well as questions of general Canadian direct investment policy negotiated to a successful conclusion. Our objective is to produce a Canadian policy environment as open to inflows of foreign direct investment as our own."

Reprinted in Reams, *supra* note 110, pp. 11-12. See also statement of William Cavitt, *ibid.*, at 42.

[118] *Supra* note 38 at 3.

argument about the relation between trade and investment, both of which are seen as complementary.[119]

2. The Investment Provisions of the Free Trade Agreement

The aspects of investment regulation covered under the Agreement comprise national treatment, performance requirements, monitoring, expropriation, transfers, dispute settlement, taxation and subsidies.[120]

It is significant to note at the outset that the Agreement does not generally require the dismantling by the State Parties of the mechanisms already in place in their respective countries regarding the regulation of foreign investment. As noted earlier, the Agreement "grandfathers" these provisions.[121] With the exception of provisions which require Canada to raise the threshold levels for review of

---

[119] Fontheim, G.W. & H. Gadbaw, "Trade Related Performance Requirements" (1980) 14 L. & Pol'y Int'l. Bus.

[120] Other aspects of the regulation of direct or portfolio investment not covered under the Agreement or to which the Agreement does not apply, is left to the Parties' respective rights and obligations under customary international law.See Article 1608(2). It is worth noting, however, that the Agreement specifically excludes the regulation of investments in the areas of government procurement, transportation, cultural industries, and financial services, with the exception of insurance. Again, under Annex 1607.3, para. 4, the oil and gas sector is exempted from the application of provisions of the Agreement which (1) prohibit the stipulation of a minimum proportion of equity to be held by nationals in an enterprise; and (2) raise the threshold level for review of an acquisition.

[121] Art. 1607(1).

investments, the Agreement appears to preserve the status quo.[122] It is thus necessary to ascertain the extent of the national treatment principle endorsed in the Agreement.

a. National Treatment

The fundamental guiding principle underlying the world trade system under the GATT - the national treatment principle - also underlies the foreign investment provisions of the Agreement; each Party is to accord an investor of the other Party[123] the same level of treatment it accords to its own nationals.[124] This, of course, is only a general rule; the Agreement spells out conditions under which the principle would

[122] The Agreement, however, permits a prompt renewal of any existing measures which do not conform to the provisions of the Agreement. Article 1607(1)(b). Under paragraph (1)(c), the non-conforming provision may be amended, provided it does not increase its nonconformity with the provisions of the Agreement.

[123] FTA, art. 1611. An "investor of a Party" is defined to comprise:

"(a) such Party or agency thereof;

(b) a province or state of such party or Agency thereof;

(c) a national of such Party;

(d) an entity ultimately controlled directly or indirectly through the ownership of voting interests by [one or more of the above persons]...

that makes or has made an investment."

[124] *Ibid.*, art. 105. Note, however, that a singular right is given to Canada to introduce a measure which may be inconsistent with the national treatment provision in respect of a business carried on by or on behalf of Canada or a province or a Crown corporation. Such a business, however, ought to be in existence at the time the Agreement enters into force.

not be applicable. The principle of national treatment therefore applies only to the extent specified in the Agreement.

National treatment of foreign investments is confined to a) the establishment of new business enterprises; b) the acquisition of business enterprises; c) the conduct and operation of business enterprises located in its territory, and d) the sale of business enterprises.[125]

Thus, for example, the State Parties are prohibited from requiring that a minimum equity level be held by their nationals in a business controlled[126] by an investor of the other State.[127] Furthermore, neither State Party is to effect a full or partial divestment of an investment on the grounds of the investor's nationality.

---

[125] *Ibid.*, art. 1602(1). For a province or state, the principle of national treatment means treatment to investors of a Party no less favourable than the most favourable treatment accorded investors of the country to which it belongs. See art. 1602.4.

[126] "Control" is defined under Article 1611 in the following terms:

"a) a business enterprise carried on by an entity, means

i) the ownership of all or substantially all of the assets used in carrying on the business enterprise; and

ii) includes, with respect of an entity that controls a business enterprise in the manner described in subparagraph (i), the ultimate direct or indirect control of such entity through the ownership of voting interests; and

b) a business enterprise other than a business enterprise carries on by an entity, means the ownership of all or substantially all of the assets used in carrying on the business enterprise."

[127] Art. 1602(2).

The principle of national treatment is made subject to "prudential fiduciary, health and safety, or consumer protection reasons."[128] In such an event, it appears that the onus is on the State Party concerned to establish that the different treatment meted out to the investor of the other Party is "equivalent in effect to the treatment accorded by the Party to its own investors for such reasons".[129]

b. Performance Requirements

i. Performance Requirements Provisions

Prominent among the investment provisions of the FTA is the prohibition of certain performance requirements. Such provisions would thus seem to have been designed to ensure that neither of the State Parties introduce investment policies which would undermine the free trade relationship established under the Agreement.[130]

---

[128] *Ibid.*, art. 1602(8)(a) & (b) and (9). In such cases, the Party resorting to such measures is required to notify the other Party of the measure. See also art. 1602(8)(c).

[129] *Ibid.*

[130] FTA., art. 2.

Although there appears to be no explicit performance requirements in the foreign investment laws of the United States,[131] such requirements have for sometime been part of the Canadian investment regulatory mechanism.[132] The existence of performance requirements in Canada is said to have been at its height in the early 1980s following the launching by Canada of its National Energy Program.[133] As noted earlier, it was the existence of certain performance requirements that had prompted the institution by the United States of a claim against Canada under the GATT dispute settlement mechanism, alleging the violation by Canada of its GATT obligations.[134] The issue of performance requirements has therefore been one concerning which Canada and the United States have had different attitudes.

Thus, it is not surprising that an Agreement intended to enhance the foreign investment relationship between the two countries should address the issue of

---

[131] It is worth noting, however, that certain economic measures adopted by the United States and other industrial countries, notably the grant of fiscal subsidies to investors, are considered also to have trade distorting effects. See UNCTC/UNCTAD *Trade Related Investment Measures, supra* note 30, pp. 72-74.

[132] *Supra* chapter one. See also G. Winham, "The Canadian Automobile Industry and Trade-related Performance Requirements (1984) 18:6 J. W. T. L. 471, who observes that since the mid-1920s,performance requirements have been an integral part of Canada's attempts to regulate its automobile industry.

[133] J.M. Spence, "Current Approaches to Foreign Investment Review in Canada" (1986) 31:3 McGill L.J. 508, pp. 519-521. One of the primary motivations for launching the program was the desire to ensure that control over industries within energy sector of the Canadian economy was firmly in the hands of Canadians. The stated objective was to ensure the attainment, by 1990, of fifty percent Canadian ownership in the oil and gas industry. See *The National Energy Program. Update 1982* (Ottawa: Minister of Supply and Services Canada, 1982) at 45.

[134] *Supra* note 235 and accompanying text.

performance requirements. The provisions of the FTA on performance requirements may thus be seen as seeking to curtail Canada's continued resort to undertakings by foreign investors as a prerequisite for the grant of permission to invest in Canada.[135]

To what extent are the State Parties prohibited from imposing performance requirements on investors from the other state? The performance requirements provisions of the Agreement addresses this issue by specifying the category of conditions which the State Parties are not permitted to impose.

The Agreement prohibits the imposition by any of the Parties of the requirement that "as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory", the investor:

"a) export a given level or percentage of goods or services;

b) substitute goods or services from the territory of such Party for imported goods or services;

c) purchase goods or services used by the investor in the territory of such Party or from suppliers located in such territory or accord a preference to goods or services produced in such territory; or

d) achieve a given level or percentage of domestic content."[136]

---

[135] This would add further validity to the view that it was Canada which indeed had to make the concessions under the investment chapter of the Free Trade Agreement. *Supra* note 56.

[136] *Free Trade Agreement*, art. 1603(1).

The prohibition against the imposition of these performance requirements does not operate only in relation to investors of the State Parties. There appears to have been the realization that the effects of performance requirements sought to be avoided could well come through the maintenance of such requirements in respect of investors from third countries. To avoid this, the Agreement also prohibits the imposition on investors of a third country similar requirements "which would have the effect of significantly affecting the trade relations of the original Parties."[137]

ii. The Relationship Between Trade and Investment

One issue which has assumed special importance in the area of foreign investment regulation in recent times is what linkages exist between foreign investment and trade regulation. The view that certain investment measures taken by states could have a direct or indirect impact on their trading relationships with other states appears to be widely recognised.[138] Indeed, the prominence attached to investment regulation under the Free Trade Agreement amply conveys this conviction. Commenting on this link, one author writes:

> "Investment and trade are inseparable. Trade barriers can be used to promote investment across borders in order to gain market access. Such barriers have led to the establishment of less efficient branch plants.

---

[137] *Ibid.*, art. 1603(2).

[138] See Fontheim & Gadbaw, *supra* note 119.

> Conversely, investment restrictions can be used to choke off trade where a local presence is essential to sales and service. Hence, a free trade agreement without the elimination of both trade and investment restrictions would not be a free trade agreement at all..."[139]

Investment restrictions, sometimes referred to as performance requirements, have usually been employed by states as an essential tool for the pursuit of their economic goals.[140] Those requirements which have a direct impact on the trade relationship between states are referred to as trade related investment measures (TRIMs) or Trade Related Performance Requirements (TRPRs).[141] Although there does not appear to be a generally agreed upon definition of what constitutes TRIMS, a number of measures have been identified as having the potential to distort international trade relations.[142] These measures usually take the form of requirements that an investor utilize a certain percentage of locally produced materials or services in its business activities in the host state (termed "local content requirements"), or that it exports a specified minimum percentage of its total products (export requirements).[143]

---

[139] F. Siddiqui, ed., *The Economic Impact and Implications of the Canada-U.S. Free Trade Agreement* (Lewiston, New York: Edwin Mellen Press, 1991) at 151.

[140] C.D. Wallace, et al., *Foreign Direct Investment in the 1990s. A New Climate in the Third World* (1990) at 8.

[141] Fontheim & Gadbaw, *supra* note 119 at 130, for example, define "TRIMs" as investment measures which are "intended to promote trade policy objectives".

[142] *Supra* note 30, pp. 11-13.

[143] *Ibid.* See also K. Schwarz, & B.A. Caplan, "Trade Related Investment Measures (TRIMS): Scrutiny in the GATT and Implications for Socialist Countries." (1987) 11 Hastings Intl. Comp. L. Rev. 55 at 57.

There are, however, other requirements that appear not to be directly related to trade.[144] For example, the investor may be required to employ a specified percentage of host state nationals. He or she may also be asked to license the technology to be used in the investment to citizens of the host country.[145]

Another notable form of performance requirements is the equity participation requirement, which prescribes a minimum percentage of local ownership of the investment project. Finally, there are employment, size, location, and financing requirements which prescribe the utilization of local labour and management of investment, the size, and the specific location of the project within the host country.[146]

These measures not only curtail the decision-making power of the foreign investor but also enable the countries pursuing them to benefit at the expense of other countries.[147]

The distortions such requirements cause to the international flow of goods and services explains why certain countries, led by the United States, have pressed for the

---

[144] *Supra* note 30 at 13. See also Schwarz & Caplan, *supra* note 143 at 57.

[145] *Supra* note 143.

[146] *Ibid.*

[147] In the case of export requirements, for instance, the investor may be compelled to sell his products on the foreign market at a price lower than what the domestic market offers.

extension of the GATT to cover them.[148]

Paragraph (a) of article 1603(1) of the Free Trade Agreement is clearly directed at export requirements, paragraphs (b) and (c) cover import substitution requirements, while local content requirements fall under paragraph (d). For Canada, this means that Investment Canada cannot continue with the practice of encouraging the giving of undertakings by United States firms desirous of investing in Canada.[149] The Agreement therefore substantially reduces, if not entirely, the potential conflicts between both countries on this issue, such as gave rise to the U.S. complaint before the GATT.

