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investment codes and individual investment agreements frequently refer to the arbitration procedures of ICSID. The widespread acceptability of ICSID procedures, indicated by the large number of countries (120) that have so far signed the ICSID Convention, and by the reference to ICSID arbitration in hundreds of large investment contracts, may be due, in addition to its relatively low cost, to the fact that it is the only form of arbitration where awards are not subject to subsequent judicial review in ICSID member countries. ICSID in fact provides two kinds of independent arbitration procedures: ICSID Convention arbitration procedures, which are available for cases where both the home and the host State of the investor are parties to the ICSID Convention; and arbitration procedures under the so-called ICSID Additional Facility, which are available for cases where either the home or the host State is not a party to the Convention. References to both types of procedures are frequently included in the provisions referred to above of bilateral investment treaties and national investment codes. Part 3 of Guideline V further encourages such use, as appropriate, of procedures provided by the ICSID Convention or Additional Facility.

Sources: THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT/THE WORLD BANK, II GUIDELINES ON THE TREATMENT OF FOREIGN INVESTMENT AND REPORT TO THE DEVELOPMENT COMMITTEE AND GUIDELINES ON THE TREATMENT OF FOREIGN INVESTMENT 30-31, 44 (1992) (footnotes have been modified slightly from the original source to conform with journal style requirements).

TOWARD A GENERAL AGREEMENT ON THE REGULATION OF FOREIGN DIRECT INVESTMENT

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Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations . . . and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallised on the international plane.

The International Court of Justice.¹

INTRODUCTION

With international trade issues capturing much of the business world's attention, the growth and importance of foreign direct investment (FDI) has gone somewhat unnoticed, despite comments such as those of the *International Court of Justice (ICJ)*.² In fact, FDI growth far outpaced trade growth throughout the 1980s, with trade increasing at a compound rate of five percent annually compared to twenty percent annually for FDI.³ Moreover, as discussed in Part I of this Article, investment is often a key determinant of trade since a large percentage of trade occurs between affiliated companies.⁴ Despite its apparent importance, states have thus far been unable, or unwilling, to conclude an international agreement regulating FDI.

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1. *Belgium v. Spain*, 1970 I.C.J. Rep. 3, at 47-48 [hereinafter *Barcelona Traction*].

2. Although there is no uniform definition for foreign direct investment, the one advocated by the *International Monetary Fund* has increasingly gained acceptance as the standard definition. The IMF defines foreign direct investment as: "Investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have an effective voice in the management of the enterprise." INTERNATIONAL MONETARY FUND, *BALANCE OF PAYMENTS MANUAL* ¶ 408, at 136 (4th ed. 1977) [hereinafter *BALANCE OF PAYMENTS MANUAL*].

3. DEANNE JULIUS, *GLOBAL COMPANIES AND PUBLIC POLICY* 14 (1990).

4. *Id.* at 74.

The absence of such an agreement is particularly striking in view of the number of trade-related agreements that have been negotiated in recent years. These include the successful conclusion to the Uruguay round of the General Agreement on Tariffs and Trade (GATT) and subsequent establishment of the World Trade Organization (WTO),⁵ the North American Free Trade Agreement (NAFTA),⁶ and the adoption of the Treaty on European Union (Maastricht Treaty).⁷ Not surprisingly, the need for an international FDI agreement has been noted by numerous international officials,⁸ academics,⁹ and the ICJ,¹⁰ as all have commented on the lack of international FDI regulation. Furthermore, the absence of an international FDI agreement has been costly, both to states anxious to attract FDI and to multinational corporations eager to enter and compete in new markets, since differing regulatory frameworks discourage potential investment by increasing administrative costs and creating uncertainty.¹¹

5. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 4 B.I.S.D. 1 (1969) [hereinafter GATT]. The initial GATT text can also be found at 61 Stat. pt. 5-6, and 55 U.N.T.S. 187 (unamended). For a brief review of the major accomplishments of the Uruguay Round, see *And Now For Something Completely Different*, *ECONOMIST*, Dec. 18, 1993, at 59. For a good compendium on the GATT, see *LAW AND PRACTICE UNDER THE GATT* (Kenneth R. Simmonds & Brian W. Hill eds., 1994).

6. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. (entered into force Jan. 1, 1994), 32 I.L.M. 603 [hereinafter NAFTA]. For an excellent compendium of NAFTA-related materials, see *NORTH AMERICAN FREE TRADE AGREEMENTS* (James R. Holbein & Brian W. Hill eds., 1994).

7. Treaty on European Union (Maastricht Treaty), Feb. 7, 1992. Although far more comprehensive than a mere trade agreement, the Maastricht Treaty, as part of the larger European Union, has the free movement of goods as one of its foundations.

8. See, e.g., the comments of Peter Hansen, the Executive Director of the United Nations Centre for Transnational Corporations (UNCTC) in Peter Hansen & Victoria Aranda, *An Emerging International Framework for Transnational Corporations*, 14 *FORDHAM INT'L L.J.* 881 (1990-91); see also the comments of Ibrahim F.I. Shihata, Vice-President & General Counsel of the World Bank and the Secretary General of the International Centre for the Settlement of Investment Disputes (ICSID), in Ibrahim F.I. Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme*, 21 *INT'L LAW* 671 (1987).

9. Academics have endeavored to attract attention to this area since the failure of the Havana Charter in 1948. Some of the most recent articles include: C.F. Bergsten & E.M. Graham, *Needed: New International Rules for Foreign Direct Investment*, 7 *INT'L TRADE J.* 15 (1992); Edward M.A. Kwaw, *Trade Related Investment Measures in the Uruguay Round: Towards a GATT for Investment?*, 16 *N.C.J. INT'L COMM. & REG. L.* 309 (1991); and Jeswald W. Salacuse, *Towards a New Treaty Framework for Direct Foreign Investment*, 50 *J. AIR L. & COMM.* 969 (1985).

10. *Barcelona Traction*, *supra* note 1.

11. For further details on the effects of disincentives on foreign investment, see ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *THE OECD DECLARATION AND DECISIONS ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: 1991 REVIEW 76-86* (1992) [hereinaf-

The inability to conclude an FDI agreement has generally been attributed to two primary factors. First, there has often been significant disagreement among states about the importance and the best method of regulating FDI.¹² Second, it has long been an established principle of international law that states retain the exclusive right to regulate the entry of investment into their own territory, and an agreement regulating the admission of FDI is regarded as an encroachment on that right.¹³

Despite the lack of progress in this area, several recent events have provided some reason for optimism. Developments such as the inclusion of investment as part of the GATT,¹⁴ the increasingly significant role being played by the International Centre for the Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA),¹⁵ and the proliferation of bilateral investment treaties

(see OECD DECLARATION); Robert O. Keohane & Van Doorn Ooms, *The Multinational Firm and International Regulation*, 29 *INT'L ORG.* 169 (1975). See also G.S. Trisciuzzi, *Multilateral Regulation of Foreign Direct Investment, in REGULATING THE MULTINATIONAL ENTERPRISE: NATIONAL AND INTERNATIONAL CHALLENGES* 143 (B.S. Fisher & J. Turner eds., 1983). In a discussion on an international agreement on the regulation of FDI, the author notes that: "Perhaps the most important potential benefit would be the harmonization of currently diverse systems of national laws and regulations. For example, harmonization could reduce the high costs borne by multinational corporations in dealing with widely divergent regulatory regimes in different countries." *Id.* at 148.

12. For a good discussion on historical legal policy toward FDI, see Samuel K.B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 *INT'L & COMP. L.Q.* 588 (1988).

13. The Havana Charter clearly stated the accepted international law principle at Chapter 3 of the Charter dealing with Economic Development and Reconstruction where it stated:

The members recognize that:

... (c) without prejudice to existing international agreements to which members are parties, a member has the right:

- (i) to take any appropriate safeguards to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies;
- (ii) to determine whether and to what extent and upon what terms it will allow future foreign investment;
- (iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investment;
- (iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments.

Havana Charter for an International Trade Organization, art. 12(1), United States Department of State Pub. 3206 (1947) [hereinafter *Havana Charter*].

14. For details on the GATT's inclusion of trade-related investment measures, or TRIMs, see Kwaw, *supra*, note 9. See also Paul Bryan Christy III, *Negotiating Investment in the GATT: A Call for Functionalism*, 12 *MICH. J. INT'L L.* 743 (1991).

15. For a good review on this increasingly important role, see Malcolm D. Rowat, *Multilateral*

(BITs),¹⁶ indicate that many states are anxious to establish international FDI standards and regulations. Moreover, agreements such as the aforementioned NAFTA and the Maastricht Treaty are illustrative of states' increased willingness to surrender economic sovereignty as a precondition for entering into international economic agreements.¹⁷

With states acknowledging the value of sacrificing some degree of economic sovereignty in return for the benefits of unrestricted trade and investment, the one remaining, albeit most significant, barrier to an international agreement on the regulation of FDI appears to be the lack of consensus on the method in which FDI should be regulated. As Samuel K.B. Asante, the former director of the UNCTC, has noted:

The demonstrated willingness of states from all regional groups to participate in this process of creating new norms for the regulation of international business supports the submission that there are no doctrinal impediments to the elaboration of international standards as such. What is contested is not so much the idea of international standards as the content of the prescribed norms.¹⁸

Therefore, according to Asante and others,¹⁹ despite a convergence of state views with regard to the beneficial nature of FDI, the difficult matter of precisely how to regulate FDI remains a source of disagreement between states.

This Article challenges this commonly held belief by examining the FDI legislation (often referred to as "codes") of eleven states from around the world. It is submitted that the nearly universal desire to attract FDI has led to a convergence of the policies and standards exercised by states with respect to the admission and establishment of FDI. Furthermore, it is the premise of this Article that there has been such significant convergence on this issue, both with respect to form

Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA, 33 HARV. INT'L L.J. 103 (1992).

16. See *infra* Part I.

17. The NAFTA includes a trilateral, binding dispute resolution mechanism which is designed to allow for the settlement of disputes outside of governmental bias. Similarly, the Maastricht Treaty, as part of the larger European Union structure, has forced member states to surrender economic sovereignty with respect to the free movement of goods, services, persons, and capital, and accept the binding nature of the European Court of Justice.

18. Asante, *supra* note 12, at 628.

19. For other examples, see Hansen & Aranda, *supra* note 8, at 882-83. See also J.H. DUNNING, MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY 583-88 (1993).

(time limits, information to be submitted to administering authorities) and to substance (criteria for rejection of investment, industries restricting foreign participation), that the basic framework for a General Agreement on the Regulation of Foreign Direct Investment (GARFDI), is much closer than is currently realized.²⁰

Prior to examining the various FDI codes, Part I of this Article assesses the importance of FDI and the practical effects of FDI codes. While the Havana Charter was the first post-World War II attempt at an agreement, there have since been several other significant agreements concluded, some of which continue to influence FDI and its regulation. Therefore, this Part also contains a historical review detailing some of the past attempts at negotiating FDI agreements at the international, regional, and bilateral levels.

Part II of this Article surveys the admission procedures of eleven national legal frameworks for FDI. The survey has been limited to admission provisions since such provisions, which regulate the entry and establishment of foreign investors, are the primary legal means possessed by states to exclude, or impose conditions upon, a prospective foreign investor. It is therefore not surprising to find that it is at this stage that investors encounter and become discouraged with the potentially confusing and time consuming regulations established by individual states.²¹

The following national legal frameworks for FDI are surveyed: from North America, the United States and Canada; from Europe, the United Kingdom, Portugal, and Poland; from Asia, Japan, South Korea, and Thailand; from Latin America, Argentina and Mexico;²² and from Africa, Nigeria. While the particular reasons for each state's inclusion in the survey are discussed at Part II, it should be noted that it is not the author's contention that the states chosen are representative of all states. Rather, the states have been selected to provide a broad geographical mix, a variety of market sizes that are all, based on past perfor-

20. For convenience, throughout the remainder of this Article the acronym GARFDI is used to refer to the concept of an international agreement regulating foreign direct investment.

