Investment Agreements and Trade Union Strategies for Regulated Investment

Hilda Sánchez Martínez (ITUC-ORIT)

This article provides a historical and present-day account of the government policies in favour of foreign direct investment (FDI), with specific reference to the case of the Americas, as well as presenting the assessment of the international trade union movement and the alternatives proposed.

I. The multilateral approach

In the post war era, the United Nations Conference on Trade and Employment (1948) considered the need to set up an "international trade organisation" (ITO), the aims of which would include drawing up an agreement on investments to promote and protect the capital flows available for productive investment[1]. The conference was however dominated by trade concerns, and approval was only secured for the General Agreement on Trade and Tariffs (GATT), geared exclusively to trade matters[2].

Given the inability to reach a multilateral consensus on the type of protection to be granted to multinational companies, developed countries began deploying bilateral strategies to protect foreign direct investment (FDI). The first bilateral treaty was signed between Germany and Pakistan in 1959. This process was set against a background of vast global foreign capital flows, within the framework of import-replacing industrialisation in the larger Latin American economies and decolonisation in other regions.

It was not until the Uruguay Round (1986), amid a climate more favourable to the liberalisation of capital flows in response to the Latin American foreign debt crisis, that a more liberal debate was initiated about how to move forward with the process of strengthening foreign investment. The outcome was the adoption, in 1994, of a series of partial multilateral agreements on trade related investments (TRIM), trade in services (GATS), and trade related aspects of intellectual property rights (TRIPS).

During the nineties, against the background of the Washington Consensus and the founding of the WTO, another two attempts were made at adopting a global multilateral agreement on investment: the first was promoted by a group of developed countries, members of G-7, which

[1] See Stanley L, "Acuerdos Bilaterales de Inversión y Denuncia ante Tribunales Internacionales, CEPAL, 2004, and Stanley and Mortimore, "Obsolescencia de la Protección a los Inversores Extranjeros después de la Crisis Argentina", CEPAL, 2006.
[2] See Pierre Sauvé: Trade and Investment Rules: Latin American Perspectives. CEPAL, 2006.

tried to seal the approval of a Multilateral Agreement on Investment (MAI) within the Organisation for Economic Co-operation and Development (OECD). The idea was to adopt the MAI within the context of the OECD, with a view to initiating a process of replacing existing bilateral agreements, and using it as a benchmark in future WTO negotiations. From this perspective, the MAI was to constitute the first global instrument aimed at creating a fair investment environment, with clear rules and without barriers (according to the secretary general of the WTO). The agreement was, however, finally aborted due to a lack of agreement between governments as well as the pressure from civil society organisations (including the unions), denouncing the secret nature of the negotiations, along with the controversies surrounding it.

The second attempt was made within the framework of the WTO[3], and referred to the need to address the issue of a multilateral investment agreement, which never came to fruition as such. Mode three of GATS (commercial presence of foreign companies that establish branches or subsidiaries to supply services in other countries) was, however, considered to be a "mini agreement on investments", based on its inclusion of negotiations on FDI treatment guidelines and the opening up of sectors to new investment[4].

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[3] The WTO has emphasised three aspects of its work in favour of a multilateral investment agreement: a) the creation, in 1996, of a Working Group to conduct analytical work on the relationship between trade and investments; b) the Agreement on Trade Related Investments Measures; and c) the General Agreement on Trade in Services (GATS), which identifies foreign investment in services as one of the four modes of supplying services. During the debate that took place within the Working Group at the beginning of the year 2000, technical considerations were raised regarding the scope and definition of the concept of investment, the political feasibility of establishing transparency and performance standards for FDI flows, etc. The corporate lobby, which advocated the creation of a multilateral framework, pointed out that this would inject multilateralism into the law of the jungle, would give developing countries more bargaining power, would promote greater FDI, contribute to creating better conditions in terms of stability and predictability for FDI in the long-term and would incorporate many of the standards in terms of market access and investment protection contained in the majority of the investment agreements signed in recent years .

[4] This mode deals with capital flows, performance requirements, labour mobility, National Treatment, etc. More specifically, the preamble to the plurilateral request on Mode Three, presented by the EU, Hong Kong, China, Japan, New Zealand, Switzerland and the US in 2006, asks for the elimination of regulations that may affect the establishment and the operations of multinational enterprises, such as those concerning foreign participation, proof of economic need, limits on the type of commercial presence (subsidiaries, representation offices, etc), joint venture requirements and limits on international exchange and the repatriation of profits.