The Agreement, however, does not address other kinds of performance requirements not directly related to trade, discussed above.[150] This omission appears to indicate that the Parties were primarily preoccupied with measures which have been proven to have a clear adverse impact on trade.[151] This omission has been proffered as supporting the proposition that Canada could indeed continue to require of foreign investors undertakings concerning those requirements not specifically

---

[148] *Supra* note 30 at 1. See also U.S. President's Statement, *supra* note 77, 299.

[149] *Ibid.*

[150] *Supra* page 53.

[151] But see the modification in attitude under the NAFTA, *infra*, Chapter 5.

mentioned under this provision.[152] This possibility has, however, been substantially weakened by the more extensive provisions on performance requirements under the NAFTA. Thus, under NAFTA, the scope of performance requirement has been broadened to cover other conditions considered to have an effect on trade.[153]

Nevertheless, the performance requirements provisions of the Free Trade Agreement clearly manifest the conviction about the inseparability of trade and investment issues and provides some impetus to the search for an international regime for trade related investment measures. The endorsement of the same attitude under the NAFTA appears to reinforce this conviction. Given this trend, it would seem that it would be increasingly difficult for countries resorting to the use of performance requirements to justify such measures on grounds of economic expediency.[154]

---

[152] *Supra* note 56 at 417, who argues that in view of the exhaustiveness of the list concerning performance requirements, Investment Canada could still negotiate undertakings in respect of issues such as local employment, research and development expenditures, technology transfer and world product mandates.

[153] *Infra* Chapter Five.

[154] It is worth noting that under the Final Act of the Uruguay Round of the Multilateral Trade Negotiations, developing countries are permitted to derogate, temporarily, from the application of the provisions prohibiting the imposition of investment measures. See Article 4.

c. The Free Trade Agreement and Expropriation

i. Expropriation Provisions Under the Free Trade Agreement

Although the state Parties do not have any history regarding the expropriation of foreign investments, the Free Trade Agreement embodies significant provisions on the issue. The provisions, relatively short and concise, cover both outright expropriations and what may be termed "disguised" or "creeping" expropriations.[155]

The Agreement endorses the right of a host state to expropriate the property of an investor of the other Party, but only upon the fulfilment of certain conditions.[156]

Any expropriatory measure or series of measures ought to be: a) for a public purpose; b) in accordance with due process of law; c) on a non-discriminatory basis;

---

[155] The list of actions falling under the rubric of "disguised expropriation" is long, and includes restrictions on production (for example, prohibition of competition), restrictions under labour legislation (hiring and dismissal of employees, training requirements, minimum wages, etc), restrictions on establishing prices, financial restrictions, the exercise of shareholder rights by the host country as shareholder in a joint venture, etc. "Creeping expropriation" is described as "a series of measures or events attributable to the host country, none of which, taken alone, is significant enough to constitute a violation of investors' rights but which collectively dilute or even destroy the economic substance of the investment". The most subtle and efficient example given is constant administrative harassment by local authorities. See J. Voss, "The Protection and Promotion of Foreign Direct Investment in Developing Countries. Interests,Interdependencies, Intricacies" (1982) 31 I.C.L.Q. 686, at 702-3.

[156] FTA, art. 1605.

and d) followed with payment of prompt, adequate and effective compensation at fair market value.[157]

ii. The Issue of Expropriation

On no other issue has the rift between the developed and developing countries been sharper than on the issue of expropriation. The main issue here has been under what conditions a host state may expropriate foreign property situated in its territory.

It has been maintained by the developed nations that for expropriation to be legitimate under international law, it ought to satisfy an international minimum standard which required that such a measure be for a public purpose, non-discriminatory, and followed by prompt, adequate and effective compensation.[158]

These limitations are widely referred to as the "Hull Formula", being conditions which most of the developed countries led by the United States have insisted should govern the expropriation by a host state of alien property.[159]

---

[157] *Ibid.*

[158] M.H. Muller, "Compensation for Nationalization: A North-South Dialogue" (1981) 19 Col. J. Intl. L. 35 at 37.

[159] V.R. Koven, "Expropriation and the "Jurisprudence" of OPIC (Overseas Private Investment Corp.) 1981 22(2) Harv. Intl. L.J. 269-327. Indeed so strong is the U.S. position on this that it has made it an integral part of its foreign relations policy. Under its Foreign Assistance Law, [22 U.S.C.S. art 2370] the President can suspend assistance to the government of any country which:

The Hull Formula has been contested by most developing countries on the ground that it was well suited to the western industrialised countries whose high level of development, together with its emphasis on private property, could accommodate such limitations.[160] Developing countries, on the other hand, had exigent problems relating to development, problems which justified in some cases the taking of property in the interests of development.[161] The collective opposition to the imposition of such limitations on their powers of expropriation was moreover, motivated by the fact that most of them had no opportunity to play any active role in the evolution of such rules, having been under colonial rule at the time.[162]

> "(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership or association not less than 50 per centum beneficially owned by United States citizens, or
>
> (C) has imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or has taken other actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned,"

and the country, government agency, or government subdivision concerned fails within a prescribed time to "discharge its obligations under international law toward such citizen or entity,including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be.."

It is apparently for this reason that the United States has continued to maintain an embargo on all trade with Cuba - i.e., because of the Government of Cuba's failure to pay compensation for American assets in Cuba expropriated on or after January 1, 1959. See *ibid*, art. 2370(a).

[160] S.K.B. Asante, "International Transactions and National Development Goals", 10 Rev. Ghana L. 4.

[161] *Ibid.*

[162] F.C. Okoye, *International Law and the New African States* (London: Sweet & Maxwell, 1972).

The difference in state attitudes on this issue has been especially manifest in attempts to draw up a multilateral code to govern transnational corporations.[163] The provisions of the code on nationalization and expropriation have generated considerable controversy, and account largely for the delay in the adoption of the code.[164]

The opposition maintained by developing countries against these limitations appears to have weakened their force, at least as rules of public international law. As a result, the first two conditions have, with time, lost much of their weight, leaving the issue of compensation.[165] In other words, there is now no controversy as to whether a state may legitimately take property belonging to an alien.[166] There is, however, the recognition that an expropriation ought, at least, to be followed by some compensation.[167] Failure to pay compensation may therefore engage the state's

---

[163] Draft United Nations Code of Conduct for Transnational Corporations, reprinted in 33 I.L.M., 602 (1984).

[164] See United Nations Commission on Transnational Corporations, *Bilateral Investment Treaties* (London: Graham & Trotman, 1988) pp. 242-3. Consequently, the Draft provisions on nationalization and expropriation incorporate separate formulations of standards reflecting the respective position of developing and developed countries.

[165] P.H. Sherrye & S. Bainbridge, Note on *American International Corporation Inc. v. Islamic Republic of Iran* 24:4 Virg. J. Intl. L. 993, at 997.

[166] *Libyan American Oil Co (LIAMCO) v. Libya*, 20 I.L.M. 1, 46-58 (1981); *Texaco Overseas Petroleum Co. v. Libya*, 17 I.L.M. 1, 21 (1977), where it is stated: "The right of a State to nationalize is unquestionable today;... [it] is regarded as the expression of the State's territorial sovereignty.")

[167] *Supra* note 158 at 37. See also Okoye, *supra* note 162, at 182.

responsibility.[168] The thorny issue which has remained has thus been the amount of compensation payable, and which standards are to be employed in valuing the expropriated assets for such purposes.[169]

Decisions of tribunals and courts on the issue of the valuation of the assets of the foreign investor for purposes of compensation do not appear to leave any consistency as to the exact standard of measurement.[170] The situation is not helped by the fact that a lot of the disputes bordering on the amount of compensation payable have been settled through negotiations between the host and the home state of the foreign investor, and in cases where there are two or more foreign claimants, followed by a lump sum payment.[171]

Thus, principles regarding the valuation of property for purposes of compensation have not yet been settled. Significant difference in state attitudes exist between developed and developing countries on this issue. Basically, developed states

---

[168] *Supra* note 165 at 997.

[169] *Ibid.*

[170] *Supra* note 165. See, for instance, the contrasting opinions on the issue given by Judge Lagergren and Holtzman in the case of *INA Corp. v. The Islamic Republic of Iran* (Iran-United States Claims Tribunal, The Hague, August 13, 1985). While the former argued that although full compensation has been awarded in certain expropriation cases and had indeed been provided for in many bilateral treaties, such a standard was not mandated by international law. Arbitrator Holzman maintained an opposite view relying on General Assembly Resolution 1803 and the decisions of many arbitral awards, including the cases relied upon by Lagergren.

[171] S.K.B. Asante, "International Law and Foreign Investment: A Reappraisal" (1988) 37:3 I. C. L. Q. 588.

insist on a value equal to the fair market value of the assets of the investor.[172] Developing countries, on the other hand, maintain that it is the net book value of the assets which should determine the amount payable.[173]

The limitations set out under the Free Trade Agreement regarding expropriation may be seen as the classic manifestation of the Hull Formula.[174] Although the fact that the expropriation provisions of the investment chapter of the Agreement epitomize the Hull standard may not be surprising, in view of the fact that the Agreement is one between two developed countries, it does, however, portray the strong adherence by the parties to that standard. More importantly, it emphasises the likelihood that the Hull formula would also be the standard by which expropriatory actions in other states would be measured. Evidence of this is to be seen in the conclusion of Bilateral Investment Treaties with developing countries, discussed below.

---

[172] See for example, the 1967 O.E.C.D. Draft Convention on the Protection of Foreign Property [7 I.L.M., 117 (1968)], article 3(iii) of which requires a nationalizing state to pay "just" compensation representing the "genuine value" of the property. The comment accompanying the text construes this provision to mean the fair market value of the property.

[173] *Supra* note 158 at 45. The net book value is defined as the "uninflated, depreciated, historical value of the existing plant and facilities". *Ibid.* at 40.

[174] *Supra* note 59.

d. Other Investment Provisions of the Free Trade Agreement

i. Monitoring

Under the Agreement, a State Party may require a foreign investor to furnish it routinely with information regarding its investment. Although the State Party is required to treat such information as confidential, any disclosure which is mandated by the non-discrimination and good faith application of its laws, may be made.[175] The provisions therefore sanction the acquisition by the host state of adequate knowledge about the activities of investors within its borders.

The brevity with which the provisions on monitoring have been couched appear to indicate that the State Parties were desirous of maintaining their usual powers of monitoring the activities of foreign investors within their territories. The provisions of the Agreement would thus seem merely to endorse the various supervisory regulations and legislations already in existence in the two countries.

Thus, legislations like the International Investment Survey Act and the Agricultural Foreign Investment Disclosure Act of the United States would continue to apply without exception to Canadian investors within the United States.

---

[175] *Ibid.*, art. 1604.

ii. Taxation, Subsidies and Transfers

Other investment provisions of the Agreement relate to taxation and subsidies and the transfer of investment proceeds. The Agreement prohibits the Parties from preventing the transfer by a foreign investor either of profits, royalties, fees, interest and other earnings from his investment or the proceeds of the sale of all or any part of the investment. Proceeds from the partial or complete liquidation of the investment are also to be transferred in like manner.[176]

A restriction may however, be imposed on a transfer where the transfer is "inconsistent with any measure of general application relating to a) bankruptcy, insolvency or the protection of the rights of creditors; b; issuing, trading or dealing in securities; c) criminal or penal offenses; d) reports of currency transfers; e) withholding taxes; or f) ensuring the satisfaction of judgments in adjudicatory proceedings."[177]

On the issue of taxation and subsidies, the Agreement in effect allows the Parties to pursue their respective policies on subsidies and taxation for as long as these do not purport to nullify the benefits sought to be conferred under the Agreement. Hence subsidies and new taxation measures which have the effect of

---

[176] Art. 1606(1).