21. E.g., in a 1991 review of Latin American FDI codes, University of Texas at Austin professor Mark Baker noted that: "the greatest disincentive to direct foreign investment was dealing with local authorities. Foreign investors do not like to deal with foreign authorities because their application and approval procedures are unclear and cause substantial delays." Mark B. Baker & Mark D. Holmes, *An Analysis of Latin American Foreign Investment Law: Proposals for Striking a Balance Between Foreign Investment and Political Stability*, 23 U. MIAMI INTER-AM. L. REV. 1, 30 (1991).

22. Although Mexico can be classified as both a Latin and North American state, it is included under the Latin American region since, from an economic perspective, it better represents that region.

mance, attractive to foreign investors, and a representation of states at different stages of economic development. Moreover, states considered politically unstable or not fully accepting of free market principles are excluded from the survey for reasons detailed at Part II.

Furthermore, it should be noted that it is not the author's intention to provide a comprehensive legal guide to foreign investment for each state examined. Although the legislation analyzed is complete and accurate as of April 1994, further legal barriers outside the scope of this survey may arise during the course of investing. In addition, while the Article is devoted primarily to the establishment of new entities, known as greenfield investing, the laws discussed herein apply equally, unless otherwise noted, to FDI through acquisition of the shares or assets of an established domestic firm.

Following the examination of the legal frameworks for FDI, the conclusion of the Article discusses their primary similarities and key remaining differences. The issues that would be of central importance in the drafting of a GARFDI, such as the administering agency, the definition of foreign investor and foreign investment, time issues, the information to be submitted to administering authorities, the criteria for rejection of an investment, and the industries that restrict foreign participation, are each addressed. Although the Article does not recommend specific wording for a GARFDI, the fundamental principles and standards that could potentially form the basis for such an agreement, as derived from the findings in Part II, are noted.

The Article concludes by reviewing the obstacles to an international FDI agreement and assessing the possibility of negotiating such an agreement in the near future. Before examining the national legal frameworks for FDI, however, further background on the effect of FDI regulation and past attempts at concluding an international agreement is needed.

I. FDI BACKGROUND INFORMATION

A. *The Importance of FDI*

The tremendous increase of FDI has resulted in FDI growth outpacing, by as much as a factor of four, the growth of international trade. Moreover, a number of studies have uncovered a direct correlation between trade and investment. This phenomenon is generally attributed to the fact that as much as fifty percent of international trade occurs between affiliated companies, referred to as intrafirm trade.²³

23. For further details on intrafirm trade, see JULIUS, *supra* note 3, at 74 (the author confirms that according to 1986 figures, fifty-five percent of U.S. exports and fifty-one percent of U.S. imports

In addition to its effect on trade, FDI provides the host state with numerous other benefits. These include the introduction of new technologies, management skills, capital, and the creation of new jobs.²⁴ Moreover, the presence of an internationally competitive manufacturer or service provider can often raise the overall performance of competing firms within a domestic market.²⁵ A further, often overlooked advantage, may arise from the fact that foreign investors regularly lobby their home government for favorable policies toward the host state to protect their investments. Although such lobbying arises out of self-interest, a major multinational corporation may have a more significant effect than the host state lobbying on its own behalf.²⁶

Many states, recognizing the benefits discussed above, have in recent years made a concerted effort to attract FDI by establishing lucrative investment incentive programs. Such programs often include the availability of tax holidays, inexpensive financing, and land at reduced prices.²⁷ Although virtually all states have established incentive programs, recent studies have cast doubt on the effectiveness of such incentives, particularly where disincentives, such as complex regulatory frameworks, are also in place. For example, a recent OECD review on the topic concluded that:

The general impact of international investment incentives on the broad directions of direct investment flows is also generally limited . . . [A]s seen from the above discussion, disincentives, in comparison to investment incentives, are likely to have a wider impact on international direct investment decisions; they are more closely associated with investors' perception of the business climate . . .²⁸

It has therefore become increasingly apparent that although incentives may be of some assistance in attracting FDI, the elimination of

involved intrafirm trade). For a discussion on intrafirm trade as it relates to Japan, see Robert Z. Lawrence, *How Open is Japan?*, in *TRADE WITH JAPAN: HAS THE DOOR OPENED WIDER* 9-48 (Paul Krugman ed., 1991). Lawrence comments that: "a remarkably high proportion of international trade occurs through intrafirm shipments. This institutional reality underscores the complementarity that frequently exists between foreign trade and direct foreign investment." *Id.* at 14.

24. OECD DECLARATION, *supra* note 11, at 8.

25. Shihata, *supra* note 8, at 674-75.

26. *Id.*

27. Although a comprehensive examination of investment incentives is beyond the scope of this Article, for further details, see OECD DECLARATION, *supra* note 11, at 77-86.

28. *Id.* at 85-86.

disincentives has a far more positive effect. This is particularly true in the case of small and medium sized firms, which often possess many desired technologies and a willingness to invest but lack the resources to negotiate their way through complex regulatory frameworks.²⁹ Partly in response to this dilemma, several attempts at negotiating FDI agreements have taken place at the international, regional, and bilateral levels, the most significant of which are discussed below.

B. Historical Background

1. International and Regional FDI Agreements

The first attempt at regulating FDI at the international level took place soon after World War II with the Havana Charter. Although the Charter was never ratified, the provisions pertaining to FDI were essentially a codification of accepted international law principles at the time and specifically provided that each state had the sole right and jurisdiction to implement rules and restrictions relating to the admission of FDI into its territory.³⁰

This international law principle has since been affirmed in a series of United Nations resolutions and declarations. For example, U.N. General Assembly Resolution 3281, which established the so-called New International Economic Order and which received the near universal support of the developing world, provided at Article 2(2) that: "Each State has the right: (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment . . ."³¹

Although international activity generally has been confined to declarations such as Resolution 3281, a number of regional organizations have also attempted to regulate FDI, occasionally with some success. In 1958, the Economic Committee of the Consultative Assembly of the Council of Europe stated that:

The question of drafting an investment statute is not new, but it is again becoming topical; furthermore, it is of world interest and is under consideration by the ECOSOC. It is easier to reach an agreement in a regional rather than in a world framework,

29. Jürgen Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L & COMP. L.Q. 686, 691 (1982).

30. *Havana Charter*, *supra* note 13.

31. U.N. General Assembly Res. 3281 (XXIX), art. 2(2), adopted Dec. 12, 1974.

and such regional agreement cannot help but facilitate a wider arrangement.³²

The committee's comments proved to be prophetic, since today one of the fundamental freedoms of the European Union is the free movement of capital.³³

The most recent directive aimed at facilitating the free movement of capital within the European Union is Directive 88/361/EEC.³⁴ The directive calls for the abolition of all restrictions to the movement of capital and includes in the definition of capital movements a wide variety of direct investments, including the establishment of new undertakings, the acquisition of established undertakings, and the participation in new or established undertakings.³⁵ In fact, the explanatory notes attached to the directive define direct investment in a manner that is entirely consistent with the definition used by the IMF.³⁶

The European Union is not the sole multinational organization to endeavor to liberalize capital movements, however. One of the more significant agreements in this field is the Organization for Economic Co-operation and Development (OECD) 1961 Capital Liberalisation Code.³⁷ The OECD Code, which in many respects establishes a framework similar to the one advocated by this Article, provides that signatories abolish all restrictions to the free movement of capital, excepting those measures that further: the protection of public order, health, morals, and safety; essential security interests; and the fulfillment of international peace and security obligations.³⁸ As with the EEC Treaty, the definition of capital movements includes direct investment and is consistent with the IMF definition.³⁹

32. Council of Europe, Doc. 798, Apr. 1, 1958, para. 34.

33. Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, art. 67, 298 U.N.T.S. 3, 42 [hereinafter EEC Treaty].

34. Council Directive 88/361/EEC, June 24, 1988.

35. *Id.* Annex 1.

36. BALANCE OF PAYMENTS MANUAL, *supra* note 2, at 136-41.

37. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CODE OF LIBERALISATION OF CAPITAL MOVEMENTS (1993) [hereinafter OECD CODE].

38. *Id.* arts. 1-3.

39. Annex A of the OECD Code, which provides detailed definitions for various terms, includes the following remarks:

The authorities of Members shall not maintain or introduce: regulations or practices applying to the granting of licenses, concessions, or similar authorizations, including conditions or requirements attaching to such authorizations and affecting the operations of enterprises, that raise special barriers or limitations with respect to non-resident (as

Unfortunately, the effectiveness of the OECD Code has been severely curtailed by two factors. First, although the basic principle of the code establishes the almost completely unrestricted movement of capital, the code also permits members to lodge reservations to the basic principle in an attached annex. Second, since the code contains no penal provisions, there has been little incentive for strict adherence by the signatories.

As noted in the introduction, there have also been several international agreements which, although not concerned with the admission of FDI per se, have endeavored to improve the international legal FDI climate by addressing a series of investor concerns. One of the first such attempts was the creation of the ICSID, an international dispute settlement center established specifically for the resolution of FDI disputes. The number of signatories to the ICSID convention has grown steadily, and the use of the ICSID as a non-partisan arbiter has become increasingly popular.⁴⁰ Similarly, the establishment of MIGA provided investors with increased assurance of the safety of their investments. This has been particularly beneficial for investors considering investment in developing states, some of which have a history of nationalizing foreign-owned firms.⁴¹ As noted above, the recently concluded Uruguay round talks of the GATT included, for the first time, a section on investment. Although limited in scope and the target of considerable criticism, its inclusion is a clear acknowledgement by states of the importance of investment issues and of the need for such issues to be addressed at the international level.⁴²

In addition to the international and large regional agreements discussed above, there have also been a series of smaller regional agreements concluded that regulate FDI and, to varying degrees, liberalize the rules of the participating signatories. For example, a 1973 treaty designed to create a common market among several Caribbean states⁴³ included a provision that removed restrictions to the free movement of

capital among the member states, subject only to an exception on the grounds of public order, health, morality, and national security.⁴⁴

Two recent free trade agreements, one between Australia and New Zealand,⁴⁵ and the above noted NAFTA between the United States, Canada, and Mexico,⁴⁶ have each included provisions governing the admission of investment. The Australia-New Zealand agreement, which did not specifically regulate FDI in the initial agreement, has since added a protocol liberalizing trade in services, subject to a number of reservations contained in an annex.⁴⁷ The NAFTA also addresses and liberalizes investment by stipulating that national treatment⁴⁸ be accorded to FDI originating from any of the three signatories, subject to certain exceptions set out in an annex.⁴⁹ Moreover, the agreement also establishes a binding dispute resolution procedure designed to ensure full compliance and fair interpretation of the agreement.⁵⁰

Not all regional agreements have been successful in liberalizing FDI, however. For example, the 1973 Andean agreement increased the restrictiveness of its signatories' FDI frameworks, thereby causing considerable concern amongst foreign investors.⁵¹ Although the code has since undergone several revisions so that it is no longer particularly restrictive,⁵² it currently makes no attempt to liberalize the admission of FDI since it leaves FDI regulation subject to each signatories' national legislation.⁵³ Similarly, a 1987 investment agreement among the Association of South East Asian Nations (ASEAN) provides for the encourage-

44. Treaty of the Establishment of the Caribbean Common Market, July 4, 1973, art. 35, 12 I.L.M. 1033, 1062-63.

45. Closer Economic Relations Trade Agreement, Mar. 28, 1983, Austl.-N.Z., 22 I.L.M. 945.

46. NAFTA, *supra* note 6.

47. Protocol on Trade in Services, Jan. 1, 1989, Closer Economic Relations Trade Agreement, *supra* note 45, art. 2.

48. The principle of national treatment provides that governing authorities treat foreign investors and foreign investment in a manner equal to domestic investors and domestic investment.

49. NAFTA, *supra* note 6, art. 1102, at 613.

50. *Id.* arts. 2003-19, at 694-98.