As regards investment-related developments in the Americas during this period, the North American Free Trade Agreement (NAFTA, 1994) included a similar chapter on investment, clearly based on studies carried out in relation to GATS. The United States then proposed a more radical version of this investment chapter some years later during the negotiation of the Free Trade Agreement of the Americas.

As regards developments during the present decade, ten international banks, linked to the International Finance Corporation (IFC) - the private sector lending arm of the World Bank - agreed, in 2003, on a corporate social responsibility protocol, known as the Equator Principles, to regulate their investment conduct. In July 2006, these principles were revised in keeping with the new social, labour and environmental standards established by the IFC to approve major investment projects. Forty banks, four of which are Brazilian, adopted these revised principles.

In 2006, the OECD adopted a Policy Framework for Investment, which attempts to overcome the limitations of the MAI, offering guidelines in ten policy areas. Its aim is to create a friendly environment for investment in developing countries, in line with the principles set out by the United Nations Millennium +5 Summit, the Monterey Consensus and the Johannesburg Sustainable Development Summit. Although this document is not binding, it could eventually constitute a good practice guide and serve as an international reference for assessing and evaluating the regulations built into the various investment agreements signed at international level. A novel aspect is that, in keeping with the new priorities set this decade by the UN, (Millennium +5 Summit, the Monterey Consensus and the Johannesburg Sustainable Development Summit), the policy framework incorporates the OECD Guidelines on Multinational Enterprises, the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and Paragraph 47 of the Millennium +5 Summit on decent work.

This year, the UN Economic and Social Council established guidelines for FDI in the Declaration of the High-Level Segment:

- Paragraph 23: refers to the balance between “policy space” and the international commitments adopted, taking into account the development goals of each country.
- Paragraph 24: calls for more FDI to be channelled towards developing countries and countries with transitional economies, to support their development and to enhance the benefits they can draw from such investments.
- Paragraph 25: supports the efforts of developing and transitional economy countries to create a transparent, stable and predictable investment climate, ensuring respect for property rights and within the context of an appropriate regulatory framework.
- Paragraph 29: calls for corporate responsibility, Global Compact style, and urges the private sector to examine the implications of its decisions from all perspectives: economic-financial, developmental, social, human rights, gender and environmental. The importance of the ILO Tripartite Declaration on Multinational Enterprises and Social Policy is underlined in this context.

- Paragraph 30: calls for an increase in national investment, international development funding and investment flows targeting developing countries and transition economies as well as sectors with greater potential to generate productive employment and decent work for all, especially women and young people.

II. The bilateral approach

As regards the actual practices of individual countries in the area of FDI, as UNCTAD has pointed out, there has been an intense process of unilateral change in national regulatory policies, with a clear trend in favour of deregulation (although there appears to have been a recent reversal of this trend) (see table 1).

Table 1.
Deregulation of
FDI at national level. 1990-2005

	1991	1995	1997	2000	2001	2003	2004	2005
Number of countries amending their legislation on FDI	35	64	76	69	71	82	92	93
Number of amendments	82	112	151	150	208	244	271	205
More favourable to FDI	80	106	135	147	194	220	235	164
Less favourable to FDI	2	2	16	3	14	24	36	41

Source: UNCTAD, World Investment Report (1998 and 2006)

Within this framework, and in the absence of a multilateral one, countries have been making increasing use of the bilateral (and exceptionally sub-regional) route.

The instruments most frequently used are those commonly referred to as Investment Protection and Promotion Agreements (IPPAs) (or Bilateral Investment Treaties (BIT)). At the same time, the United States followed by the European Union and Japan have signed trade agreements that increasingly include chapters on investment.

II.1 Global level

The first IPPAs date back to the post-war era in Europe and were signed amid a political context of widespread concern among developed countries over the possible spread of communism and the impact on new trade interests arising from decolonisation. Accordingly, the initial agreements were based on a single aspect of the investment process: the protection of foreign investments and capital. Furthermore, given that the agreements were signed bilaterally between home and host countries, they did not give rise to the creation of institutions or processes to analyse or assess the success or failure of the agreements. The whole post-war era was in fact, dominated by a "State diplomacy" system of protecting foreign direct investment, whereby the backing given to investors depended on the will of the State of origin.

But it was not until recently that IPPAs gained real impetus: there were less than 400 IPPAs at the end of the 80s compared with almost 2500 in 2005 (UNCTAD, 2006) (see table 2).

Both developed and developing countries have taken part in this process, and although the former account for the majority of the agreements signed (40% of the total), a sizeable percentage of the agreements have been signed between developing countries (26% of the total). The greatest dynamic in this respect has come from Asia-Pacific countries (40% of the total).