[177] *Ibid.*, paragraph 2.

arbitrarily and unjustifiably discriminating between the investors of the Parties, or constitute a "disguised restriction" on the benefits accorded under the Agreement, are to be made subject to the provisions of the Agreement.[178]

3. Foreign Investment Provisions and State Policies

Although the general status quo regarding foreign direct investment regulation by the State Parties is maintained, the Agreement makes a significant impact on respective state policies. Thus, apart from the impact of the performance requirements on Canadian foreign investment review processes, the review of the indirect acquisitions which had been used to some effect especially in the petroleum and cultural industries, is to phased out entirely.[179] Again, the policy whereby acquisition of assets above Can.$5 million had to be reviewed under the Investment Canada Act, would have to be altered; the Agreement stipulates a raise, over a three year period, from the present threshold to Can.$150 million in constant 1992 dollars.[180] The investment provisions therefore make a significant dent in the Canadian investment review mechanism in favour of United States investors.

---

[178] Art. 1609(1) & (2).

[179] *Ibid.*

[180] Art. 1607, para. 3, and Annex. 1607.3. For the implementation of that modification, see *Canada-United States Free Trade Agreement Implementation Act*, s. 130.

In the case of the United States, the provision under the Agreement requiring that no new restrictive measures be taken against investors of the other Party would mean that Canadian investors would be excluded from any future investment review process it sets up. Although the general preservation of the status quo would mean the continued application of already existing restrictions to Canadian investors, this is said to have generated some concern, especially in the face of the Exon Florio. Thus, Canada is known to have strongly suggested a revision of the Exon-Florio amendment to give special consideration to Canadian companies operating under the Free Trade Agreement.[181]

[181] *Id.*

CHAPTER THREE

LESSONS FOR DEVELOPING COUNTRIES

1. Developing Countries and the Regulation of Direct Foreign Investment

a. Traditional Attitudes Regarding Foreign Investment

Developing countries have continuously expressed concern about the relatively insignificant role they play in the international economic order, together with the increasing gap of development between them and developed industrial countries. In the area of foreign investment, developing country concerns have centred on the desire to maintain a firm control over their resources and to dictate the use to which they are to be put to further developmental goals. They have questioned the validity of, and sought to effect a change in, the public international law rules which are seen as having entrenched and served to perpetuate the inequities in international economic relations.[182] Latin American countries have been particularly active in this movement for change.[183]

These efforts have been pursued at various international fora, especially within the United Nations system, and the new principles of the international order desired

[182] See R.P. Anand, *International Law and the Developing Countries* (New Delhi: Banyan Publications, 1986) pp. 106-112.

[183] *Supra* note 171, pp. 591-2.

by developing countries have been endorsed in various resolutions of the General Assembly of the United Nations. Notable among these are the Resolution on the Permanent Sovereignty over Natural Resources, 1962,[184] which seeks to enunciate contemporary principles relating to the extent of a state's powers of control over its natural resources, and the Charter of Economic Rights and Duties of States of 1974.[185] The latter resolution, for example, makes a notable departure from the Hull Formula regarding expropriation.[186] In more recent times, the claims of developing countries have focused on the establishment of a New International Economic Order which would address more effectively the inequitable international economic system.[187]

---

[184] GA Resolution 1803 (XVII). G.A.O.R., 17th Session, Supp. 17, p. 15, provided, inter alia, that the "rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."

[185] GA Resolution 3281 (XXIX). The Charter reflected even more sharply the position of developing countries on such matters. See UN GAOR, Supp. (No 31) 50, at 52, U.N. Doc A/9030 (1974), reprinted in 14 I.L.M. 251 (1975).

[186] Article 2 of Chapter II of the Charter provides, inter alia, as follows:

"(2) Each State has the right:

> c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant rules and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

[187] United Nations, "Declaration on the Establishment of a New International Economic Order", G.A. Res. 3201 (S-VI), 29 U.N. GAOR Supp.(No 1) at 3, U.N. Doc.

Not surprisingly, developing countries have often come into conflict with developed industrial countries on such issues. In the area of foreign investment regulation, the difference in attitudes have been most manifest on issues of performance requirements and expropriation.

Equal, if not more significant, interest in the attitudes of developing countries on issues pertaining to their economic development are their attempts to integrate such attitudes into their national legislations. Their concerns continue to pervade their regulation of direct foreign investment within their countries.

b. Performance Requirements

The desire to ensure that the activities of foreign investors are well integrated into their countries' national economic or social objectives has often driven

---

A/9559 (1974) and G.A. Res. 3202 (S-VI), 29 U.N. GAOR Supp. (No 1) at 5, U.N. Doc. A/9559 (1974). See M. Bulajić, *Principles of International Development Law*(Netherlands: Martinus Nijhoff Publishers, 1993), 2nd ed., Chapter V. and J. Makarczyk, *Principles of a New International Economic Order* (Netherlands: Martinus Nijhoff Publishers, 1988) Part II.

The force of these resolutions as establishing valid rules of international law has not been without controversy. The controversy relates to a broader issue - the legal significance of General Assembly Resolutions. While some writers argue that such resolutions are of legal significance in either enunciating customary rules of international law or serving the progressive development of international law (see for example, Anand, *supra* note 182, at pp.115-6), others deny that it has any significance other than political. For a review of the debate, see, M.E. Ellis, "The New International Economic Order and General Assembly Resolutions: The Debate over the Legal Effects of General Assembly Resolutions Revisited(1985) 15 Cal. W. Intl. L.J. 647-704.

developing countries to impose various conditions on the foreign investor.[188] Performance requirements, perceived as necessary tools of economic development, have been among the tools by which such conditions have been imposed.[189]

These requirements are maintained by most developing countries in a variety of forms. Some of these countries leave no doubt as to their intention to make certain performance requirements an integral part of their foreign investment regulation. In other words, the grant of permission to invest is made contingent on the investor's proof of ability to achieve state prescribed objectives, such as the transfer of technology, creation of employment, or the significant export of products. For example, the 1981 Industrial Policy of Nepal partly states that:

> "Foreign investment in industrial enterprises will be welcomed on the grounds of obtaining access to desirable technology, import substitution or expansion of export markets, higher management standards and an increase in employment opportunities."[190]

A similar attitude is maintained by countries such as Mozambique,[191] Burma,[192]

---

[188] *Supra* note 30 at 1. See also Hadreep Puri and Delfino Bondad "TRIMSs Development Aspects and the General Agreement" in *Uruguay Round: Further Papers on Selected Issues* 55 at 57.

[189] *Ibid.*

[190] See Industrial Policy of His Majesty's Government of Nepal (2037 of 1981), FR.01. See ICSID, *Investment Laws of the World* (New York: Oceana Publications) vol VI.

[191] The Foreign Investment Law of Mozambique (1984) states in Article 3 as follows:

Ethiopia,[193] and Syria.[194]

One may, nevertheless find countries which maintain a liberal attitude on the issue of performance requirements, but these would seem to be rare. example of this position is to be seen in Malawi's investment law which permits investors to invest in any sector of the economy, with no restriction on ownership, the source of funding or size of the investment. Furthermore, no requirements for export are imposed on the investor.[195]

"Direct foreign investment in the People's Republic of Mozambique must contribute towards the economic and social development of the country, namely, by means of:

a) Increasing exports;

b) Substituting for imports;

c) Providing other benefits for the balance of payments;

d) Promoting technological development and an increase in productivity and efficiency;

e) Increasing the number of workplaces available and improving the skills of the country's labour-force.

[192] See *The Union of Burma Foreign Investment Law* No. 10/88 of November 30, 1988, Chapter 3, s. 4. ICSID, *op. cit*, vol 2.

[193] See *The Encouragement, Expansion and Coordination of Investment* Proclamation No. 15/1992, arts. 3 and 8. reproduced in ICSID, *op. cit.*,

[194] Law No. 10 of 1991, art. 4, reproduced in ICSID *op. cit.*

[195] Investment Promotion Act of Malawi (No. 28 of 1991) s. 5 - Schedule to the Act. Reproduced in ICSID,*Investment Laws*, vol.5.

A number of developing countries, however, have enacted investment provisions which combine performance requirements with a host of investment incentives. Thus, although such requirements may not be mandatory, investors willing to meet them become eligible for additional benefits otherwise inapplicable to their investments. For example, under the Investment Code of Ghana,[196] investors obtaining approval to conduct business in prescribed "priority areas"[197] of the economy qualify for a host of benefits and incentives. These include exemption from payment of customs import duties on plant, machinery and other accessories required for the business, investment allowances and reduced tax rates.[198]

Similarly, under the Promotion of Investments Act of Malaysia, extensive benefits in the form of tax deductions are prescribed for investments which are export oriented.[199] An investor who is engaged in export trade is allowed to deduct from taxable income expenses incurred in respect of export activities such as publicity and advertisement, the supply of samples to prospective customers outside Malaysia,

---

[196] *Investment Code*, 1985, P.N.D.C.L. 116, reproduced in ICSID, op. cit., vol.3.

[197] *Ibid.*, s. 12. See also *Investment Code (Areas of Special Priority) Instrument*, 1991. These areas include agriculture (the production, protection, processing and preservation of livestock), manufacturing (including the production of agricultural equipment, machinery, spare parts and machine tools), construction and building (embracing real estate development and road construction) and tourism.

[198] *Ibid.*

[199] 1986 *Promotion of Investments Act*. Chapters 4-6., reproduced in I.C.S.I.D *Investment Laws*, vol. 5

and the carrying out of export market research.[200]

There appears to be no indication that in the pursuit of their economic goals, developing countries are presently prepared to abandon their resort to such performance requirements. While the respective positions taken by western and developing countries on the issue do not appear to have been conclusively resolved,[201] the necessity for a consensus on a common ground on the issue cannot be overemphasized. While the prohibition of performance requirements under the Free Trade Agreement is confined to the state parties, it cannot be doubted that the parties' attitude towards a multilateral prohibition of the imposition of such requirements would reflect the position they have maintained under the Agreement. To that extent, developing countries could expect to face increased opposition against their resort to such measures.

In any case, the potential for resort to artificial barriers by the developed countries to counter the perceived threat of such performance requirements exists,[202]

---

[200] *Ibid.* s. 41. Similar provisions are to be found in the investment laws of Cameroon [Ordinance No. 90/007 of November 8, 1990 to institute the Investment Code of Cameroon, s. 10] and the Dominican Republic [Export Promotion Law No. 69 of November 8, 1979, article 1.].

[201] The issue of performance requirements has been addressed under the recently concluded Uruguay Round of the GATT multilateral trade talks. These talks have led to some consensus on the need to curtail resort to such requirements.

[202] See for example the Foreign Assistance Act of the United States [22 U.S.C.S. Art 2370, which forbids the provision of assistance on a loan basis "for construction or operation of any productive enterprise in any country where such enterprise will compete

and developing countries ought to advert their minds to this eventuality when these provisions are being applied.

c. Expropriation

Developing and developed countries generally continue to maintain their respective positions regarding the issue of expropriation. Some developing countries have indeed based their regulation of direct foreign investment on the principles enunciated in the resolutions mentioned above.[203] It is therefore hard to find reference to the Hull Formula in the investment legislation of developing countries.