51. The current signatories to the Andean agreement are Peru, Columbia, Venezuela, Bolivia, and Ecuador. Chile was an original signatory in 1973 but left the organization in 1976. For further information on the original Andean agreement, see Richard W. Moxon, *Harmonization of Foreign Investment Laws Among Developing Countries: An Interpretation of the Andean Group Experience*, 16 J. COMMON MKT. STUD. 22 (1977). See also F. Armstrong, *Political Components and Practical Effects of the Andean Foreign Investment Code*, 27 STAN. L. REV. 1597 (1975).

52. The latest version of the regulations pertaining to FDI is *Andean Group: Commission Decision 291 Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties*, Mar. 21, 1991, available in LEXIS, Intlaw Library, ASIL File [hereinafter *Decision 291*].

53. *Id.* arts. 2 & 3.

compared to resident) investors, and that have the intent or the effect of preventing or significantly impeding inward direct investment by non-residents.

Id. Annex A.

40. As of October 1991, 109 states had become signatories to the ICSID convention with every region of the world represented. See Jan Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID REV.—FOREIGN INV. L. REV. 380 (1991) (for further details of ICSID's accomplishments).

41. Shihata, *supra* note 8, at 686-88.

42. See generally Kwaw, *supra* note 9; Christy, *supra* note 14; *And Now for Something Completely Different*, *supra* note 5, at 59-60.

43. The parties to the agreement are Barbados, Jamaica, Trinidad and Tobago, and Guyana.

ment of FDI but leaves applicable FDI regulations subject to individual national legislation.⁵⁴

Despite the fact that few agreements at either the international or regional level have significantly curtailed national sovereignty vis-à-vis the regulation of FDI, some progress has clearly been made. Moreover, the fact that agreements have been negotiated and concluded on a regular basis over the past forty years is indicative of the fact that the regulation of FDI is regarded as an important issue by a significant number of states. More impressive than the progress at the international and regional level, however, is the proliferation of bilateral investment treaties, discussed below.

2. Bilateral Investment Treaties (BITs)

BITs, used primarily to assure prospective investors of the safety of their investments, have become an extremely popular form of investment agreement. The first BIT was concluded between West Germany and Pakistan in 1959,⁵⁵ and their popularity has grown rapidly since—such that by 1991, 440 BITs had reportedly been signed.⁵⁶ Moreover, the use of the BIT has become truly international, with virtually every developed state and over ninety developing states having entered into at least one.⁵⁷

BITs, until recently, were generally concluded between a developed state (the capital exporting state) and a developing state (the capital importing state), with each party entering into reciprocal undertakings guaranteeing, at a minimum, the protection of FDI and pledging the encouragement and creation of favorable conditions for FDI.⁵⁸ Although most BITs adhered to this form, recent BITs involving developing states such as Thailand, South Korea, China, and Poland as the more economically developed of the two parties, indicate that the previous distinction between capital exporting and capital importing has become somewhat blurred.

54. Agreement for the Promotion and Protection of Investments, Dec. 15, 1987, art. 3, 27 I.L.M. 612, 613.

55. Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 655 (1990).

56. UNITED NATIONS CENTER FOR TRANSNATIONAL CORPORATIONS & INTERNATIONAL CHAMBER OF COMMERCE, *BILATERAL INVESTMENT TREATIES—1959–1991* (1992) [hereinafter *BILATERAL INVESTMENT TREATIES—1959–1991*].

57. Mohamed I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 7 ICSD Rev.—Foreign Inv. L.J. 339 (1992).

58. For an excellent review of model BITs, see UNITED NATIONS CENTER ON TRANSNATIONAL CORPORATIONS, *BILATERAL INVESTMENT TREATIES* (1988). See also *BILATERAL INVESTMENT TREATIES—1959–1991*, *supra* note 56.

Despite their popularity, the provisions contained in most BITs have remained rather modest and, with respect to the admission of investment, often simply codify existing national legislation.⁵⁹ One exception to this general rule has been the U.S.-model BIT that includes a provision mandating national treatment for both the admission of FDI and its treatment once established.⁶⁰ Unlike most other BITs, which limit the effectiveness of such provisions by making them subject to national law, the U.S.-model BIT does not include such a limitation; instead, it contains an annex in which the parties may list those industries excepted from the general principle. This method, which is similar in form to the OECD Code discussed above, removes potential confusion and thereby enhances transparency. Although the United States has been criticized for employing this form of BIT,⁶¹ its BIT program has enjoyed some success, and the United States has entered into agreements with several states, including Russia, the Czech Republic, Argentina, and Sri Lanka.

Although the popularity of BITs is indicative of the eagerness of many states to attract FDI, it may also be attributable to the absence of an international FDI agreement.⁶² Moreover, the general unwillingness of BITs to encroach upon established national law may be one explanation for the fact that they have not been found to significantly affect investment flows.⁶³

As the foregoing review demonstrates, there has been increasing worldwide recognition of the benefits of FDI. This realization has created a new willingness to admit FDI and to enter into agreements aimed at attracting FDI. Whether at the international, regional, or bilateral level, many states are now more receptive to the concept of surrendering economic sovereignty in order to achieve economic growth and to establish an investor friendly market.

Although the political will for a GARFDI appears to be on the rise, according to most analysts there are lingering differences in policy pertaining to the admission and regulation of FDI among states. Part II

59. Khalil, *supra* note 57, at 346–49.

60. For an excellent review of U.S. BIT policy, see Kenneth J. Vandervele, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621 (1993).

61. See Michael R. Reading, Note, *The Bilateral Investment Treaty in ASEAN: A Comparative Analysis*, 42 DUKE L.J. 679 (1992) (for a recent example of such criticism).

62. It has often been stressed that the absence of a multilateral framework for investment appears to have intensified the need to rely on concluding bilateral investment treaties. *BILATERAL INVESTMENT TREATIES—1959–1991*, *supra* note 56, at 105.

63. “[T]here is no apparent direct relationship between the number of bilateral agreements and the volume of foreign investment flows.” *Id.* at 14.

challenges this view, however, as the examination of eleven national legal frameworks for FDI reveals that the differences between states may not be as significant as is generally perceived.

II. NATIONAL FDI CODES

As discussed above, many states have determined that FDI is beneficial to their domestic economy and should therefore be encouraged. Although this may bode well for the establishment of a GARFDI, a closer examination of the particular policies employed by individual states is necessary in order to ascertain the degree to which a convergence has occurred with respect to FDI policy and practice.

This Part of the Article undertakes such an examination by analyzing eleven national FDI codes. Although the specific reasons for each state's inclusion are noted individually, all states surveyed share a number of *common characteristics that make them well suited to represent other states in their geographic region or at their level of economic development*. All states examined adhere to a free market economic approach, are members of the WTO, and have adopted policies encouraging FDI.⁶⁴ Furthermore, each state has in recent years enjoyed a relatively high degree of political stability, particularly from an economic perspective,⁶⁵ and each state has proven to be highly successful in attracting FDI, often through a combination of an attractive market size for investors and its FDI policies and legal framework.

Although the laws and regulations discussed for each state are complete and up to date as of April 1994, the analysis should not be regarded as a comprehensive legal guide.⁶⁶ Since the focus of this Article is the admission and establishment of FDI, many other regulatory

64. The use of this criteria should not be taken to suggest that FDI does not occur in states that do not employ free market policies or are not members of the WTO. The People's Republic of China, which has recently been among the world's leading recipients of FDI, is an excellent example to the contrary. However, it is assumed that states that have embraced such policies and have shown a willingness to enter into international economic agreements in the past would be more receptive to the possibility of entering into a GARFDI.

65. Although political stability is not a prerequisite for FDI, past investment trends indicate that investors are more likely to invest where there are assurances that the legal or political framework is not likely to undergo radical alteration. For this reason, Russia, which, should it solve its political difficulties, would be a popular destination for investors, has been excluded from among the states examined in this survey.

66. Throughout the survey, the English version of the relevant legislation has been used. This is the original text for the United States, Canada, the United Kingdom, and Nigeria. For the remaining states, it is a translation from the original and, should any issues of interpretation arise, the original language version should be consulted.

issues, including dispute settlement, investment incentives, and industry-specific regulations are beyond the scope of this Article. Where available, however, further references are provided so that a more detailed study may be undertaken for a particular state.

For sake of clarity and ease of comparison, the states are grouped by geographic region. Each state's discussion is outlined similarly to assist the reader in comparing the various legal frameworks and to allow for conclusions to be more easily drawn in Part III.⁶⁷ Each section begins with a brief description and comparison of the state's market size, its past inward FDI flows, and its most recent approach and policy toward FDI.

Following this general discussion, the legal framework is examined. Since virtually all states employ a notification and/or prior approval or review procedure,⁶⁸ each section analyzes the specifics of these procedures, including the following:

- (a) which ministry or agency regulates the FDI review process;
- (b) whether a distinction is made between greenfield investment and FDI by acquisition;
- (c) the definition of a foreign investor;
- (d) time issues, such as prior or post notification of the FDI and the time permitted for official review;
- (e) the information required for submission by the foreign investor to the administering authorities;
- (f) the issues to be considered by authorities in the review process;
- (g) the criteria for rejection of FDI; and
- (h) the availability of an appeal.

The final issue addressed in the section is a review of industries which, either through complete prohibition or through limitations on permitted holdings, restrict participation by foreign investors. Such restrictions may arise as a result of rules contained within the national FDI code or, as is often the case, from separate, industry-specific regulations. As the particulars pertaining to such industry-specific regulations are beyond the scope of this Article, this aspect of the analysis is limited to a listing of those industries that are restricted, accompanied by a discussion of any peculiarities.

67. For a brief, chart-form comparison, the reader's attention is called to Appendix A, which contains a chart contrasting each state's approach to several FDI issues.

68. The terms approval and review are used interchangeably throughout the survey, since whichever is mandated, the effect on the foreign investor is the same.

A. North America

1. United States

As the world's leading recipient of FDI and its largest investor, the United States may have the most to gain from a GARFDI.⁶⁹ According to Commerce Department statistics, in 1990 the United States attracted US\$29.97 billion in FDI, the highest figure among the eleven states surveyed.⁷⁰ With a population of over 250 million people and one of the world's highest per capita GNP figures at US\$22,240,⁷¹ it is not surprising to find that the United States represents perhaps the single most important market for foreign investors.

The U.S. framework for the admission of FDI is among the most liberal of the eleven states surveyed. Unlike most states, there is no single FDI code. Virtually all investment is both permitted and not subject to review.⁷² There are exceptions to this general rule, however, since a procedure for notification exists for all FDI and certain FDI may be reviewable.

The requirement to notify all FDI arises from the International Investment and Trade in Services Survey Act, 1976 (IITSSA).⁷³ Administered by the Commerce Department, IITSSA mandates that all FDI involving a direct or indirect foreign participation of at least a ten percent holding be reported within forty-five days of establishment.⁷⁴ Furthermore, IITSSA requires foreign investors to submit periodic reports, on either an annual or quarterly basis depending on the size of the entity.⁷⁵ These notifications are for statistical purposes only, and no review of the investment is conducted by the Commerce Department.

Potentially more significant is the review process, which arises as a result of the Exon-Florio amendment to the Defense Production Act.⁷⁶

69. JULIUS, *supra* note 3, at 44.

70. U.S. COMMERCE DEPARTMENT, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: DETAIL FOR HISTORICAL-COST POSITION AND BALANCE OF PAYMENTS FLOWS (1990).

71. All population and per capita GNP figures cited herein are as of the end of 1991 and are taken from INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT & WORLD BANK, WORLD DEVELOPMENT REPORT 1993 238-39, 282-83 (1993) [hereinafter WORLD DEVELOPMENT REPORT].

72. See J.M. BARBEAU & M.W. AINSIE, A GUIDE TO FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (1992) (for a comprehensive guide to the laws and regulations pertaining to FDI in the United States).

73. 22 U.S.C. §§ 3101-08 (1994).

74. There is, however, a small exception made for agricultural land under 200 acres in size and for acquisitions where the asset value is under US\$1 million.