United States enterprise unless such country has agreed that it will establish appropriate procedures to prevent the exportation for use or consumption in the United States of more than twenty per centum of the annual production of such facility during the life of the loan." Where the state concerned fails to implement such an agreement, "the President is authorized to establish necessary import controls to effectuate the agreement." These restrictions could only be lifted for reasons of national security interests, to be determined by the President.

The effect of this provision is essentially to curtail the utilization by a developing country of a performance requirement in the nature of an export requirement.

[203] See, for example, the Preamble to the Foreign Investment Law of the Peoples Republic of Mozambique, which states in part:

> "In Mozambique, the possibility of foreign capital participation in the country's economic life is established in the Constitution.
>
> The present law gives detailed form to this constitutional provision, defining the scope for foreign investment and setting out the basic guarantees for and obligations attached to foreign investors *in terms of the principles laid down in the Charter of Economic Rights and Duties approved by the General Assembly of the United Nations and set out in Resolution 3281 (XXIX).*" (emphasis added).

On the valuation of expropriated property, although a number of developing countries do not expressly provide for the standard of the net book value of the expropriated assets, their laws certainly fall far short of guaranteeing a standard equal to the fair market value of the expropriated assets.

For example, Article 16(1) of Mozambique's Foreign Investment Law provides:

> "The nationalization or expropriation of property rights which constitute direct foreign investment will only take place exceptionally and only on the basis of weighty considerations of the national interest, with the guarantee of *just and equitable* compensation transferable in freely convertible currency." (Emphasis added)[204]

This provision clearly leaves out considerations of promptness, adequacy and efficiency of the compensation payable, together with the fair market value as the appropriate standard of valuation.

---

[204] The Foreign Investment Act of Namibia, (Act no. 27 of 1990) also stipulates in Art. 11(2) as follows:

> "Where an enterprise or any part of an undertaking carries on by an enterprise, or any interest in or right over any property forming part of such undertaking is expropriated, the Government shall pay to the holder of the Certificate *just compensation* for such expropriation without undue delay and in freely convertible currency."(emphasis added).

Another example is the Nepalese Law (Industrial Enterprises Act 2038) of 1982, which states in s. 11:

> "Enterprises shall not be nationalised.
> Provided that, in case of nationalization under special circumstances, compensation shall be paid based on *just evaluation*." (emphasis added).

The Free Trade Agreement not surprisingly, adopts the fair market value standard.[205] This serves to reemphasise the traditional position developed countries, to which the state parties belong, have maintained. Here again, developing countries can expect to be faced with the prospect of having to soften up on their positions in any direct dealings with such countries. This trend of affairs, as is shown below, is already emerging with the conclusion of bilateral investment treaties between developing and developed countries, an activity in which both Canada and the United States are becoming increasingly involved.

[205] *Free Trade Agreement*, art. 1605(d).

2. The Growth of Bilateral Investment Treaties (BITs)

The collective position maintained by developing countries on the aspects of direct foreign investment appears to be threatened by the spate of the conclusion of bilateral investment treaties between them and developed countries.

The bilateral investment treaty is designed to assure foreign investors of a measure of stability and reliability in their dealings with both the host state and their home states.[206] This is sought to be achieved by providing a host of guarantees regarding the standard of treatment to be meted out to the investor by the host state. A core feature of such treaties has therefore been provisions designed to protect the investor's property from the extensive powers of the host state.[207]

The principal motivation for the conclusion of such treaties by developing countries has been the desire to attract foreign investment.[208] From the perspective of developed state parties to such treaties, the main objective for the conclusion of such treaties is to obtain legal protection for foreign investment under international law and thus reduce the non-commercial risks facing foreign investors in host

---

[206] United Nations Centre on Transnational Corporations/International Chamber of Commerce, *Bilateral Investment Treaties*, (New York: United Nations, 1992) ST/CTC/136, UNCTC, pp. iii-iv.

[207] *Ibid.*

[208] Supra note 206 at iii. See also *supra* note 18 at 82.

countries.[209] Thus, to the extent that foreign direct investment creates both costs and benefits for the host country, the conclusion of BITs may not necessarily lead to the economic development which developing countries may expect the activities of foreign investors to foster.

a. United States Bilateral Investment Treaties with Developing Countries

Bilateral Investment Treaties concluded by the United States with developing countries, are regarded as successors to earlier Friendship, Commerce, and Navigation treaties ("FCNs").[210] Bilateral Investment Treaties are designed for a similar purpose - to furnish protection to foreign investment within the developing country, thereby encouraging foreign investors from the United States to invest within such country.[211]

---

[209] *Supra* note 206 at iii.

[210] K.J. Vandevelde, "The Bilateral Investment Treaty Program of the United States" (1988) 21 Cornell Int'l L.J. 201, pp. 203-213. V.H. Ruttenberg, "The United States Bilateral Investment Treaty Program: Variations on the Model" (1987) 9 Univ. Penn. J. Int'l Bus. L., 121, pp. 123-126. Among the reasons cited for the change from FCNs to BITs is the discontent over the general nature of FCN provisions and their lack of attention to specific investment issues and concerns; the successful conclusion of BITs by European countries with developing and developed countries; and the increasing restrictions countries were placing on foreign investment.

[211] M.N. Leich, "Bilateral Investment Treaties", (Contemporary Practice of the United States Relating to International Law) 1990 84 A. J. I. L. 895 at 896, where the Acting Secretary of State of the U.S., Lawrence Eagleburger, stated in a report accompanying a letter of transmittal from President George Bush to the Senate, for its ratification of the concluded United States-Poland Bilateral Investment Treaty:

> "....the treaty will encourage, facilitate and protect U.S. investment and business activity in Poland, which can act as an important stimulus to

Such treaties, considered to be replications of a model treaty drafted by the United States, usually incorporate four core provisions:[212] a) a "treatment provision", which " imposes both relative and absolute standards on the host state's treatment of foreign investment"; b) an "expropriation provision", which prohibits expropriation of covered investment unless it meets certain criteria;[213] c) a "transfers provision", which "guarantees to the investor repatriation of the net profit arising from the investments within the host country"; and d) a "dispute provision" which gives investors the right to binding arbitration of disputes between the investor and the host state regarding the investment.

Although the exact impact such treaties make to the flow of foreign investments has not been empirically ascertained, the impression is that they make a positive impact the investment position of developing countries.[214]

---

economic reform. Potential U.S. investors who otherwise might perceive uncertainties in the current business climate in Poland will find considerable assurance in the protections provided by this treaty."

[212] Vandevelde, *supra* note 210, at p. 202; See also Gudgeon,K.S., "United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards" 1986 4 Int'l Tax & Bus. L. 105.

[213] *Ibid.*, at 202. The criteria identified by the writer is that of the traditional United States view of international law, comprising a "public purpose, nondiscriminatory, in accordance with due process of law, consistent with any agreements between the expropriating state and the expropriated investor, and accompanied by prompt, adequate, and effective compensation."

[214] For instance, it has been observed that the existence of a BIT may have a symbolic importance for developing countries in that it favourably affects risk perceptions of potential investors. For such investors, the BITs may thus offer subtle advantages beyond their substantive investment protections. See *supra* note 212, pp.133-134.

The recent surge in BIT negotiations and conclusions indicates that developing countries are interested in promoting these treaties. Developing countries see them as crucial to their efforts to attract foreign investment into their countries.[215]

The anticipated benefits which have inspired such efforts may, however, need to be viewed with caution. The mere conclusion of a BIT might not necessarily affect positively the flow of direct foreign investment into developing countries.[216]

Moreover, the collective position maintained by developing countries usually under the umbrella of the Group of 77 on those issues covered by such treaties, are largely inconsistent with some of the treaty provisions, as shown below. These contradictory attitudes towards essential issues of foreign direct investment may adversely affect the flow of direct foreign investment into their countries.

b. The Effect of BITs

The legal effect of such bilateral investment treaties is an issue which has not escaped controversy. The main points of contention are whether BITs place significant fetters on the host state party's discretion in foreign investment regulation,

---

[215] *Ibid.*

[216] In fact, U.S. negotiators of such treaties are known to decline to guarantee that such a result would follow from the conclusion of a bilateral investment treaty. See *supra* note 212.

and wider still, whether they, as examples of state practice, establish any principles having the force of customary public international law.

Some writers have argued that these treaties add to the substance of traditional customary principles regarding the protection of foreign investment.[217] Others, in a more cautious tone, indicate that BITs at least, have the potential of growing to represent state practice on the issue of foreign investment, with the effect that the provisions and principles they endorse would influence the content of customary international law. Muller, for example states that:

> "These bilateral agreements may be of limited practical use in the actual negotiations after nationalizations. From the point of view of emerging modern international law, however, their development can be of significance since these agreements will form part of state practice in this field, and might thus influence customary international law."[218]

Other writers, maintaining a different position, insist that such treaties do not in any way curtail the host state's discretionary powers nor establish a new corpus of public international legal principles applicable to the treatment of foreign investment. The coherence and consistency required to generate customary principles of law are

---

[217] F. A. Mann, "British Treaties for the Promotion and Protection of Investment" (1982) 52 B.Y.I.L. 241 at 249.

[218] *Supra* note 158 at 77.

seen as clearly absent in such treaties.[219] Moreover, the conclusion of BITs is seen as having been necessitated by the confusion which exists as to the existence of a customary law on investment protection.[220]

BITs are therefore seen as merely conferring special privileges - a "bundle of benefits and impositions" - upon the investors of the state parties, which are not intended to transcend the bounds of a purely bilateral relationship.[221]

It cannot be doubted, however, that at the very least, these treaties create binding obligations for the parties to it.[222] Considering the growing trend in the conclusion of such treaties,[223] their cumulative effect in limiting the discretion which developing countries have claimed in dealings with foreign investors, cannot be dismissed. If their conclusion is considered to be necessary in the drive to

---

[219] See also *supra* note 18 pp. 80-83.

[220] *Ibid.*

[221] *Supra* note 171 at 601.

[222] Such an obligation arises by virtue of the basic principle of treaty law, *pacta sunt servanda*, which requires that agreements entered into ought to be complied with in good faith. See the 1969 Vienna Convention on the Law of Treaties, art. 26, reprinted in International Legal Materials, vol. 8, (1969) at 679. See also the case of *INA Corp. v. The Islamic Republic of Iran* (Iran-United States Claims Tribunal, The Hague, August 13, 1985),in which the Tribunal held that the standard of valuation for purposes of compensation to the plaintiff for its shares expropriated by the Iranian government, was the Treaty of Amity between Iran and the United States.

[223] The most recent study shows that the number of bilateral investment treaties concluded has grown steadily from 83 treaties in the 1960s, to 176 in the 1970s, 377 at the end of 1989, and 440 by the first half of 1991. See *supra* note 206, at 3.

encourage foreign direct investment, then developing countries ought to be prepared to make concessions for such ends.

In this wise, the Canadian experience with the conclusion of the Free Trade Agreement becomes instructive. The concessions Canada had to make under the investment Chapter of the Agreement were certainly considered to be necessary when measured against the benefits the Agreement was seen as conferring on Canada.[224]

In the light of this, the continued claim by developing countries at international fora to wide sovereign rights in relation to the treatment of foreign investors would seem to be inconsistent with their attitudes towards the conclusion of bilateral investment treaties. Most, if not all, bilateral investment treaties between developing and developed countries reproduce standards which bear striking contrast to what developing countries traditionally lay claim to under international law, even in cases where their municipal legislation adopts a less stringent position. For example, on the issue of expropriation, the Egyptian Investment Law[225] states:

> The real estate properties of projects may not be expropriated, in whole or in part, except for reasons of public utility according to law, and against an equitable compensation based on the market value of such properties.."[226]

---

[224] *Supra* note 75 and accompanying text.

[225] Law No. 230 of 1989, reproduced in ICSID, *op. cit.*

[226] *Ibid.*, art. 8.

Although the concept of "market value" is explicitly included, thus conveying some liberalism regarding the amount of compensation payable, the terms "public utility" and "equitable compensation" import into the provision some uncertainty regarding the standards under which expropriation is to be carried out. Both terms are left undefined, thus creating the impression that it is an issue over which the state's discretion will be paramount.

It is perhaps for this reason that the Egypt-U.S. bilateral investment treaty[227] imposes more extensive limitations on the state's powers, by requiring that expropriation be non-discriminatory, followed by "prompt, adequate compensation freely realizable" and not in violation of any specific contractual engagement.[228] In a more detailed fashion the treaty proceeds to state that:

> "compensation shall be equivalent to the fair market value of the expropriated investment on the date of expropriation. The calculation of such compensation shall not reflect any reduction in such fair market value due to either prior public notice or announcement of the expropriatory action, or the expropriatory action. Such compensation shall include payments for delay as may be considered appropriate under international law, and shall be freely transferable at the prevailing rate of exchange for current transactions on the date of the expropriatory action."[229]

---

[227] *Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, 1982*, Consolidated Text, reproduced in ICSID, *Investment Promotion and Protection Treaties*, Issue June 1986, at 65.

[228] *Ibid.*

[229] *Id.*

Another example of the inconsistency between the provisions of BITs and the traditional position of developing countries is to be seen in the provision concerning performance requirements under the Cameroon-U.S. bilateral investment treaty. In spite of a generally liberal attitude by Cameroon towards performance requirements, the treaty removes resort to such requirements by providing that:

> "Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments owned by nationals or companies of the other Party, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements."[230]

The effect of this provision is effectively to remove any basis for resort to the imposition of performance requirements by either party. Whatever power Cameroon may have had to impose certain investment measures on investors from the United States, even within its relatively liberal investment regulatory framework, has been eliminated under the treaty.

Should the argument that such treaties do not impair the host state's sovereign powers over foreign investment even be entirely supported, the effect is likely to be counterproductive in terms of its impact on the attractiveness of the host state investment climate. If foreign investors are to be encouraged to invest within a

[230] *Treaty Between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment* article I(6), reproduced, in ICSID, *op. cit.*

particular country, a lot would seem to rest on the existence of a predictable atmosphere within which they may carry out their activities.[231] This argument, however, overlooks the element of predictability. The uncertainty which different attitudes generate might well deter potential foreign investors from considering a particular developing country as a suitable place for investment.[232]

---

[231] F. Nattier, "Regulation of TNCs: Latin American Actions in International Fora" (1984) 19:2 Texas Int'l L.J. 265.

[232] *Ibid.* The writer observes that to the extent that the hardliner positions maintained by developing countries are perceived as precursors of domestic policies, they weaken the predictability upon which confidence by transnational corporations in a particular country is based.

CHAPTER FOUR

DEVELOPING COUNTRIES IN CANADIAN AND UNITED STATES INVESTMENT POLICY

1. Foreign Direct Investment and Home Countries

A review of efforts by Canada and the United States to promote foreign investment within developing countries ought to be placed in the proper context. How extensive would such efforts be, and what effects do these have on both countries?

That foreign direct investment could offer both advantages and disadvantages for the home countries of foreign investors is a fact which is not disputed.[233] The establishment of a plant by an investor in a foreign country may generate an export demand for parent or home country goods, such as equipment, thereby having a positive impact on the balance-of-payments position of the home country.[234] Other benefits may include the preservation of foreign markets and the securing of sources of raw material not available in the home country.[235]

---

[233] *Supra* note 39.

[234] *Ibid.* See also Overseas Private Investment Corporation, Annual Report, 1988 (Washington, D.C.: O.P.I.C., 1988) at 13.

[235] R.K. Paterson, *Canadian Regulation of International Trade and Investment* (Toronto: Carswell, 1986) at 355.

On the other hand, the activity of the investor may have a negative effect on the home country. Thus, where the foreign market is supplied by the subsidiary of the investor in the host country rather than from the parent company or other home country enterprises, this would produce a negative effect on the balance-of-payment position of the home country. A similar effect would also be produced where the output of the subsidiary is exported back to the parent or home country or competes with other home country enterprises in the home or third markets.[236]

The examination of Canadian and United States efforts to promote foreign direct investment in developing countries reveals the extent to which these considerations have shaped such measures and are likely to affect continued promotion of investment in such countries.

2. United States Foreign Investment Promotion Programs

a. The United States' Investment Guaranty Programme

The guaranty program originated in 1947 as part of the European Recovery Program,[237] but has since 1959 focused on encouraging investment by American

---

[236] *Supra* note 39.

[237] R. Stilwell, "Encouraging Investment in LDCs: the United States Investment Guaranty Program" (1982) 8 Brooklyn J. Int'l L. 365, 366. See also U.S. House of Representatives Committee on Foreign Affairs, *The Overseas Private Investment Corporation: A Critical Analysis* (New York: Arno Press, 1976) pp. 5-6., and T. Meron, *Investment*

investors within less developed countries (LDCs).[238]

The objective of the program, administered by the Overseas Private Investment Corporation (OPIC),[239] is "to mobilize and facilitate the participation of the United States private capital and skills in the economic and social development of less-developed countries and areas, thereby complementing the development assistance objectives of the United States."[240]

In accordance with its objective, the Corporation is authorized to issue guarantees to encourage and support those private investments in LDCs which are sensitive and responsive to the special needs and requirements of their economies and which contribute to the social and economic development of their people.[241]

Insurance in International Law (New York: Oceana Publication, 1976) pp. 49-50.

[238] The indicia for the determination of which countries were eligible under the program, were spelt out in the form of the level of the per capita income of the country concerned. The least level required was raised from $450.00 to $520.00 for the poorest developing countries, while the minimum level for least-developed countries was a maximum of $1,000.00.

[239] The O.P.I.C was established in 1969 under the *Foreign Assistance Act* of 1969, 83 Stat. 805, since amended. See particularly *The Overseas Private Investment Corporation Amendments Act* of 1974, 88 Stat. 763; 22 U.S.C.A. art 2191-2200a (Supp. 1975). Its establishment as a form of a government corporation, instead of "as an administrative division of the Government, was based on the belief that corporate management is preferable where a federal government activity is predominantly of a business nature, is revenue producing and potentially self-sustaining, involves numerous business type transactions with the public and requires greater flexibility than the governmental annual appropriation budget would permit"- statement of the President of the O.P.I.C. See Meron, *supra* note 237, at 50.

[240] 22 U.S.C. art. 2191 (1976).

[241] *Ibid.*

The activities of the Corporation include conducting feasibility studies of potential projects in LDCs on a cost-sharing basis with the potential foreign investor, and making loans to firms investing in LDCs.[242] The investor is then reimbursed up to 50% of any agreed upon price of the survey.

The Corporation also provides insurance cover for investors desirous of investing in the countries covered by the program.[243] The foreign investor may be insured against a number of risks. These risks are apparently perceived as factors which discourage foreign investment within developing countries. They comprise:

> "(A) inability to convert into United States dollars other currencies, or credits in such currencies, received as earnings or profits from the approved project, as repayment or return of the investment therein, in whole or in part, or as compensation for the sale or disposition of all or any part thereof;
>
> (B) loss of investment, in whole or in part, in the approved project due to expropriation or confiscation by action of a foreign government;
>
> (C) loss due to war, revolution, insurrection, or civil strife; and
>
> (D) loss due to business interruption caused by any of the risks set forth in subparagraphs (A), (B) and (C)."[244]

---

[242] *Ibid.*, art. 2194.

[243] *Id.*

[244] 22 U.S.C. 2194(a)(1). Article 2198 defines "expropriation" as including, but not limited to:

> "any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor with respect to a project, where such abrogation, repudiation, or impairment is not caused by the investor's own

Again, the Corporation may, in the case of small business, pay for the fees of the licensed insurance brokers chargeable on services provided by the Corporation through them.[245]

The advantages of the scheme have been lauded by various writers. OPIC agreements, being largely procedural, are seen as being less sensitive politically compared to full BITs which create reciprocal international legal obligations concerning the treatment of investors.[246] In particular, several Latin American countries, which have been liberalizing their investment rules, have been more willing to conclude OPIC agreements than full bilateral investment treaties (BITs), in view of the former's less onerous nature.[247]

It has also been observed that some developing countries interested in improving their investment climates have consulted with OPIC about policy reforms that would help to attract investment. [248]

---

fault or misconduct, and materially adversely affects the continued operation of the project."

[245] See U.S. House of Representatives Committee on Foreign Affairs, *The Overseas Private Investment Corporation: A Critical Analysis*, (1976) *op. cit.* pp. 14-24.

[246] A.C. Brennglass, *The Overseas Private Investment Corporation* (New York: Praeger Publishers, 1983).

[247] *Ibid.*

[248] *Id.*

Like the bilateral investment treaty program, the amount of additional investment in LDCs due to the availability of OPIC insurance and financing is difficult to determine. However, "there is a general consensus that OPIC programs are an effective way of encouraging the flow of capital and technology to the Third World."[249]

c. Limitations of the Guaranty Programme

It worth noting, however, that the guaranty program pursued under the Corporation is not entirely motivated by altruistic considerations. The pursuit of the program appears to be dictated by national economic interests and therefore the desire to avoid any potential adverse effects of such a program on the United States economy.

The potential negative effects of investment abroad by companies based in the United States have been perceived, especially in the area of employment. One study commissioned by the state had concluded that in the short run, at least, foreign investment by American investors was likely to have negative effects on the employment situation in the United States.[250] In other words, the export of capital and technology by United States-based firms was seen as most likely to cause a

---

[249] *Id.*

[250] P.B. Musgrove, *Direct Investment Abroad and the Multinationals; Effects on the United States* (Washington: United States Government Printing Office, 1975) at 32. This point is said to have been emphasised by some labour union leaders who had opposed the program. See *supra* note 246, pp. 54-55.

diminution in the ability of the firm concerned to maintain its employment capacity within the United States. Amendments were therefore made to the Charter of the Corporation, obliging it to refuse to issue a guaranty in respect of any proposed project which was likely to reduce by a significant margin, the investor's employee level in the United States.[251] Thus, under its charter, the Corporation is to refuse to issue:

> "any contract of insurance or reinsurance, or any guaranty, or to enter into any agreement to provide financing for an eligible investor's proposed investment if the Corporation determines that *such investment is likely to cause such investor (or the sponsor of an investment project in which such investor is involved) significantly to reduce the number of his employees in the United States* ..."[252] (emphasis added)

The amendment is intended to apply in cases where such an event is not likely, that is, where the commodity to be manufactured by the investor in the host country is substantially the same product for substantially the same market as the investor's United States production.[253] A further amendment of the OPIC Charter in 1976 required the Corporation to refuse to insure projects which it considered likely to reduce significantly the number of United States employees.[254]

---

[251] 22 U.S.C. art. 2191(1).

[252] *Ibid.*

[253] *Id.*

[254] *Ibid.*, para. k(1).

It is also significant to note that in 1971, the Charter of the OPIC was amended to include a trade purpose to the program's objectives.[255] The corporation was thus mandated to seek and to support those developmental projects which have positive trade benefits for the United States. The amendments oblige the corporation to decline to issue the requisite guarantee to any project which would reduce substantially the positive trade benefits likely to accrue to the United States from the investment.[256] In a significant move, the Corporation's Board of Directors was enlarged to include the United States Trade Representative.[257]

The OPIC program may already have made an impact on the foreign investment policies of LDCs desirous of attracting American investors into their countries. The Corporation has been known to play a role in encouraging LDC policy reform by declining to insure projects which are subject to performance requirements and which are likely to reduce the expected trade benefits to the United States by 50 percent or more.[258]

---

[255] *Ibid.*, para. m.