75. BARBEAU & AINSIE, *supra* note 72, at 46.

76. 50 U.S.C. App. § 2170 (1994). See Patrick L. Schmidt, *Exon-Florio: A Primer for Foreign Investors and Foreign Lenders Doing Business in the United States*, 20 INT'L BUS. LAW. 485 (1992) (for

Enacted in 1988, the rule applies exclusively to foreign acquisitions of domestic firms engaged in defense related industries. Foreign investor is defined by ascertaining whether the investing entity is "controlled" by foreign interests. The definition of control involves an evaluation of the power to cause decisions to be taken (de facto control), rather than deeming as control a specific percentage of ownership (de jure control). The review is administered by a specially created agency, the Committee on Foreign Investment in the United States (CFIUS), which is headed by the Treasury Department but is comprised of representatives from various departments.⁷⁷

Unlike many review procedures, reporting to CFIUS is optional rather than mandatory. There is considerable incentive to report, however, since failure to do so leaves CFIUS free to investigate and potentially unwind the transaction at any time. The information required to be submitted to CFIUS includes biographical information of the persons investing,⁷⁸ a summary of the transaction, a description of the assets being acquired, and future plans for the enterprise. Once reported, CFIUS has thirty days to act or else the acquisition is deemed approved. Should CFIUS determine that further review is warranted, an additional forty-five day period may be used to conduct further investigation.⁷⁹

The sole criterion used in conducting the review involves a determination of whether the acquisition threatens to impair national security.⁸⁰ Should CFIUS make such a determination, the President is required to review it and provide final approval for the unwinding or blockage of the transaction within fifteen days. There is no appeal process provided for in the statute.⁸¹

In addition to these notification and review procedures, there are a number of industries that restrict foreign participation. The most prominent restricted industries include: atomic energy, broadcasting, air and land transport, and shipping.⁸² Furthermore, the banking and

further details on the Exon-Florio amendment); see also Evan Berlack & Hendrik Gordenker, *Exon-Florio—Amended but Still Unclear*, INT'L CORP. L., July-Aug., 1993, at 36.

77. BARBEAU & AINSIE, *supra* note 72, at 27-29.

78. Biographical information, which is required by virtually every state in this survey, refers to the following information: name, address, official corporate documents, and name and address in the investing state. Depending on the state, it may also include the local name of the person accepting legal service and the names and addresses of members of the board of directors or senior management officials.

79. BARBEAU & AINSIE, *supra* note 72, at 27-29.

80. *Id.*

81. *Id.*

82. *Id.* at 31-33.

insurance industries, although open to foreign investors, have some restrictions in place, often as a result of state legislation.⁸³ Although the United States employs both a notification and review procedure, the foregoing review reveals that it is both limited in scope and of only minimal concern to foreign investors. The notification procedure is purely for statistical purposes, while the review process is only applicable in a limited set of circumstances. Moreover, the industries that restrict foreign participation are also limited and, as will become apparent, are typical of those industries commonly restricted by states.

2. Canada

For much of the 1970s and early 1980s, Canada was perceived as highly protectionist with respect to the admission of foreign investment. However, in 1985 it signalled its desire to attract foreign investment⁸⁴ by repealing the much criticized Foreign Investment Review Act⁸⁵ and replacing it with the Investment Canada Act (ICA).⁸⁶ With a population of 27.3 million people and a per capita GNP of US\$20,440,⁸⁷ Canada is representative of high income, smaller populated states such as Australia and the Scandinavian states.

The ICA is administered by a specially created agency named, appropriately enough, Investment Canada. Although the ICA is fairly complex and has been criticized for being poorly drafted, it has succeeded in providing investors with a unified legal framework for FDI.⁸⁸ Although the ICA's approval provisions treat greenfield investments and acquisitions on the same basis, there are differences, discussed below, with respect to whether a review is required. Foreign investor is defined on the basis of control, deemed to be a majority voting interest, de facto control, or instances where the board of directors or management of the entity is controlled by a non-Canadian.⁸⁹ The ICA establishes a notification and approval procedure

83. *Id.* at 33-39.

84. See generally R.K. PATERSON, CANADIAN REGULATION OF INTERNATIONAL TRADE AND INVESTMENT (1980). For a good review of Canada's historical policy toward FDI and an analysis of the ICA, see *id.* at 313-42.

85. S.C. 1973-74, ch. 46 (now repealed).

86. R.S.C., ch. 28 (1985) (1st Supp.), as amended [hereinafter ICA].

87. WORLD DEVELOPMENT REPORT, *supra* note 71, at 239.

88. PATERSON, *supra* note 84.

89. This aspect of the ICA is, unfortunately, unnecessarily complex. See ICA § 26 (for further details on the specifics).

by requiring that all FDI be notified to Investment Canada prior to or within thirty days of establishment.⁹⁰ The information required to be submitted includes biographical information and details pertaining to the investment, such as the amount to be invested, the projected number of employees, and the projected earnings.⁹¹ If the FDI is a greenfield investment, it is subject to approval only if it is classified as a cultural industry, defined as the publication, distribution or sale of books, magazines, and newspapers; or the production, distribution, sale or exhibition of films, videos, and audio or video recordings.⁹² If the FDI is an acquisition, there are detailed regulations that establish minimum thresholds to determine whether the transaction is subject to approval.⁹³

Should the FDI fall under one of the above categories, Investment Canada has forty-five days to review the investment to determine whether it is of net benefit to Canada.⁹⁴ The factors taken into consideration under this test include the investment's effect on the Canadian economy, its effect on productivity and technological development, its competitive effects both within Canada and globally, and its compatibility with Canadian industrial, economic, and cultural policies.⁹⁵ If investment Canada does not make a determination within the forty-five day period, the investment is deemed approved. If it determines that the investment should not be permitted, an appeal process is available whereby the investor may propose various undertakings in order to persuade the agency to reverse its decision.⁹⁶

In addition to the cultural industries noted above, Canada has several other industries that, as a result of industry-specific legislation, restrict foreign participation. As with the United States and Mexico, these restrictions remain in force despite the national treatment provision contained in the NAFTA. Restricted industries include: air and land transport, marine services, fishing, oil and uranium mining, banking, and insurance.⁹⁷ The ICA provides a good example of an FDI code that attempts to balance the good of attracting FDI with the desire to maintain some regulatory framework and governmental controls. The resulting frame-

90. *Id.* § 11.

91. Investment Canada Regulations, Schedule One.

92. Investment Canada Regulations, Schedule Four.

93. ICA § 14.

94. *Id.* § 21.

95. *Id.* § 20.

96. *Id.* § 23.

97. NAFTA, *supra* note 6, at Annex I, at 704.

work is one that is reasonably transparent to investors and addresses state concerns regarding several sensitive industries.

B. Europe

1. United Kingdom

As noted in Part I, the creation of the European Economic Community resulted in the elimination of barriers to the free movement of capital between member states. Although some non-EU states expressed concern about the potential development of a fortress Europe mentality, many member states have used the opportunity to remove their barriers not only to EU members but to all states. As the third largest market in the European Union with 57.5 million people, the United Kingdom is ideally suited to represent this open policy.⁹⁸ Moreover, despite a per capita GNP of US\$16,550, which is among the lowest of the high income states, the United Kingdom leads the European Union in the receipt of FDI.⁹⁹

The United Kingdom employs one of the most liberal FDI frameworks among the states surveyed.¹⁰⁰ With the exception of the notification procedure discussed below, the United Kingdom does not distinguish between foreign and domestic firms in the establishment of a business.

The Department of Trade and Industry has established a separate bureau, the Invest in Britain Bureau, which is responsible for promoting FDI in the United Kingdom.

The sole notification procedure is contained in the Oversea Companies section of the Companies Act.¹⁰¹ The Companies Act requires that companies incorporated outside the United Kingdom that establish a branch in the United Kingdom submit to the registrar of companies, within one month, biographical information and a certified copy of the company's charter or statute.¹⁰² This process is a mere formality since registration of a branch cannot be refused on substantive grounds by the registrar.

98. See EUROPEAN BUSINESS CONCERNS (R. Prentis ed., 1993); see also DEPARTMENT OF TRADE AND INDUSTRY, BARRIERS TO TAKEOVERS IN THE EUROPEAN COMMUNITY, vols. 1-3 (1989) (for a good review of all twelve member states' policies toward FDI).
99. INVEST IN BRITAIN BUREAU, BRITAIN: THE PREFERRED LOCATION 4 (1993).
100. See John Kitching, *United Kingdom*, in INT'L FIN. L. REV., SPECIAL SUPP., INVESTING ACROSS BORDERS, Sept. 1993, at 42 (for a good survey on establishing a business in the United Kingdom).
101. Companies Act, 1985 ch. 6, pt. XXIII.
102. *Id.* § 691.

There are no prior approvals required for FDI in the United Kingdom. The United Kingdom has, however, lodged reservations with the OECD restricting foreign participation in several industries. These include air transport, flag vessels, and broadcasting by non-EU firms. Moreover, the banking and insurance industries also carry special provisions for foreign investors, particularly for those from outside the European Union.¹⁰³ The positive effect of the European Union in removing the barriers to the free movement of capital is readily demonstrated by the example of the United Kingdom, and this liberalization has been replicated in much of the European Union. The United Kingdom's FDI framework provides investors with a liberal procedure involving limited restrictions to foreign participation.

2. Portugal

Portugal, which joined the European Community in 1986, is representative of its medium and smaller sized members. With a population of 10.5 million people and a per capita GNP of US\$5,930, it is the European Union's seventh largest state and one of its poorest members.¹⁰⁴ Despite its relatively poor status, Portugal has succeeded in attracting a considerable amount of FDI. In 1991, US\$2.02 billion was invested, one of the highest figures among developing European states.¹⁰⁵

Although Portugal was long regarded as protectionist with regard to FDI, its EC membership forced it to liberalize its policies.¹⁰⁶ Portugal employs two statutes for the regulation of FDI: one general system for all FDI contained in Decree-Law 197-D/86¹⁰⁷ and a second system for those investors applying for investment incentives.¹⁰⁸ A new agency, Investment, Trade and Tourism of Portugal (ICEP), has been created to administer all aspects of FDI, including its promotion and review.

Law 197 applies equally to greenfield investments and to acquisitions, provided that the acquisition comprises at least twenty percent of the domestic company's capital.¹⁰⁹ Foreign investors are defined as non-

103. OECD Code, *supra* note 37, Annex B.

104. WORLD DEVELOPMENT REPORT, *supra* note 71, at 239.

105. *Id.* at 283.

106. See Patrick F.K. Artison & Peter J. Buckley, *Investment Legislation in Greece, Portugal and Spain: The Background to Foreign Investment in Mediterranean Europe*, 17 J. World Trade L. 513, 517-19 (1983) (for a historical review of Portugal's FDI policies).

107. Decree-Law 197-D/86, July 18, 1986 [hereinafter Law 197].

108. Regulatory Decree 24/86, July 18, 1986. Since this Decree deals primarily with Portugal's incentive program, it is outside the scope of this Article and is not analyzed herein.

109. Law 197, art. 5(3).

resident individuals or corporations, or those Portuguese corporations that, through a holding in capital or by any other means, should be considered economically connected to a non-resident individual or corporation.¹¹⁰

Law 197 utilizes a combined notification and approval framework. All FDI, with the exception of those investments subject to the investment incentives program, must be notified to ICEP prior to establishment.¹¹¹ Investors are required to submit to ICEP biographical information, details on their main activities and financial participation, and the FDI's objectives.¹¹² Applications submitted by EU nationals may only be refused on the following grounds: if the FDI encroaches on the exercise of public authority; if it affects public order, security, or health; if it relates to the production or trade of weapons or ammunition; or if it contravenes any law.¹¹³ Moreover, applications submitted by non-EU nationals may be assessed on the basis of the FDI's effect on the Portuguese economy. This assessment takes a variety of factors into consideration, including the creation of new jobs, the introduction of new technologies and professional training, the improvement of Portuguese natural resources and domestic products, and the reduction of industrial pollution.¹¹⁴ ICEP must render its decision within two months, and failure to do so is deemed approval.¹¹⁵ If ICEP rejects the application, there is no appeal process available, and the application may not be resubmitted for consideration.¹¹⁶

Law 197 does not specify any industries specifically restricting foreign participation. However, Portugal has lodged reservations with the OECD restricting foreign participation in several industries, including cinema, flag vessels, travel agencies, banking, and insurance.¹¹⁷

Portugal's FDI code provides another good example of a framework that balances the need to attract FDI with the desire to regulate it in certain instances. Law 197 is investor friendly since there are only limited restrictions to FDI and the criteria upon which bureaucratic decisions are made are readily transparent to foreign investors.