[256] *Id.* Under the article, the Corporation undertakes:

"to refuse to insure, reinsure, or finance any investment subject to performance requirements which would reduce substantially the positive trade benefits likely to accrue to the United States from the investment."

[257] U.S.C. art. 2193(b).

[258] *Ibid.*, at 14.

The positive effects of the investment promotion scheme under the guaranty programme on direct investment flows to developing countries is therefore necessarily limited.

As a policy tool for the promotion of foreign direct investment in developing countries, the U.S. Investment Guaranty Program would seem to be more a tool for strengthening the U.S.'s economic position, than one primarily dedicated to the promotion of foreign investment in developing countries.

Although no policy statements appear to have been issued on whether the OPIC program would in any way be adversely affected by the conclusion of the FTA, there does not appear to be any indication for hoping that the restrictions imposed on the administration of the guaranty program in the U.S.' economic interest would be relaxed in favour of an all-out promotion of foreign direct investment in LDCs.

3. Canadian Promotion of Foreign Direct Investment in Developing Countries

a. The Canadian Investment Insurance Scheme

Canada maintains a policy largely similar to that in the United States, for the purpose of encouraging foreign investment by Canadian investors in developing countries. An investment insurance program is administered by the country's Export

Development Corporation (EDC).[259] Further promotion activities are conducted by the Canadian International Development Agency (CIDA) as part of its primary duty of implementing Canada's official development assistance program.[260]

The risks which the Export Development Corporation is authorised to insure fall into categories similar to those prescribed under the United States Guaranty Program. They cover:

> (a) war, riot, insurrection, revolution or rebellion in that country;
>
> (b) the expropriation, confiscation or deprivation of the use of, or the arbitrary seizure of, any property by a government, or an agency thereof, in that country;
>
> (c) any action by a government, or an agency thereof, in that country, other than action of a kind described in paragraph (b), that deprives the investor of any rights in, or in connection with, an investment; and
>
> (d) any action by a government, or an agency thereof, in that country that prohibits or restricts the transfer of any money or the removal of any property from that country."[261]

In ascertaining the significance of the insurance scheme for developing countries, one notable element is the requirement that the proposed investment

---

[259] *Export Development Act.* R.S., c. E-18, s.1. For a more detailed overview of the Corporation's activities, see Paterson, *supra* note 235, pp. 351-367.

[260] Such promotion activities are usually conducted under CIDA's Industrial Cooperation Program. See CIDA, Public Affairs Branch, *The Industrial Cooperation Program* (Hull: Minister of Supply and Services Canada, 1989). These include preliminary studies on capital projects contemplated by the investor; support for the capital project; rehabilitation of industrial plants; industrial planning; and developmental support.

[261] *Ibid.*, s. 34.

benefit both Canada and the host state.[262] It is submitted that while this requirement may be met in a lot of the investment proposals brought before the E.D.C., it nevertheless effectively precludes support for an investment which may benefit the host developing state but threaten to have adverse consequences for Canada. Thus, although the objectives of the requirement are not necessarily mutually contradictory, the potential for contradiction is real, as the U.S. experience shows, and the said requirement ensures that in any such event, the Canadian national interest would not be undermined.

4. Conclusion

The above shows that the continued support by both countries for the encouragement of investment within developing countries is limited by the necessity for such support to be compatible with home country needs.

Although there is nothing reprehensible in the efforts of countries to promote investment within developing countries while taking steps to ensure that such promotion efforts do not have adverse consequences for them, the point is that such efforts, though laudable, ought to be viewed by developing countries in their proper context. Moreover, with a heightened interest in encouraging investment in their

[262] *Export Development Act*, s. subsequently repealed, but the requirement persists in the nature of an administrative consideration. See Paterson, *supra* note 235, at 355.

countries, both state parties to the Free Trade Agreement may indeed be less inclined to make the encouragement of foreign direct investment in developing countries by home firms, a strong instrument of state policy.

CHAPTER FIVE

THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

1. Introduction

The NAFTA represents a development upon what had initially commenced as negotiations for a U.S.-Mexico Free Trade Agreement.[263] In terms of its geographical and population coverage, the NAFTA represents the first free trade agreement of its kind between two developed countries and a developing country.[264]

---

[263] Canada had shown an interest in the negotiations from its outset and had participated as an observer, and then finally indicated its desire to see the negotiations expanded to include Canada for the establishment of a wider Free Trade Agreement embracing the whole of North America. See Investment Canada, *Canada-U.S.-Mexico Free Trade Negotiations: The Rationale And The Investment Dimension* (1990), esp. pp. 3-10. In Canada's estimation, the benefits accruing under a trilateral relationship would far exceed one in which both Canada and Mexico maintained separate bilateral free trade arrangements with the United States.

The desire to join the United States-Mexico free trade negotiations appear also to have been largely motivated by the apprehension of the adverse effects a separate United States-Mexico Free Trade Agreement would have on the Canadian-United States trade relationship. In the words of Investment Canada:

> "A Mexico\U.S. free trade agreement would certainly undermine Canada's current advantage as the sole country having assured and free access to the U.S. market.... Mexico's investment gains could be at the expense of Canada, although this presumes a zero sum game.." *Ibid.*

[264] Perhaps the closest comparison of any such arrangement may be found in the Agreement between the European Economic Community (EEC) and the African, Caribbean and Pacific countries (ACP) otherwise known as the Lome Convention. There are, however,striking differences between the two. The Lome Convention does not establish a Free Trade area among the state Parties. Under the Convention, the EEC accords preferential treatment to specified goods originating from certain African, Caribbean and Pacific countries, by declining to impose the same level of tariffs which is generally imposed on all goods entering the Community's Common Market. For a more detailed discussion of

The issue of disparities in state attitudes regarding the issues covered under the Agreement would therefore seem to be greater under NAFTA than under the Canada-U.S. Free Trade Agreement.[265]

2. The Investment Provisions of the NAFTA

In several respects, the provisions on investment in the NAFTA are more detailed and comprehensive than those in the FTA. This is especially manifest in the provisions regarding the treatment of investors, performance requirements and expropriation. The NAFTA also breaks new ground in the area of the settlement of investment disputes by establishing a separate dispute settlement mechanism for investment disputes that may arise under the Agreement.[266]

---

the scope of the Convention, see W. Benedek, "The LOME Convention and the International Law of Development: A Concretisation of the New International Economic Order?" (1982) 26 J.A.L. 74-93.

[265] For example, one writer, commenting on Mexico's traditional stance on a number of foreign investment issues, notes that "rather than become a trusted ally of the U.S., Mexico has chosen to be an important leader of the Third World bloc with which the United States has often been at odds." See S. Zamora, "The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement" (1993) 24:2 L. & Pol'y. Int'l. Bus. 391, at 394.

[266] See Section B of Chapter 11, comprising Articles 1115-1138. The singular dispute settlement mechanism is designed to operate alongside the general dispute settlement procedures established under Chapter 20 of the Agreement. The rationale for this is the desire to establish a mechanism for the settlement of investment disputes "that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."

The said section is replete with detailed rules regarding the institution of claims, the methods for settling these claims, the constitution of a tribunal of arbitration, the place of arbitration, and the finality and enforcement of an award.

One notable peculiarity in the investment chapter of the NAFTA is the delineation of investors of the Parties and their investments; it is evident that the provisions are not only concerned with the treatment to be meted out to *investors* of the parties, but also with the treatment received by the investors' *investments*.[267] The provisions on monitoring under the FTA are now stipulated as an exception to a national treatment and most-favoured-nation standard.[268]

a. National Treatment

The provisions on national treatment[269] closely resemble those under the FTA regarding its scope.[270] As noted above, the national treatment covers both investors of the Parties and the investments established by them. The exceptions to the

[267] See for example, Art. 1102, which addresses the issue of national treatment. Paragraph 1 is addressed to investors while paragraph 2 is addressed to the "investments of investors". Otherwise, the same language is used in both paragraphs. Paragraph 3 makes the point even clearer: "The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, or the Party of which it forms a part." The same delineation is employed in Articles 1104 (Standard of Treatment), 1105 (Minimum Standard of Treatment), 1106 (Performance Requirements).

[268] See art. 1111(2).

[269] NAFTA, art. 1102.

[270] *Id.* National treatment covers the establishment, acquisition, expansion, management, conduct, operation and sale or other dispositions of investments of the business enterprises located within the state Party's territory. The only noticeable difference is the addition of the term "management".

national treatment rule stipulated under the FTA,[271] have also been abandoned under the NAFTA.[272] So are the provisions according certain preferential rights to Canada.[273]

Again, unlike the FTA, the principle of national treatment under the NAFTA is buttressed by provisions on most-favoured-nation treatment[274] and minimum standard of treatment.[275] The cumulative effect of these additional provisions would

---

[271] *Free Trade Agreement*, art. 1602(8).

[272] Under Article 1111 of NAFTA, however, a Party is permitted to adopt or maintain measures that establish special formalities for the establishment of investments by investors of another Party, on the condition that those formalities do not materially damage the protections otherwise accorded under the investment Chapter. Again, the Party may require the investor or its investment located within its territory, to furnish it with "routine information concerning that investment solely for informational or statistical purposes."

[273] *Ibid.*, art. 1602(5), (6) & (7). These, as noted earlier, relate to Canada's right to introduce new measures, subject to specified limitations, in respect of businesses carried on its behalf or on behalf of a province or a Crown corporation. It is worth noting, however, that all three Parties to the NAFTA are permitted to make, and have indeed made, reservations regarding the national treatment and other provisions of the Agreement. See Art. 1101(1)(b) and Annexes I, II, III and of the Agreement.

[274] NAFTA, art. 1103, which requires that the each Party accord to "investors" and the "investments of investors" of another Party "treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion,management, conduct, operation, and sale or other disposition of investments." Article 1104 stipulates that "Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103." It is worth noting, however, that under Article 1108(7), "subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance", will not be considered as violative of either the national treatment or most-favoured-nation treatment.

[275] *Ibid.*, art. 1105, which stipulates, in relation to the investments of investors, "treatment in accordance with international law, including fair and equitable treatment and full protection and security." In cases where losses have been suffered by the investments of the investors of another Party, the host state is required to accord the investors affected, together with the investments concerned, "non-discriminatory treatment with respect to

seem to be the establishment of a yardstick against which the national treatment standard is to be measured. In other words, a Party may still be in violation of the Agreement even if the standard of treatment meted out to foreign investors is the same as that accorded its own nationals.

b. Performance Requirements

The observation as to the more detailed nature of the NAFTA over the FTA in its investment provisions is most evident on the issue of performance requirements. The NAFTA sets out with a greater degree of specificity[276] and exhaustiveness the type of investment related performance requirements that would be considered intolerable under the Agreement. The general prohibition against performance requirements is also bolstered by Article 1107 under which the Parties

---

measures it adopts or maintains" pertaining to such losses. The only exception in the latter case would arise where subsidies or grants have been awarded by the host state which are not violative of the national treatment standard.

[276] The NAFTA provisions generally employ a more direct diction than those of the FTA. The opening paragraphs on the issue are revealing. Article 1603(1) of the FTA states:

> "Neither Party shall impose on an investor of the other Party, as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a requirement to:..."

Contrast this with Article 1106 of the NAFTA:

> "No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investor of a Party or of a non-Party in its territory:..."

are precluded from requiring an investor to appoint persons of any prescribed nationality to any of the enterprise's senior management positions.[277]

The performance requirements prohibited under the NAFTA goes beyond the minimum export, domestic import substitution, domestic purchase and local content stipulations of the FTA.[278] Four additional performance requirements are proscribed. These comprise a) the relation of the volume or value of the investor's imports to his exports or to the amount of foreign exchange earned from the investment; b) the restriction of the investor's sales within the territory in relation to the volume or value of his exports or foreign exchange earnings; c) the requirement that the investor serve as the exclusive supplier of the goods it produces or the services it provides to a specific region or world market; and d) with an exception,[279] the requirement to transfer technology or other proprietary knowledge to a person within the host state.[280]

---

[277] The only permissible requirement of such a kind would be cases in which the Party prescribes that a majority of any committee of the board of directors, or the board itself, be made up of persons of a particular nationality or resident within its territory "provided that the requirement does not materially impair the ability of the investor to exercise control over its investment." See NAFTA art. 1107(2).

[278] FTA art. 1603(1).

[279] NAFTA art. 1107. The exception applies in cases where the requirement that a particular technology be used is necessary to meet "generally applicable health, safety or environmental requirements", and where "the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement."

[280] *Ibid.*

Furthermore, these requirements are not to be made the basis for the receipt or continued receipt of an advantage in relation to an investment.[281] It is worth noting, however, that the NAFTA permits the imposition of domestic content requirements in certain circumstances, but these are strictly limited.[282]

It can be seen therefore that the reach of the performance requirements provisions of the NAFTA are not only confined to requirements which are directly related to trade, as in the case of the Free Trade Agreement.

c. Expropriation

State Parties cannot take an expropriatory measure unless it is in accordance with due process of law.[283] This limitation is further strengthened by the provision

---

[281] *Ibid.* The exception prescribed here is in respect of requirements concerning the location of production, the provision of a service, training or employment of workers, construction or expansion of particular facilities, or the carrying out of research and development.

[282] NAFTA arts. 1106(1)(b) & (c), (3)(a) & (b) and 1106(6). These comprise cases in which measures are taken:

> "(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
>
> (b) necessary to protect human, animal or plant life or health; or
>
> (c) necessary for the conservation of living or non-living exhaustible natural resources."

[283] FTA art. 1605(b).

entitling foreign investors to a minimum standard of treatment.[284]

The provision for compensation abandons the "prompt, adequate and effective" standard[285] in favour of detailed rules regarding the valuation of the expropriated investment,[286] the currency within which payment is to be made,[287] accrual of interest,[288] and the transferability of the compensation paid.[289]

---

[284] NAFTA arts. 1110(c) and 1105.

[285] FTA art. 1605(d).

[286] NAFTA., art. 1110(2).

[287] Although the expropriating Party is not obliged by the provisions to pay compensation in any particular currency, the provisions leave no doubt as to the fact that the yardstick for measuring any such compensation would be a G7 currency. Article 1110(5) therefore provides:

> "If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment."

"G7 Currency" is defined to comprise "the currency of Canada, France, Germany, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland or the United States".

[288] *Id.*

[289] The compensation paid is to be made freely transferable from the territory of the expropriating Party, in accordance with the provisions on transfers [see NAFTA arts. 1110(6) & 1109]. The transfer provisions, again more extensive than under the FTA, require the state Parties to permit a wide category of transfers from their territories "freely and without delay". The state Parties may, however, prevent such transfers "through the equitable, non-discriminatory and good faith application" of their laws relating to:

"(a) bankruptcy, insolvency or the protection of the rights of creditors;

The NAFTA is similar to the FTA in requiring that the fair market value of the expropriated investment be paid. The former, however, treats the issue more explicitly by requiring that the compensation payable be equivalent to the fair market value "immediately before the expropriation took place ("date of expropriation"), and should not "reflect any change in value occurring because the intended expropriation had become known earlier." [290]

Without limiting the factors to be considered in valuing an expropriated property, the provision indicate that the criteria must include the going concern value of the investment, the asset value, including the declared tax value of tangible property.[291]

In conclusion, the Parties appear to have been more keen under the NAFTA to put beyond doubt the nature of the rights and obligations each of the Parties is to assume in the area of investment regulation. The lengths to which the Agreement goes to iron out the controversial issues which have plagued this area is remarkable.

(b) issuing, trading or dealing in securities;

(c) criminal or penal offenses;

(d) reports of transfers of currency or other monetary instruments; or

(e) ensuring the satisfaction of judgments in adjudicatory proceedings."

[290] NAFTA, art. 1110.

[291] *Ibid.*

Judging from the specificity and detailed nature of the provisions, however, one is tempted to think that they must have been largely, if not wholly, inspired by the realization of the apparent differences in the attitudes of the State Parties regarding the regulation of foreign direct investment. Canada, and to a greater extent, Mexico, appear to have been traditionally more wary of foreign direct investment than the United States, as evident in the mechanisms for screening the inward flow of foreign investments. This is so although, as observed earlier, there appears to be a growing wave of apprehension of the activities of foreign investors in the United States too.

More importantly, the potential differences in attitudes which would have been brought about by the disparities in the economic strengths of Canada and the United States on one hand, and Mexico on the other, appear to be ominous enough to require some future guarantees. Being a developing country, Mexico might not be entirely free from identifying itself with the developing world on some of the issues which have tipped the least developed countries against the industrialised western ones. Indeed, it would seem that of the three Parties, only Mexico has had a record of controversial expropriations.[292]

---

[292] See W.C. Gordon, *The Expropriation of Foreign Owned Property in Mexico*, (Connecticut:, Greenwood Press, 1975).

CONCLUSION

The regulation of direct foreign investment under the Free Trade Agreement, together with NAFTA, essentially reinforces developed country perspectives regarding the treatment of foreign investment by host countries. Hence, traditional western perceptions about the relationship between trade and investment issues as well as expropriation are amply reflected in the investment provisions of both the Free Trade Agreement and NAFTA. To that extent, it indicates the difficulty of expecting a compromise on the issues regarding foreign investment regulation which has traditionally divided developed and developing countries.

The unlikelihood of compromise is clearly reflected in the Bilateral Investment Treaty mechanism, under which standards for the treatment of foreign direct investment generally follow those advocated by developed countries. It would seem that developing countries need to revise their attitudes in the light of these developments. There is certainly a great need to avoid the ambivalence which appears to be reflected in their attitudes towards the security of foreign investment. The argument that the conclusion of bilateral investment treaties, and the promulgation of investment codes with elaborate guarantees against expropriation of property does not in any way curtail the state's sovereign powers over such property does not enhance the image of developing countries as potential hosts of foreign direct investment.

The urgency of the need for developing countries to change their policies in relation to FDI is perhaps best summed up in the following remark:

> "Because investment decisions depend on expectations of an array of variables such as demand and prices far into the future, uncertainty is an inherent part of the process. To the extent that government policy helps to reduce or minimize the uncertainty, private investment is likely to be more robust. In addition to avoiding frequent vacillations in the rules of the game, government policies must be credible and sustainable in the long run if private investors are to commit themselves to investment projects that would promote growth and development."[293]

The continued claim in international fora to wide powers of control over investment may act as a disincentive to potential investors. This is an issue over which developing countries could learn from the Canadian experience, which demonstrates that "a policy of excessive intervention in the decision-making of foreign investors (as carried out under the FIRA), and sharp negative shifts in policy affecting existing investors (such as occurred under the NEP) will have an adverse effect on the ability to attract foreign direct investment."[294]

Although compared with the contemporary attitudes of certain developed countries, notably the United States, the position maintained by developing countries

[293] Chhibber, et. al., *op cit.*, at 15.

[294] *Supra* note 76 at 219.

on certain issues may seem justifiable,[295] the rate of conclusions of bilateral investment treaties with developed countries is gradually but steadily eroding the very basis upon which claims to the extensive sovereign powers of the state over foreign property have been based. This has necessitated a modification by developing countries of the position they have traditionally maintained regarding such issues.[296] Indeed, the provisions on foreign direct investment in the NAFTA perhaps testify to the unlikelihood that in a bilateral or trilateral agreement with developed countries, standards which developing countries traditionally lay claim to would be observed.

What effect is the Free Trade Agreement (and NAFTA) likely to have on the State Parties' efforts to encourage direct foreign investment in developing countries? Given the very nature of the promotional mechanisms, with their inherent limitations, the answer is that it is more likely to be negative than positive. This reveals the need for increased individual and collective efforts by developing countries to help themselves in the promotion of foreign investment. Such a need has indeed been

---

[295] See, for example, Wallace, *supra* note 140, who, describing the perceived threat of foreign investment by the United States,observes:

> "if the people in a strong, advanced country can raise flags of caution in the face of rising foreign investment, it is likely that the concerns of citizens of the Third World will be greater."

[296] Commenting on this development, Muller, *supra* note 158, observes at p.77:

> "This new development should induce the developing countries to take a more flexible stance with regard to the formulation of rules concerning nationalization and compensation than they have taken during the negotiations of article 2 of the Charter of Economic Rights and Duties of States."

realised by developing countries,[297] but the point being made here is that efforts in that direction need to be strengthened. That is not to discount the significance of the cooperation of developed countries in this effort.[298]

While advocating a modification in attitudes, the importance of economic factors as determinants of the flow of foreign direct investment must not be trivialized. As observed by the I.M.F., "Countries with small internal markets, few natural resources, a relatively underdeveloped infrastructure, and limited possibilities for manufactured exports may not be able to attract substantial direct investment, even with liberal regulations and generous incentives."[299] A modification of attitudes would therefore have to be accompanied with some amount of economic restructuring.

---

[297] See for example, the Pyongyang Declaration and Plan of Action on South-South Cooperation of 23 July 1987 adopted by the Extraordinary Ministerial Conference of Non-Aligned Countries. [United Nations. General Assembly. Security Council. Document A/42/411 of 23 July 1987], reproduced in O. Jankowitsch, K.P. Sauvant & J. Weber, ed., *The Third World Without Superpowers: The Collected Documents of the Non-Aligned Countries* vol. 11 (New York: Oceana Publications, 1993) pp. 523-545.

[298] The need for such cooperation was also recognised in the Pyongyang Declaration, *supra* note 297, which states in paragraph 17 as follows:

> "The Ministers reaffirmed the view that neither was South-South co-operation a substitute for North-South co-operation nor did it in any way relieve the developed countries of their historical responsibilities for facilitating and contributing to the development of the developing countries on the basis of equality and mutual interests within the context of the indivisible nature of global prosperity."

[299] IMF, *Foreign Private Investment in Developing Countries*, *supra* note 1, at 9.

All told, the Free Trade Agreement, together with the NAFTA, ought to sound a caution to developing countries - the lesson that change and consistency in attitudes towards issues of foreign direct investment is not only necessary, but expedient.

BIBLIOGRAPHY

A. DOCUMENTS AND INSTRUMENTS

Department of Trade and Commerce, *Foreign-Owned Subsidiaries in Canada* (Ottawa: Queen's Printer, 1967), at 40-41: "Some Guiding Principles of Good Corporate Behaviour for Subsidiaries in Canada of Foreign Companies."

Foreign Investment Review Act, S.C. 1973-74, c. 46, amended by S.C. 1976-77, c. 52, s. 128(2), S.C. 1980-81-82, c. 107, s. 63, and S.C. 1984, c. 31, s. 14

Free Trade Agreement between Canada and the United States of America, in *Canada-U.S. Free Trade Implementation Act*, S.C. 1988, c. 65, Schedule-Part A; also reproduced in 27 I.L.M. 281 (1988).

GA Resolution 3281 (XXIX). Charter of the Economic Rights and Duties of States,reprinted in 14 I.L.M. 251 (1975)

General Agreement on Tariffs and Trade (GATT) 55 UNTS 194; 55 UNTS 308; BISD IV (1969)

House of Commons Debates. Official Report, (Ottawa: Queen's Printer, 1988) Vol.