110. *Id.* art. 2(1).

111. *Id.* art. 5(1).

112. Prior Declaration of Foreign Investment, Form A.

113. Law 197, art. 7.

114. *Id.* art. 8.

115. *Id.* art. 6.

116. *Id.* art. 7(3).

117. OECD Code, *supra* note 37, Annex B.

3. Poland

Poland, with one of Eastern Europe's largest populations at 38.2 million people as well as a strategic location,¹¹⁸ is among the most popular destinations for FDI in the region.¹¹⁹ In fact, despite a low per capita GNP of US\$1,790 and debilitating economic reforms, Poland still attracted the second highest level of FDI in Eastern Europe in 1991¹²⁰ and, after further liberalizing its legal framework, nearly doubled inward FDI in 1992.¹²¹

Poland's FDI system is regulated by a single code, the Law on Companies with Foreign Participation.¹²² The 1991 Law is administered primarily by the Ministry of Ownership Transformation (MOT), although the newly created State Foreign Investment Agency (PAIZ) also plays a role in attracting and assisting foreign investors. The 1991 Law does not distinguish between greenfield investments and acquisitions, and it defines foreign investor on the basis of control, in this case either voting control or the power to appoint or dismiss a majority of the company's managing body.¹²³

Although the 1991 Law does not contain an explicit notification process, the procedure for the creation of a company in Poland contained in the Commercial Code, while a formality, acts as such since it involves submitting biographical information, the company's statute, and a valuation of any non-monetary contributions by the foreign investor.¹²⁴ Moreover, the MOT is entitled to request that further information, including documents relating to the financial status of the investor and expert opinions on the investor or the FDI agreement, be submitted within thirty days of notification.¹²⁵

The approval process established by the 1991 Law is considerably more significant, however. The 1991 Law mandates that FDI engaged in the operation of harbors and airports, real estate, defence, the wholesale

118. Poland maintains borders with six countries, including Russia, the Ukraine, the Czech Republic, and Germany.

119. WORLD DEVELOPMENT REPORT, *supra* note 71, at 239.

120. Poland attracted US\$291 million in FDI in 1991. *Id.* at 283.

121. STATE FOREIGN INVESTMENT AGENCY (PAIZ), PROMOTING FOREIGN INVESTMENT IN POLAND (1993). See Z. DOBOSIEWICZ, FOREIGN INVESTMENT IN EASTERN EUROPE 42-45 (1992) (for further details on the historical regulation of FDI in Poland); see also David Gordon, *The Polish Foreign Investment Law of 1990*, 24 INT'L LAW 335 (1990).

122. Law on Companies with Foreign Participation, June 14, 1991 [hereinafter 1991 Law].

123. *Id.* art. 7(2).

124. M. Orzelski, *A Flexible Framework for Development*, INT'L CORP. L., Mar. 1992, at 37.

125. PAIZ, PERMISSION FOR CREATING A COMPANY (1993).

trade of imported consumer goods, and legal services, obtain prior approval from the MOT.¹²⁶ By implication, FDI in all other industries may be established without prior approval, although industry-specific regulations may require that separate permits be obtained.

The MOT must render its decision within two months of submission¹²⁷ and may request that additional information, such as documents or expert opinions pertaining to the financial condition of the investor, be submitted.¹²⁸ The MOT may only reject an application on the grounds that the investment would threaten state economic interests or state security or defence. Moreover, refusal on the basis of economic interests must be accompanied by a factual justification,¹²⁹ and the approval may be granted subject to the imposition of operating conditions.¹³⁰

In addition to the industries noted above, there are several other industries that restrict foreign participation due to industry-specific legislation. These include air, sea, and land transport, the music and film industries, banking, insurance, and certain aspects of the mining industry.¹³¹

With the 1991 reforms and the creation of a state agency charged with the task of facilitating FDI, Poland has clearly indicated to investors that it is anxious to attract FDI. Its current legal framework permits investment in most industries without bureaucratic interference, and where approval is mandated, the regulations are typical of those found elsewhere in this survey.

C. Asia

1. Japan

Although it is Japan's trade surplus that often captures headlines, Japan's investment surplus has also angered its economic competitors.¹³² While Japan emerged as one of the world's leading sources of FDI during the 1980s, inward FDI did not keep pace, resulting in an enormous investment imbalance that further heightened tensions

126. 1991 Law, art. 4(1).

127. *Id.* art. 18.

128. *Id.* art. 4(1).

129. *Id.* art. 17.

130. *Id.* art. 16.

131. KPMG, INVESTMENT IN POLAND 79 (2d ed. 1993).

132. Japan attracted US\$4.08 billion of FDI in 1992, resulting in an investment surplus figure of 8.3, a decrease from 9.5 in the previous year. The 8.3 figure means that there was 8.3 times more outward Japanese FDI than inward FDI for the year. Yo Makino, *Overseas Direct Investment Falls for Third Year*, NIKKEI WEEKLY, JUNE 7, 1993, at 3.

between Japan and its competitors.¹³³ Moreover, the lack of investment is somewhat surprising since Japan, with a population of 123.9 million people and a per capita GNP of US\$26,930, has one of the world's largest and wealthiest populations, making it an ideal market for FDI.¹³⁴

Historically regarded as protectionist, the Japanese regulatory framework underwent reforms in 1980 and 1992 that improved the situation considerably. FDI is regulated primarily by the Foreign Exchange and Foreign Trade Control Law (FECL),¹³⁵ which is administered by the Ministry of Finance (MOF). The FECL does not distinguish between greenfield investments and acquisitions, provided that the acquisition constitutes a minimum of ten percent of the domestic company's shares.¹³⁶ The FECL defines foreign investor on the basis of control and includes in the definition holdings of fifty percent or more of the company in question or instances where foreign persons comprise a majority of the board of directors.¹³⁷

The FECL utilizes both a notification and an approval procedure. All investments not requiring approval must be notified within fifteen days of establishment. The information to be submitted to the MOF is the same for both the notification and approval procedures and includes biographical information and the reason for, objective, and value of the investment.¹³⁸

FDI is subject to prior approval if it is categorized in one of three groups causing apprehension.¹³⁹ The first group includes investments that imperil national security, disturb the maintenance of public order, or hamper the protection of the general public.¹⁴⁰ The second group involves investments in those industries for which Japan has lodged a reservation with the OECD, including agriculture, forestry, fisheries, mining, oil, and leather.¹⁴¹ The third group applies to foreign investors resident in a state that does not grant Japanese investors reciprocal investment rights.¹⁴²

133. See Michael A. Geist, *Foreign Direct Investment in Japan: A Guide to the Legal Framework*, 9 BANKING & FIN. L. REV. 305 (providing details on the investment surplus, as well as a detailed examination of Japan's current legal framework for FDI); see also MITSUO MATSUSHITA, INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 170-271 (1993).

134. WORLD DEVELOPMENT REPORT, *supra* note 71, at 239.

135. Law No. 228 of 1948, as amended [hereinafter FECL].

136. *Id.* art. 26(2).

137. *Id.* art. 26(1).

138. FECL Cabinet Order No. 354, art. 3(4) (1991).

139. FECL, art. 27.

140. Cabinet Order No. 354, art. 3(1)(a).

141. *Id.* art. 3(1)(b).

142. Ordinance Concerning Direct Domestic Investments, Final amend., Dec. 21, 1991.

If the FDI falls under one of these groups, an application for approval must be submitted at least three months prior to the intended date of establishment. The MOF may approve the investment within thirty days, or, if it determines that further investigation is warranted, delay its determination for up to five months.¹⁴³ The MOF is required to commence an inquiry should it suspect that the FDI might imperil national security, disturb the maintenance of public order, hamper the protection of the general public, or adversely and seriously affect the Japanese economy.¹⁴⁴ This last condition has in the past been interpreted broadly, leading some analysts to express concern over the power exercised by ministry officials in the form of administrative guidance.¹⁴⁵ If the MOF rejects the application, there is no appeal process available to the foreign investor.

In addition to the FECL, numerous industries are subject to industry-specific legislation resulting in restrictions on foreign participation. These include, in addition to the OECD reservations noted above, broadcasting, air and sea transport, telecommunications, petroleum, banking, and insurance.¹⁴⁶

Japan's attempts to improve its legal framework for FDI have resulted in a system that compares favorably with others surveyed herein. The post-notification procedure is similar to those used elsewhere, and, although the approval procedure is lengthy, the standards under which an investment may be rejected have been made relatively transparent.

2. South Korea

One of the four dragons of Asia,¹⁴⁷ South Korea enjoyed the world's highest economic growth rate in the mid-1980s and consequently became a highly attractive market for investment.¹⁴⁸ Furthermore, with one of Asia's largest populations at 43.3 million people and with a per capita GNP of US\$6330, it is nearly ready to join the high income group of states.¹⁴⁹

South Korea's economic policies have often mirrored those of its

neighbor Japan, and its legal framework for FDI is no exception. Until recently, South Korea was very restrictive toward FDI and, despite significant reforms to the legal framework in 1993, investors remain critical.¹⁵⁰ The admission of FDI to South Korea is comprehensively regulated by the Foreign Capital Inducement Act (FCIA).¹⁵¹ The FCIA is administered by the Ministry of Finance (MOF) and is the most restrictive and complex framework of those surveyed herein. The FCIA does not distinguish between greenfield investments and acquisitions, and foreign investors are broadly defined as companies organized under foreign legislation.¹⁵²

The FCIA utilizes a combined notification and approval procedure whereby all investments must be notified and, under certain circumstances, may also be subject to the MOF's approval. Unlike all other notification procedures surveyed however, South Korea's notification procedure is also, for all practical purposes, an approval procedure since notification may be rejected.

Notification must take place prior to the establishment of an enterprise,¹⁵³ by submitting to the MOF biographical information and a business plan.¹⁵⁴ The MOF has thirty days to determine whether to accept the notification or request that it be reviewed for an additional thirty days by a special committee.¹⁵⁵ The MOF will reject the notification if it determines that the proposed investment may: threaten national security, public order, or the protection of public morals; affect the ability to fulfill international peace and security agreements; lessen the protection of national health or the environment; or result in monopolistic pricing or other anti-competitive behavior.¹⁵⁶ If the MOF rejects the notification, the foreign investor is entitled to respond to the rejection and to enter submissions on its own behalf.¹⁵⁷

The FCIA's approval procedure operates in much the same manner. Although the FCIA broadly details the types of industries subject to

150. *Foreigners Cool to Seoul*, INT'L HERALD TRIB., Mar. 3, 1994, at 15. See Hayward, *supra* note 148, at 406-22 (for a historical review of South Korea's FDI framework and policies). See also Chan-Jin Kim, *Foreign Investment Law of Korea*, in BUSINESS LAWS IN KOREA 186 (Chan-Jin Kim ed., 2d ed. 1988).

151. Law No. 1802, Aug. 3, 1966, as amended [hereinafter FCIA].

152. *Id.* art. 2(1).

153. *Id.* art. 7, para. 1.

154. FCIA Working Rules, art. 2.

155. FCIA, art. 7(2).

156. FCIA Enforcement Decree, art. 7(2).

157. *Id.* art. 7(3).

143. FECL, art. 27.

144. *Id.* art. 27(3).

145. See generally Geist, *supra* note 133.

146. *Id.*

147. The other three dragons are Hong Kong, Singapore, and Taiwan.

148. Stephen F. Hayward, *Foreign Investment and Licensing in Korea*, 23 U. BRIT. COLUM. L. REV. 405 (1989). South Korea attracted US\$1.12 billion in FDI in 1991. WORLD DEVELOPMENT REPORT, *supra* note 71, at 283.

149. WORLD DEVELOPMENT REPORT, *supra* note 71, at 239.

approval,¹⁵⁸ attachments to the Regulations on Foreign Investment¹⁵⁹ provide detailed lists of industries that restrict foreign participation¹⁶⁰ or are subject to prior approval. Among the industries subject to prior approval are retail stores, telecommunications, insurance, health, publishing, and mining. The FCIA's approval procedure is identical to the notification procedure as the MOF has thirty days to review the application and to make a determination. The MOF's decision is based on the criteria noted above as well as an analysis of the investment's influence on domestic industries and relation to internal and external policies.¹⁶¹

South Korea's current FDI legal framework is the most complex and restrictive of the eleven states surveyed. Nevertheless, South Korean officials have expressed a desire to further deregulate the current structure and are apparently concerned about the recent drop in inward FDI.¹⁶² Moreover, although the framework is complex, the basic structure of notification and approval mirrors many others surveyed herein.

3. Thailand

One of the fastest growing economies in the world, Thailand is the third largest state in the ASEAN with a population of 57.2 million.¹⁶³ Located in the heart of South-East Asia, Thailand provides close links to newly opened states such as Vietnam and Cambodia and has managed to attract a significant amount of FDI.¹⁶⁴

FDI is regulated by two statutes operating in tandem. The Alien Business Law (ABL)¹⁶⁵ outlines those industries that restrict foreign participation, while the Investment Promotion Act (IPA)¹⁶⁶ establishes a

158. This list includes public works projects, investments related to health, the environment, and morals, and those investments using excessive energy or producing heavy pollution. *Id.* art. 10.

159. Regulations on Foreign Investment, Mar. 1993.

160. These industries include education, defense, and banking.

161. FCIA, art. 7(3).

162. *Foreigners Cool to Seoul*, *supra* note 150, at 15.

163. Thailand's per capita GNP is US\$1570. WORLD DEVELOPMENT REPORT, *supra* note 71, at 238.

164. In 1991, Thailand attracted US\$2.05 billion in FDI, the second highest figure in the ASEAN. *Id.* at 282.

165. National Executive Council Announcement No. 281, Nov. 26, 1972 [hereinafter Announcement No. 281].

166. Investment Promotion Act B.E. 2520 (1977), as amended by Investment Promotion Act (No. 2) B.E. 2534 (1991) [hereinafter IPA].

procedure for the review of such investments.¹⁶⁷ The administration of FDI is conducted jointly by the Office of the Board of Investment (OBOI), which is comprised of representatives from various ministries,¹⁶⁸ and the Department of Commercial Registration (DCR), a division within the Ministry of Commerce. Foreign investors are defined as those who own over fifty percent of the capital of the investing company, or instances where over fifty percent of an investing company's shareholders are foreigners, regardless of their cumulative capital holdings.¹⁶⁹

Thailand does not employ a notification procedure; only those investments subject to approval must comply with the ABL. The ABL covers foreign participation in virtually all industrial sectors, dividing investment into three categories: Category A, which is always restricted; Category B, which is generally restricted but for which an approval may be obtained from the OBOI; and Category C, which is generally restricted but for which an Alien Business Licence may be obtained.

Category A industries include real estate, accountancy, law, advertising, and construction. Category B industries include retail stores, domestic air, land, and sea transport, hotels, forestry, fishing, publishing, and many types of manufacturing. In order to obtain the OBOI's approval, the investor must apply for a promotional certificate, entitling it to both the necessary approval and to investment incentives. In its determination, the OBOI considers factors such as the prospect that the investment will expand the domestic market, foreign currency considerations, and anything else deemed relevant.¹⁷⁰ Depending on the size of the investment, the OBOI must respond within sixty or ninety days of submission,¹⁷¹ and conditional approval may be granted.¹⁷² Although no appeal process is provided for in the IPA, an OBOI publication indicates that appeals are possible, provided that they are submitted within sixty days of the decision being rendered.¹⁷³

Category C industries include all services not listed under A or B and a wide range of manufacturing industries. In order to obtain an Alien Business Licence, the ABL stipulates that an application must be made to the DCR, which determines whether to grant the license based on the

167. See C. CORDIER ET AL., THAILAND: GUIDE TO BUSINESS AND INVESTMENT (1986) (for a comprehensive guide to investment in Thailand).

168. IPA § 6.

169. Announcement No. 281, *supra* note 165, cl. 3.

170. IPA § 18.

171. OFFICE OF THE BOARD OF INVESTMENT, A GUIDE TO INVESTING IN THAILAND 41(1993) [hereinafter A GUIDE TO INVESTING IN THAILAND].

172. IPA § 20.

173. A GUIDE TO INVESTING IN THAILAND, *supra* note 171, at 42.

amount of debt financing in the project and the proportion of Thai involvement. Although no guidelines are provided as to how much Thai involvement is necessary, many licenses are granted on the condition that after a certain period of time Thai and foreign participation will be at least equal.¹⁷⁴ There is no time period prescribed for the rendering of a decision, although an appeal procedure is available should the application be rejected.¹⁷⁵

Although Thailand has a well developed investment incentive program, the ABL, which governs virtually all investment, remains somewhat restrictive and outdated. The procedures employed by Thailand have much in common with other systems; however, foreign participation remains restricted in a significant number of industries.

D. Latin America

1. Argentina

The third largest state in Latin America with a population of 32.7 million,¹⁷⁶ Argentina for many years restricted FDI.¹⁷⁷ However, it recently abolished all investment restrictions and has established a framework that is the most liberal of those surveyed. Although the latest legislation enacted in September 1993 lacks detail, it provides investors with a clear and unequivocal indication of Argentina's commitment to attract FDI.¹⁷⁸

FDI is governed by Decree 1853¹⁷⁹ and is administered by the Secretary of Commerce and Investment (SCI), a division within the Ministry of Economy and Public Works and Services.¹⁸⁰ Foreign investors are defined on the basis of controlling interest, herein deemed to be forty-nine percent or more of capital or a majority of shareholders.¹⁸¹ Decree 1853 applies equally to greenfield investments and to acquisitions.¹⁸²

174. ABL Ministerial Regulation § 8.

175. Announcement No. 281, *supra* note 165, cl. 12.

176. WORLD DEVELOPMENT REPORT, *supra* note 71, at 239. Per capita GNP is US\$2790. *Id.*

177. Bernardo E. Duggin & Griselda Lambertini, *Argentina, in* INVESTING ACROSS BORDERS, *supra* note 101, at 3-6.

178. Argentina attracted US\$2.44 billion in FDI in 1991, the second highest figure in Latin America. WORLD DEVELOPMENT REPORT, *supra* note 71. See also Maciel, Norman & Asociados, *Setting Up a Business in Argentina*, 8 INT'L COMPANY & COMMERCIAL L. REV. Supp. i-viii (1993) (for a good review of the legal framework for establishing a business in Argentina).

179. Decree 1853, Sept. 8, 1993.

180. *Id.* art. 9.

181. Decree 1852, Sept. 8, 1993 (accompanying regulations), art. 2.

182. *Id.*

Decree 1853 provides that all industries are open to foreign investment without notification or prior approval.¹⁸³ This new decree abolishes an earlier system of prior notification and has limited the SCI's duties to gathering statistical data.¹⁸⁴ Notwithstanding this complete liberalization, several industries restrict foreign participation due to industry-specific regulations, including mining, oil, gas, fishing, forestry, broadcasting, banking, and insurance.¹⁸⁵

With virtually no administrative restrictions or involvement, Argentina's FDI framework comes the closest among those surveyed to granting foreign investors unqualified national treatment. Its desire to attract FDI is apparent from its liberal legal framework and, although the framework is new and untested, it provides investors with the assurance of an investor friendly market.

2. Mexico

Having adopted new liberal economic policies, Mexico has become the largest recipient of FDI in Latin America.¹⁸⁶ Moreover, with a large population of 83.3 million people, a rapidly increasing per capita GNP,¹⁸⁷ unimpeded access to the U.S. market, and a new FDI regulatory framework, Mexico promises to be a leading host to FDI for the foreseeable future.

The most recent revision to the FDI framework came in 1993 with the promulgation of a new Foreign Investment Act.¹⁸⁸ The 1993 Act is essentially a codification of the 1989 Regulations,¹⁸⁹ which had been criticized for lacking legal weight and for violating the now abolished 1973 Foreign Investment Act.¹⁹⁰ The 1993 Act is administered by the

183. Decree 1853, art. 2.

184. *Id.* art. 10.

185. MINISTRY OF ECONOMY AND PUBLIC WORKS AND SERVICES, ARGENTINA: A GROWING COUNTRY 24-28 (1993).

186. Mexico attracted US\$4.76 billion in FDI in 1991. WORLD DEVELOPMENT REPORT, *supra* note 71, at 283. See generally Fernando Heftye Etienne, *The New Investment Opportunity: Mexico*, 46 BELL INT'L FISCAL DOC. 419 (1992) (for a good review of Mexico's new economic policies).

187. Mexico's per capita GNP is US\$3030, the highest in Latin America. WORLD DEVELOPMENT REPORT, *supra* note 71, at 239.

188. Foreign Investment Act of 1993, Dec. 27, 1993 (Basham, Ringe & Correa, S.C. trans.) [hereinafter 1993 Act].

189. Regulation to the Law to Promote Mexican Investment and Regulate Foreign Investment, May 16, 1989 (Hoagland y Jauregui Abogados trans.).

190. Law To Promote Mexican Investment and Regulate Foreign Investment, Mar. 9, 1973 (repealed) (translation reproduced from FOREIGN INVESTMENT LEGAL FRAMEWORK AND ITS APPLICATION (1986)). See generally Hope H. Camp et al., *Foreign Investment in Mexico from the Perspective of the Foreign Investor*, 24 ST. MARY'S L.J. 775 (1993) (for a historical review of Mexican FDI policy).

National Commission of Foreign Investments (NCFI), an agency comprised of representatives from several government ministries.¹⁹¹ It does not distinguish between greenfield investments and acquisitions and defines foreign investors simply as those entities that are not Mexican.¹⁹²

The 1993 Act establishes a dual notification and approval procedure under which all FDI must be notified and certain FDI must also receive prior approval. The notification procedure, which is for statistical purposes only, requires investors to register their investment within forty working days of establishment by submitting biographical information and the approximate amount of the investment to the National Registry of Foreign Investment.¹⁹³ Furthermore, investors must update their notification on an annual basis by submitting updated financial information.¹⁹⁴

The prior approval requirement is based both on the FDI's industrial sector and on the percentage of foreign ownership in the investment. The 1993 Act lists those industries that are reserved exclusively to the Mexican government,¹⁹⁵ reserved exclusively to Mexicans,¹⁹⁶ limit foreign participation to a maximum of forty-nine percent,¹⁹⁷ or require prior approval for foreign participation exceeding forty-nine percent.¹⁹⁸ Furthermore, where the foreign participation in an FDI project, regardless of the industrial sector, exceeds eighty-five million pesos and forty-nine percent ownership, prior approval is mandated.¹⁹⁹

Once an application for approval has been submitted, the NCFI has forty-five working days to make a determination; if no decision has been rendered by that time, approval is deemed granted.²⁰⁰ The NCFI evaluates the proposed FDI on the basis of the following criteria: its impact on employment, technological contribution, compliance with environmental legislation, and general contribution to Mexico's competi-

191. 1993 Act, art. 23.

192. *Id.* art. 2.

193. *Id.* arts. 32, 33.

194. *Id.* art. 35.

195. These industries, which are unchanged from the 1973 Act, include petroleum, electricity, telecommunications, and atomic energy. *Id.* art. 5.

196. These industries include land transport, broadcasting, development banks, and retail gasoline sales. *Id.* art. 6.

197. These industries include: air transport, which is limited to 25 percent; banking and stock market services, which is limited to 30 percent; and insurance, publishing, fishing, cable television, basic telephone service, and marine transport. *Id.* art. 7.