International Centre for the Settlement of Investment Disputes, *Investment Laws of the World*

Investment Canada Act, S.C. 1985, c. 28, as amended.

Investment Canada Regulations, SOR/DORS/85-611, sched. IV, 119 Can. Gaz. II 3027, 3032-33 (1985), amended by SOR/DORS/89-69, 123 Can. Gaz. II 130 (1989).

Omnibus Trade and Competitiveness Act of 1988 50 U.S.C. App. art. 2170

Overseas Private Investment Corporation, Annual Report, 1988 (Washington, D.C.: O.P.I.C., 1988)

U.S. President's Statement announcing United States Foreign Direct Investment Policy, December 26, 1991. Reprinted in 31 I.L.M. 488 (1992).

U.N. General Assembly Resolution 1803 (XVII). G.A.O.R., 17th Session, Supp. 17, p. 15

1967 O.E.C.D. Draft Convention on the Protection of Foreign Property [7 I.L.M., 117 (1968)]

Vienna Convention on the Law of Treaties, 1969, reprinted in vol. *International Legal Materials*

C. BOOKS

Anand, R.P., *International Law and the Developing Countries* (New Delhi: Banyan Publications, 1986)

Bowker, M.M., *On Guard for Thee: An Independent Analysis, Based on the Actual Text of the Canada-U.S. Free Trade Agreement* (Hull, Quebec: Voyageur, 1988)

Brennglass, A.C., *The Overseas Private Investment Corporation* (New York: Praeger Publishers, 1983)

Brownlie, I., *Principles of Public International Law*, 4th. ed., (Oxford: Clarendon Press,1990)

Bulajić, Milan, *Principles of International Development Law* (Netherlands: Martinus Nijhoff Publishers, 1993), 2nd ed., Daintith, T. ed., *Law as an Instrument of Economic Policy: Comparative and Critical Approaches* (Berlin: Walter de Gruyter, 1988).

Deloitte, Haskins & Sells, *Doing Business in the United States of America - A Guide for the Foreign Investor* (1981)

Foreign Investment in the United States Hearing before the subcommittee on Economic Stabilization of the Committee on Banking, Finance and Urban Affairs, House of Representatives, 101 Congress, First Session, Nov. 15, 1989 (Washington: U.S. Govt. Printing Office, 1989)

Gordon, W.C., *The Expropriation of Foreign Owned Property in Mexico*, (Connecticut: Greenwood Press, 1975)

Graham, W., "Types of Regulation of Foreign Investment in Canada Apart From the Foreign Investment Review Act.", Practising Law Institute, Legal Aspects of Doing Business in Canada. (1983); G. Hughes, *Foreign Investment Law in Canada* 64.1-41-44 (1983).

Guisinger, S.E., *Investment Incentives and Performance Requirements: Patterns of International Trade, Production and Investment* (New York: Praeger Publishers, 1985).

IMF, *Report on the Measurement of International Capital Flows* (Washington, D.C.: I.M.F., 1992)

IMF, *Foreign Private Investment in Developing Countries* (Washington, D.C.:I.M.F., 1985)

Investment Canada, *Canada-U.S.-Mexico Free Trade Negotiations: The Rationale And The Investment Dimension* (Ottawa: Minister of Supply and Services, 1990)

Jankowitsch, O., K.P. Sauvant & J. Weber, ed., *The Third World Without Superpowers: The Collected Documents of the Non-Aligned Countries* (New York: Oceana Publications, 1993)

Lanning C., & M. Muller, *Africa Undermined: Mining Companies and the Underdevelopment of Africa* (London: Penguin, 1979)

Leman, M., *Canadian American Relations*, (Ottawa: Minister of Supply and Services Canada, 1992)

Makarczyk, J., *Principles of a New International Economic Order* (Netherlands: Martinus Nijhoff Publishers, 1988)

Meron, T., *Investment Insurance in International Law* (New York: Oceana Publications Inc., 1976)

Ocran, T.M., *Law in Aid of Development: Issues in Legal Theory, Institution Building and Economic Development in Africa* (Tema, Ghana: Ghana Publishing Corporation, 1978).

Organization for Economic Cooperation and Development *Promoting Private Enterprises in Developing Countries* (Paris: O.E.C.D., 1990)

Organisation for Economic Cooperation and Development, *International Investment and Multinational Enterprises: Recent Trends in International Direct Investment* (Paris: O.E.C.D., 1987)

Okoye, F.C., *International Law and the New African States* (London: Sweet &Maxwell, 1972)

Oppenheim, L., *International Law, a Treatise*, ed., by H. Lauterpacht, 8th ed. (London: Longmans, 1955)

Paterson, R.K., *Canadian Regulation of International Business* (Toronto: Carswell, 1986)

Petrochilos, G.A., *Foreign Direct Investment and the Development Process* (London: Gower Publishing, 1989)

Reams, B.D., Jr., & M.A. Nelson, *United States-Canada Free-Trade Act: A Legislative History of the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. 100-449* (New York: William S. Hein & Co., 1990)

Ross, R.B., ed., "*A Summary*" (The International Business Research Centre of the Conference Board of Canada, 1985)

Siddiqui, F., ed., *The Economic Impact and Implications of the Canada-U.S. Free Trade Agreement* (U.S., Edwin Mellen Press, 1991)

The National Energy Program. Update 1982 (Ottawa: Minister of Supply and Services Canada, 1982)

U.S. House of Representatives Committee on Foreign Affairs, *The Overseas Private Investment Corporation: A Critical Analysis* (New York: Arno Press, 1976)

UNCTC/UNCTAD *The Impact of Trade-related Investment Measures on Trade and Development.* (New York: United Nations, 1991)

United States Department of Commerce. *Foreign Direct Investment in the United States*, volume 2. (Washington, D.C: Government Printing Office, 1976)

United Nations Centre on Transnational Corporation and the International Chamber of Commerce, *Bilateral Investment Treaties 1959-1991* (New York: United Nations, 1992) UN/CTC/136

United Nations Centre for Transnational Corporations, *Foreign Direct Investment, Debt and Home Country Policies* (New York: United Nations, 1990).

United Nations Department of Economic and Social Development, Transnational Corporations and Management Division, *Formulation and Implementation of Foreign Investment Policies* (New York: United Nations, 1992)

Wallace, C.D., et. al, *Foreign Direct Investment in the 1990s. A New Climate in the* Third World (Netherlands, Kluwer Academic Publishers, 1990)

Weber, M., *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1966)

D. ARTICLES

Asante, S.K.B., "International Law and Foreign Investment: A Reappraisal" (1988) 37:3 International and Comparative Law Quarterly 588

Asante, S.K.B., "International Transactions and National Development Goals", 10 Review of Ghana Law 4.

Bale H.E.Jr., "The United States Policy Toward Inward Foreign Direct Investment" (1985) 18:2 Vanderbilt Journal of Transnational Law 199

Benedek, W., "The LOME Convention and the International Law of Development: A Concretisation of the New International Economic Order?" (1982) 26 Journal of African Law 74

Ellis, M.E., "The New International Economic Order and General Assembly Resolutions: The Debate over the Legal Effects of General Assembly Resolutions Revisited (1985) 15 California Western International Law Journal 647

Feldman, L.P., "U.S.-Mexico Free Trade Agreement" (1991) 4(2) Transnational Lawyer 553

Fontheim, G.W. & Gadbaw, "Trade Related Performance Requirements" (1980) 14 Law and Policy in International Business

Greenberg, D.F., "Law and Development in Light of Dependency Theory" (1980) 3 Research in Law and Sociology 129

Grosse, R., "Codes of Conduct for Multinational Enterprises" (1982) 16 Journal of World Trade Law 414

Gudgeon, K.S., "United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards" (1986) 4 International Tax and Business Lawyer 105

Koven, V.R., "Expropriation and the "Jurisprudence" of OPIC (Overseas Private Investment Corp.) (1981) 22:2 Harv. International Law Journal 269

Kresl, P.K., "Canadian and American Approaches to Foreign Direct Investment and International Trade Policies" (1981) 4 Comparative Social Research 135

Lash, W.H., "The Buck Stops Here: The Assault on Foreign Direct Investment in The United States" (1991) St. Louis University Law Journal 83

Leckow, R.B. & I.A. Mallory, "The Relaxation of Foreign Investment Restrictions in Canada." (1991) 6 *ICSID REVIEW.* Foreign Investment Law Journal 1

Leich, M.N., "Bilateral Investment Treaties", (1990) 84 American Journal of International Law 895

Mann, F.A., "British Treaties for the Promotion and Protection of Investment" (1982) 52 British Yearbook of International Law 241

Morici, P., "The Canada-U.S. Free Trade Agreement: A Laboratory for the World Trading System, (1991) 21:2-3 American Review of Canadian Studies. 305

Muller, M.H., Compensation for Nationalization: A North-South Dialogue" in (1981) 19:1 Columbia Journal of Transnational Law 35

Nattier, F., "Regulation of TNCs: Latin American Actions in International Fora" (1984) 19:2 Texas International Law Journal 265

Paterson, R.K., "The GATT and Restriction on Foreign Investment: The United States Challenge to Canada's Foreign Investment Law (1982) 1 University of California Los Angeles Pacific Basin Law Journal 224-46

Puri, H., & D. Bondad "TRIMs: Development Aspects and the General Agreement" *Uruguay Round: Further Papers on Selected Issues*, (New York: United Nations, 1990) 55

Raby, J., "The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective." (1990) 84 American Journal of International Law 394

Ruttenberg, V.H., "The United States Bilateral Investment Treaty Program: Variations on the Model" (1987) 9 University of Pennsylvania Journal of International Business Law 121

Safarian, A.E., "The Canada-U.S. Free Trade Agreement and Foreign Direct Investment" (1988) 3 Trade Monitor 5

Schmidt, T., "Closing the Barndoor: A Suggested United States Response to International Restrictions on Foreign Acquisition of Agricultural Land (1980) 10 California Western International Law Journal 536

Schwarz K. & B.A. Caplan, "Trade Related Investment Measures (TRIMS): Scrutiny in the GATT and Implications for Socialist Countries." (1987) 11 Hastings International and Comparative Law Review 55

Sornarajah, M., "State Responsibility and Bilateral Investment Treaties" (1980) 20 Journal of World Trade Law 79

Spence, J.M., "Current Approaches to Foreign Investment Review in Canada" (1986) 31:3 McGill Law Journal 508

Stilwell, R., "Encouraging Investment in LDCs: the United States Investment Guaranty Program" (1982) 8 Brooklyn Journal of International Law 365

Trisciuzzi, G.S., "Multilateral Regulation of Foreign Direct Investment" in *Regulating the Multinational Enterprise. National and International Challenges*, B.S. Fisher & J. Turner, ed., (New York: Praeger Publishers, 1983) 143

Trubek, D., "Max Weber on Law and the Rise of Capitalism" 1972 3 Wisconsin L. Rev. 720-753.

Turner, G., "Exon-Florio: the Little Statute That Could Become a Big Headache for Foreign Investors" (1991) 4:2 Transnational Lawyer 701

Vandevelde, K.J., "The Bilateral Investment Treaty Program of the United States"(1988) 21 Cornell International Law Journal 201

Voss, J., "The Protection and Promotion of Foreign Direct Investment in Developing Countries. Interests, Interdependencies, Intricacies" (1982) 31 International and Comparative Law Quarterly 686

Winham, G., "The Canadian Automobile Industry and Trade-Related Performance Requirements (1984) 18:6 Journal of World Trade Law 471

Zamora, S., "The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement" (1993) 24:2 Law and Policy of International Business 391