198. These industries include education, legal services, cellular phones, oil and gas drilling, and port services. *Id.* art. 8.

199. *Id.* art. 9.

200. *Id.* art. 28.

tiveness.²⁰¹ Moreover, the NCFI may reject any application on national security grounds.²⁰² The 1993 Act does not provide for an appeal process should an application be rejected.

Although Mexico has made significant progress in liberalizing its FDI framework, the foregoing demonstrates that it is still fairly restrictive with regard to foreign majority ownership.²⁰³ The procedural aspects of notification and approval now compare favorably to other systems surveyed, however, and Mexico has pledged to undertake further reforms in the coming years.

E. Africa

1. Nigeria

Although Africa is host to only a small percentage of total international FDI, numerous states are endeavoring to improve on this record and attract investment.²⁰⁴ The poorest of the states surveyed herein with a per capita GNP of only US\$340, Nigeria has been selected to represent Africa since it has the continent's largest population at 99 million people and is its leading recipient of FDI.²⁰⁵

Nigeria's FDI framework is governed by two statutes, both of which were liberalized in the late 1980s and work in conjunction with one another. The Industrial Development Co-ordination Act²⁰⁶ established the Industrial Development Co-ordination Committee (IDCC), which is headed by the Ministry of Industries²⁰⁷ and provides investors with one-stop shopping as it is responsible for granting all approvals related to the establishment of FDI.

201. *Id.* art. 29.

202. *Id.* art. 30.

203. Since several industries, such as telecommunications and land transport, are scheduled to be liberalized before the year 2000, there is some reason for optimism. Moreover, even where an investment is reserved exclusively for the State or for Mexicans, there may be limited exceptions contained within an industry-specific statute permitting some foreign participation. For further details see M.A. Vega & R.J. Diez, *Mexico Revamps Foreign Investment Laws*, INT'L CORP. L., Feb. 1994, at 37.

204. In addition to Nigeria, states such as Namibia, Tanzania, and Zambia have all, in recent years, revised their FDI frameworks in order to attract FDI.

205. Justice Niki Tobi of Nigeria's High Court notes: "[Nigeria] is the largest African Country [sic] with probably the largest concentration of foreign investment potentialities with viable and adequate financing." Niki Tobi, *Legal Aspects of Foreign Investment and Financing of Energy Products in Nigeria*, 14 DALHOUSIE L.J. 5 (1991). Nigeria attracted US\$712 million in FDI in 1991. WORLD DEVELOPMENT REPORT, *supra* note 71, at 282.

206. Industrial Development Co-ordination Act, Sept. 30, 1988, ch. 178 [hereinafter IDCA].

207. *Id.* § 2.

The other relevant statute is the Nigerian Enterprises Promotion Act (NEPA).²⁰⁸ The NEPA provides that, with the exception of forty industries listed in an annex, all industries are open to foreign investment.²⁰⁹ However, even this exception may be overridden if the investment's value exceeds twenty million Nigerian naira.²¹⁰ The NEPA applies only to greenfield investments and defines foreign investors simply as anyone who is not Nigerian.²¹¹

The Nigerian FDI framework does not require notification since all investments are subject to prior approval. All FDI applications, which must include biographical information and a certificate of incorporation,²¹² are to be submitted to the IDCC, which must render a decision within thirty days of submission.²¹³ According to a 1990 Industrial Policy paper, as part of the approval process investors are required to obtain a business permit, an approved status to ensure that imported capital may be repatriated, and investment guarantee approvals.²¹⁴ There are neither guidelines detailing how the IDCC arrives at a decision nor a provision for an appeal process.

Although Nigeria has liberalized its FDI policies, the current framework still suffers from a lack of transparency. In theory, provided the investment is of a certain size, there are no restricted industries. However, the absence of details regarding the decision-making process may discourage some investors.

III. THE FRAMEWORK FOR A GARFDI

As the foregoing survey demonstrates, although no two FDI frameworks are identical, the convergence of FDI policy has led to significant similarities in the standards and procedures applied to the admission of FDI internationally. All eleven states surveyed have adopted general policies of permitting FDI subject to certain exceptions (a positive framework) rather than adopting general bans on FDI with permitted exceptions (a negative framework). Moreover, the almost uniform use of a notification and/or prior approval procedure further demonstrates

208. Nigerian Enterprises Promotion Act, Dec. 29, 1989, ch. 303 [hereinafter NEPA].

209. This list includes many types of manufacturing, retail stores, publishing, broadcasting, travel agencies, advertising, and domestic transport.

210. NEPA, § 1.

211. *Id.* § 17.

212. INVESTING ACROSS BORDERS, *supra* note 100, at 28.

213. IDCA § 9.

214. Chudi Ubezonu, *Some Recent Amendments to Laws Affecting Foreign Investment in Nigeria*, 8 ICSID REV.—FOREIGN INV. L.J. 123, 125-26 (1993).

that widespread agreement currently exists on the method to review the admission of FDI.

This Part of the Article examines in further detail the similarities among the eleven FDI frameworks and attempts to establish the basic principles, based on these similarities, on which a GARFDI could be framed. In fact, it is submitted that the issues discussed below could provide much of the foundation for an agreement aimed at facilitating international investment by standardizing the procedures for the admission of FDI.

A. Basic Principle—National Treatment

The principle of national treatment, which serves as one of the foundations for the GATT, should also serve as the underlying and fundamental principle for a GARFDI. With the exception of Argentina,²¹⁵ the principle is not explicitly mentioned in any of the FDI codes. In practice though, all eleven legal frameworks surveyed use it as their underlying principle,²¹⁶ since all states accord foreign investors the right to establish themselves in their state. This right is then qualified by the implementation of notification and approval procedures and by the limitations created by restricting foreign participation in certain industries. In keeping with established state practice therefore, a GARFDI should have as its foundation the national treatment principle, with much of the remainder of the agreement devoted to qualifying this principle by outlining the procedural framework for establishment and listing those industrial sectors falling outside of the general principle.

B. Administering Agency

Although the agency that administers FDI policy in individual states would be beyond the scope of a GARFDI and is, moreover, of less importance than the policies themselves, it should be noted that seven of the eleven states surveyed have established agencies charged specifically with the task of regulating FDI. There are several advantages to the use of an agency specializing in FDI. First, such an agency will likely be

215. Decree 1853 provides that: "Foreign investors may invest in the country without prior approval under the same conditions as investors domiciled within the country." Decree 1853, art. 2. See *supra* notes 179-80 and accompanying text.

216. As noted in Part I, at the international level, the OECD Code explicitly utilizes a national treatment provision and permits reservations to the principle by the code's signatories. Similarly, the model U.S. BIT calls for national treatment in the admission of FDI by both parties to the agreement but permits derogations in an attached annex.

perceived by foreign investors as both expert in the field and better able to provide information and advice that will not be contradicted at a future time, thereby increasing certainty. Second, and perhaps more importantly, since many of the FDI agencies are comprised of representatives from several government ministries, no single ministry within a government is able unilaterally to dictate FDI policy. As noted in the discussions on Japan and South Korea, the exclusive power vested in their finance ministries has led to investor concerns over the enormous power wielded by these ministries, particularly since they often administer other industry-specific legislation. By establishing an FDI agency outside of the established bureaucracies, regulatory power is diluted and FDI issues can be addressed from a non-partisan perspective.

With regard to what agency might administer a GARFDI itself, there is no obvious answer, although several options exist. First, the agreement could conceivably be administered by the World Trade Organization, which, as noted above, has increased its FDI-related activities.²¹⁷ Alternatively, a new organization administered by the World Bank group could be created. Such an organization could work alongside ICSID and MIGA as the international regulation of FDI continued to develop. Regardless of the agency used, however, the success of an international agreement would be dependent primarily on a state's willingness to adhere both to the terms and spirit of the agreement and not on which agency is engaged in its administration.

C. Definition of Foreign Investor and Foreign Investment

In order to establish the scope of a GARFDI, agreement must be reached on definitions for foreign investor and foreign investment. The examination in Part II reveals considerable similarities, particularly with respect to the definition of foreign investor. With the exception of the United Kingdom, South Korea, Mexico, and Nigeria, all of whom utilize nationality as the basis for defining "foreign" investor, the remaining states examine the degree to which the entity making the investment is controlled by foreign interests in assessing whether an investor should be subject to its FDI legal framework. The definition of control is the critical aspect of the definition, and virtually every FDI code reviewed takes a practical approach to the matter, defining control on the basis of voting control, control of the entity's management, or control by any other means, whether direct or indirect. This approach,

217. See *supra*, Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime For Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633, 641-48 (1995).

which determines whether *de facto* control exists, ensures that an FDI framework cannot be avoided by employing legal technicalities.

The definition of a foreign investment is somewhat less clear. Although the IMF definition noted in the introduction enjoys near universal acceptance, it is not readily apparent whether a GARFDI should encompass only greenfield investments or include FDI by acquisition. The majority of the FDI codes reviewed treat greenfield investments and acquisitions as the same for admission purposes; however, there is not universal accord with regard to what percentage of share acquisition should qualify as FDI.²¹⁸ Furthermore, a number of FDI codes contain separate provisions designed specifically for FDI by acquisition. Without consensus in this area, including acquisitions in a GARFDI may prove to be difficult. Therefore, restricting such an agreement to greenfield investment, to which all FDI codes apply, may be the safest short-term approach.

D. Notification and Approval Procedures

Apart from codifying the national treatment principle, the establishment of standardized notification and approval procedures would be the most significant achievement of a GARFDI. Standardization would reduce regulatory confusion, saving both time and money, and increase investor confidence and certainty in the legal frameworks for FDI of states that are signatories to such an agreement.

Although not all states utilize both a notification and approval procedure, with the exception of Argentina, which has neither, all other states employ some combination of the two. Moreover, there are considerable similarities with respect to the manner in which these procedures are administered. Since the need for specificity would be great in this part of an agreement, the particular aspects of each procedure are addressed individually below.

1. Notification

Of the eleven states surveyed, seven utilize a notification procedure, while an additional state, Portugal, combines the notification and approval procedures. Among the remaining three states, Thailand and Nigeria use only approval procedures, and Argentina does not use either. The information required to be submitted by investors is generally the same as that required for approval, since in many states, including Canada, Japan, and South Korea, the actual forms used are identical.

218. For example, Japan uses a threshold of ten percent, Portugal a threshold of twenty percent, and many other states do not specify a particular threshold.

The notification procedures are almost invariably post-establishment and, therefore, only require submission of the notification within a certain period after the investment has been established. This stems from the fact that, with the exception of South Korea,²¹⁹ the notification procedure is for statistical or legal establishment purposes only and does not serve as a means of reviewing or possibly rejecting an investment. The periods for submission range from any time prior to establishment, to a maximum of forty working days after establishment, as is the case in Mexico. On average, the time period is approximately one month, which presumably provides investors with sufficient time to establish themselves and assures prospective investors that there are no disguised motives behind the notification requirement.²²⁰

With considerable common practice, adoption of a standard notification procedure should not pose any major difficulties. A procedure whereby notification was mandated, for statistical or legal establishment purposes only, within thirty days of establishment would likely meet with widespread agreement, since it would require little change from most existing legal frameworks. Moreover, standardized notification and approval forms, as further discussed below, would ease the process of application for foreign investors by increasing familiarity and eliminating confusion and unnecessary costs.

2. Approval

Although notification procedures play a role in FDI frameworks, the approval procedures are clearly more significant, both as the method of implementing FDI policy and as the primary barrier and disincentive to foreign investors. With the exception of Argentina and the United Kingdom, all states surveyed utilize some form of approval procedure. These range in degree of severity from the United States' defense industry approval to the all-encompassing approval required of those investing in Nigeria. Despite this range of approval requirements, there appears to be sufficient similarity between the frameworks to reach an agreement that establishes harmonized standards. Discussed below is an analysis of the various aspects of the approval procedure with recommendations designed to gain widespread approval.

219. As discussed in the survey on South Korea, its notification procedure is effectively an approval procedure since the reviewing authority is permitted to reject the notification.

220. Although it may seem surprising, one of the primary criticisms leveled at Japan's FIECI for many years was that the requirement that notification be submitted prior to investing was a disguised method of review. See generally Geist, *supra* note 133.

a. Time Issues

There are two separate time issues that are relevant with respect to approval procedures. First, as with notification, is the time period for submission of an approval application by the investor. Since approval procedures are designed to review proposed investments prior to their being established, virtually all require that submission be made before the establishment of the investment.²²¹ The second time issue relates to the amount of time granted to the administering agency for review of the application. Although there is a range of periods, from thirty days in Nigeria to up to five months in Japan, most FDI codes mandate that a decision be rendered within two months of application. Moreover, virtually all codes deem approval to have taken place if there has been no response when the time period has elapsed. Accordingly, the two month period would likely receive broad support as a standard time for review, since it would require only a minimal modification by most states.

b. Information to be Submitted

Despite each state having its own particular concerns, the information that each requires to be submitted by prospective investors is very similar. All states require, at a minimum, basic biographical information such as the name, address, and nationality of the investor, as well as legal documents such as a corporate charter or statute and a domestic address for legal service. Furthermore, each often requires details pertaining to the investment, such as a description, the investment value, start date, objective, and projected revenues. Since, as noted in (c) below, the criteria for rejection are generally similar, it is not surprising that the information requested is also similar. As such, a significant benefit of a GARFDI would be the adoption of a standard approval form incorporating all the information noted above, to be used for submission to all signatory states.

c. Criteria for Rejection of FDI

Since it has long been assumed that each state has its own specific concerns with respect to the admission of FDI, perhaps the most unexpected finding of this survey is the degree to which the criteria used

221. The sole exception to this among the FDI codes reviewed is the United States, where approval is not mandatory and may take place at any time. In view of CFIUS's power to unwind a transaction, however, it is generally considered to be in the best interest of the investor to apply for prior approval.

in the evaluation of FDI are similar. With the exception of Nigeria, all states utilizing an approval procedure also provide investors with details pertaining to the grounds for rejection of proposed investments.

The standardization in a GARFDI of the criteria for rejection would be extremely significant for several reasons. First, harmonized standards would provide certainty to investors and eliminate much of the confusion surrounding the approval process. Second, the development of international standards might, after a period of time, yield universal interpretations of said standards.²²² These interpretations would act as precedents and would assist in curtailing abuses of a GARFDI by limiting rejection of proposed investments on dubious grounds.

The criteria for rejection can be grouped into three broad categories. The first category is rejection on national security or defense grounds. This is found in virtually every FDI code²²³ and would justifiably remain a ground for rejection under a GARFDI since state security clearly takes precedence over any investment considerations. The second category is rejection on public order, safety, or health grounds. This, too, is found in many of the FDI codes, since the protection of citizens as is deemed necessary is regarded as an inherent right in the exercise of state sovereignty.

The third and most controversial category is rejection on the basis of state economic interests or national competitiveness. Although the manner in which this ground is termed varies greatly,²²⁴ the ultimate goal of such criteria is to ensure that the proposed investment does not harm domestic economic interests. Since this is the broadest of the categories, it is also the most open to abuse. Most states have outlined criteria to be used in its interpretation, however, which often include the importation of technology, job creation and training considerations, environmental issues, national competitiveness and antitrust issues, the importation of capital, and domestic participation in the new entity. Although not all states use all these considerations, this list encompasses most criteria.

A GARFDI that detailed the criteria set out above, though obviously not immune to abuse, would undoubtedly increase transparency and remove some of the confusion that currently plagues FDI codes.

222. This process would be similar to the GATT's development of a case law, which is derived from actions that have come before its tribunals.

223. In fact, in the U.S. approval system it is the only basis for rejection.

224. For example, Canada utilizes the "net benefit" test, whereas Poland pointedly refers to threats to state economic interests.

Moreover, a developing case law on the criteria's interpretation would limit a state's likelihood of abusing the standards or, at the very least, call investors' attention to potentially troublesome areas.

d. *Appeal Procedures*

The review in Part II indicates that the availability of an appeal procedure in the event that an application for approval is rejected is quite rare. States seem to be suggesting that, after due consideration, a decision is final. Although a GARFDI would be unlikely to mandate the establishment of appeal procedures at the national level, an appeal procedure for disputes arising out of the agreement itself could prove beneficial. Such disputes might include questions on the interpretation of a clause in the agreement, delays in a state granting approval, or the requirement of submission of additional documentation not encompassed by the standardized forms. The ICSID might be best qualified to act as an arbiter in such situations, since it is already responsible for assisting in the resolution of foreign investment disputes between investors and state authorities.

e. *Industries Subject to Approval*

The survey in Part II reveals that there is a great deal of commonality with regard to the industries that restrict foreign participation or are subject to approval. Although a GARFDI would not immediately remove these barriers, it could allow for them to be more easily identified and provide a framework for their future relaxation.

For the majority of states, the following industries are subject to review or are restricted: defense and weapons industries, publishing, broadcasting, domestic land, sea, and air transport, telecommunications, construction, natural resource-based industries such as agriculture, fisheries, and mining, education, retail stores, banking, and insurance. Although this is a long and daunting list, a GARFDI could conceivably be of benefit in two ways. First, an annex to the agreement in which each signatory would be permitted to list those industries for which some restrictions to foreign participation exist could be created, thereby increasing transparency.

Second, a GARFDI could preside over negotiating rounds, much like the GATT, in order to reduce restrictions through multilateral bargaining. This could be achieved by gradually increasing the degree of foreign participation permitted in a restricted industry. For example, a state that completely restricts foreign participation in an industry might be

persuaded to permit minority foreign ownership, whereas a state that requires approval might be persuaded to downgrade merely to notification. Although progress would likely be incremental, a GARFDI would provide a suitable forum in which states could gradually eliminate restrictions to foreign participation and eventually establish an unqualified principle of national treatment on an international scale.

CONCLUSION

The increasing importance and growth of worldwide FDI is a phenomenon which, while not having gone completely unnoticed, has been largely overshadowed by world trade issues. Consequently, the development of international legal standards governing the area has, with few exceptions, been limited to a series of international declarations with only limited effect.

The lack of progress is particularly glaring in view of the progress that has been made on the regional and bilateral levels, both of which demonstrate the desire of individual states to improve the legal climate for FDI. The need for a more developed legal framework was recently reiterated by the World Bank, which stated in a report that:

The need for international legal standards is increased by the quest for improved investment climates on a worldwide scale and the uncertainty surrounding international rules in this field at present. As the latest UNCTC report indicated "the question is no longer whether international norms should exist but whether the international framework as it exists today is sufficient—or, indeed, adequate—to ensure stable, reliable and mutually beneficial foreign investment relations in the new economic and political landscape."²²⁵

The lack of progress has generally been attributed to the belief that there is insufficient international consensus with regard to FDI policy in order to successfully reach an agreement. In particular, although it has sometimes been acknowledged that virtually all states now believe that FDI should be encouraged, the manner in which it should be regulated is a source of disagreement.

The survey of eleven national legal frameworks for FDI in Part II

225. World Bank, World Bank Report to the Development Committee and Guidelines on the Treatment of FDI, 31 I.L.M. 1363, 1369 (adopted Sept. 21, 1992).

sought to examine the validity of this claim and, on the basis of this examination, assess whether greater consensus may exist than is currently realized. Although differences clearly remain among states, the admission procedures, both in policy and in form, have become remarkably similar regardless of a state's geographic region or stage of economic development. States such as the United States, the United Kingdom, and Argentina have established legal frameworks that create minimal bureaucratic interference and come closest to an unqualified national treatment principle. A second group of states, which includes Canada, Portugal, Poland, and Japan, have established legal frameworks that, while requiring prior approvals, pose few problems for investors and are only moderately restrictive. Even among the most restrictive states surveyed, including South Korea, Thailand, Mexico, and Nigeria, investment is encouraged, and their legal frameworks bear considerable resemblance to the other, more liberal states.

In view of the significant similarities, a GARFDI may be easier to achieve than is commonly perceived. As with the GATT, such an agreement could be founded on the principle of national treatment, with derogations to the general principle to be subsequently reduced through multilateral negotiation. Moreover, such an agreement could establish harmonized standards, with regard to form and policy, as to the manner in which investment is admitted to individual states.

Although such an agreement has long been regarded as a potential encroachment on state sovereignty, the existing similarities ensure that most states would need only minor adjustments to their policies in order to comply with the international standard. All eleven states reviewed use the national treatment principle, although admittedly few express it as such. Similarly, the definition of foreign investor and foreign investment, a critical element in an international agreement, is widely agreed upon. Time issues, both with respect to the submission of an application and to review by administering authorities, encompass a range of periods, all of which are quite similar. Most important, virtually all states have adopted some form of notification and/or approval procedure. These procedures are remarkably similar in their requirements for information submission, their criteria for rejection, and in the industries that are made subject to review or that restrict foreign participation.

The degree of similarity readily lends itself to an agreement that establishes harmonized FDI standards in several areas. First, a standardized notification and approval form that takes into account the information required by all states would eliminate potential confusion, linguistic

difficulties, and ease the process of applying for approval. Second, harmonized time limits and criteria for approval would remove much of the guesswork inherent in investing and allow investors to form business plans with greater predictability. Moreover, a uniform list of criteria for investment approval might also limit the degree to which government regulators abuse FDI frameworks by acting beyond the scope of their powers. Third, listing those industries that restrict foreign participation would increase transparency and, through GARFDI talks, restrictions on foreign participation could be progressively reduced and eventually eliminated.

The absence of an international agreement regulating FDI has been costly, both to investors and to states anxious to attract investment. The time has come for the world's investment regulators to realize that the barriers to such an agreement are far less daunting than is generally perceived. Such a realization could pave the way for a GARFDI and, in the process, accomplish for world investment what the GATT accomplished for world trade nearly fifty years ago.

APPENDIX A

Country	National Treatment ¹	FDI Agency ²	FDI Definition ³	Notification (Time) ⁴	Approval (Information) ⁵	Approval (Criteria) ⁶	Approval (Issues) ⁷	Approval (Industries) ⁸	Appeal ⁹
United States	yes	yes	yes	45 days	30 + 45 days	yes	yes	yes	no
Canada	yes	yes	yes	30 days	45 days	yes	yes	yes	yes
United Kingdom	yes	no	no	one month	no process	no process	no process	no process	no
Portugal	yes	yes	yes	two months	yes	yes	yes	yes	no
Poland	yes	yes	yes	prior	two months	yes	yes	yes	no
Japan	yes	no	no	15 days	five months	yes	yes	yes	no
South Korea	yes	no	no	prior	10 + 30 days	yes	yes	yes	no
Thailand	yes	yes	yes	none	60/90 days	yes	yes	yes	yes
Argentina	yes	yes	yes	no process	no process	no process	no process	no process	no process
Mexico	yes	yes	no	40 work days	45 work days	yes	yes	yes	no
Nigeria	yes	no	no	none	30 days	yes	no	yes	no

¹National Treatment—Is there a positive legal framework such that all investment is permitted, subject to certain limitations?
²FDI Agency—Is there a separate agency for the regulation of FDI?
³FDI Definition—Is a control based definition (de facto and de jure) used for FDI?
⁴Notification (Time)—The time period after establishment of FDI for notification.
⁵Approval (Time)—The time period for review of FDI applications by the administering agency.
⁶Approval (Information)—Is the information required for submission by investors transparent and typical of those of other states (i.e., biological information)?
⁷Approval (Criteria)—Are the criteria for rejection of an investment transparent and typical of those of other states (i.e., the three categories noted above)?
⁸Approval (Issues)—Are the issues to be considered by administering authorities in determining Approval Criteria transparent and typical of those considered by other states (i.e., list noted above)?
⁹Appeal (Industries)—Are those industries restricting foreign participation transparent and typical of those of other states (i.e., list noted above)?
 Appeal—Is an appeal procedure available?