Additionally, the number of cases presented to international arbitration mechanisms (mainly ICSID) has risen sharply: from 5 at the end of the eighties to over 200 at the end of 2005, two thirds of which are concentrated in the present decade.

II.2 The Americas

The countries of Latin America and the Caribbean have signed 560 IPPAs in total, of which 419 are still in force. Table 2 gives a breakdown of those still in operation, differentiating between countries with a high, intermediate and low number of agreements. There are wide disparities between countries, regardless of the size of their economies, as is the case, for example, with Paraguay and Colombia. The most striking case is Brazil, which has signed 14 agreements but has not ratified them.[5]

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[5] The agreements still in force signed by Latin American and Caribbean countries include 9 with the United States and 8 with Canada (out of a total of 39 and 25, respectively). The FTA countries that have signed with both countries are Argentina (both in 1991), Ecuador, Panama (first in the region, in 1983), and Trinidad and Tobago. Those that have signed agreements with the United States are Barbados, Costa Rica and Venezuela, and those that have signed with Canada are Bolivia, Grenada, Honduras and Jamaica. Uruguay signed a bilateral investment treaty (BIT) with Canada in 1997, to which it added another with the United States at the end of 2005.

Table 2
FTA countries with IPPAs in force
According to three categories. 2005

Countries with a high number of agreements	Countries with an intermediate number of agreements	Countries with a low number of agreements
Argentina, 54	Peru, 28	Panama, 14
Paraguay, 40	Uruguay, 26	Costa Rica, 13
Chile, 38	Cuba, 26	Guatemala, 12
Mexico, 36	Ecuador, 23	Nicaragua, 12
	Venezuela 21	Jamaica, 10
	El Salvador, 20	Dominican Republic, 5
	Bolivia, 18	Colombia, 1

Source: based on UNCTAD data, 2006.

Other small countries together account for 15 agreements: Belize, Dominica, Grenada, Guyana, Haiti, and Saint Vincent and the Grenadines.

The number of cases presented to ICSID and other such organisations has also seen a major increase in the Americas: there were 94 underway in 2005, almost half (42) of which concerned Argentina (related to the 2000 crisis), with a significant number (28) relating to Mexico and the United States, within the framework of NAFTA.

Another important channel for pro-investment policies in Latin America and the Caribbean are trade agreements, in which the three economic blocs are involved:

- US: during the current decade, the focus of NAFTA, aside from the FTAA project, was projected on the various FTAs signed by the United States with countries in the Americas (Chile, Central America, Dominican Republic, Peru, Colombia). Another formula used by this country, although to a lesser extent, are the Trade Investment Framework Agreements (TIFAs), which establish consultation mechanisms concerning matters affecting trade and investment, and usually constitute a prelude to the signing of a trade agreement.

- EU: although the EU has been using a more limited mechanism (Economic Cooperation Agreements, ECA) since the 80s in its international dealings with the countries of the region, focusing on cooperation and cultural aspects, it did sign an FTA with Mexico (in 1997, progressively entering into force since 2000), which included free trade and investment commitments. A later agreement with Chile (in force since 2003) contained the same commitments. These have been expanded on in the agreement that the EU started to negotiate with MERCOSUR countries in 2001, although an agreement has not

yet been reached. During the III EU-LAC Summit (Vienna, 2006), it was decided that the same type of agreements would be negotiated with Andean and Central American countries as of 2007.

- Japan: this country has also started negotiating agreements in the region (referred to as Economic Association Agreements). An agreement has already been signed with Mexico (2005) and another is being negotiated with Chile.

III. The increasing profile of pro-investment clauses in free trade agreements

The aforementioned growth in IPPAs has been accompanied by major changes in their content. Already at the end of the 70s, specific chapters were being included on State-investor dispute settlement mechanisms, granting the right to appeal to international courts, and thus reversing the historic Calvo Doctrine trend, according to which disputes are settled in local courts. This was accompanied by the creation of international arbitration institutions, the main one being the International Centre for the Settlement of Investment Disputes (ICSID)[6]. The agreements then went on to become increasingly specific, placing ever-greater restrictions on government action. In this sense, these agreements have, in fact, gradually come to constitute legal protection instruments for FDI, blocking any attempt to re-regulate. The situation is similar in the case of investment clauses in FTAs[7].

The following list covers the main components of the present agreements:

1. Definition of investment. Wide scope is sought for the protection measures established by BITs, covering all types of property interests, whether direct or indirect, real or contingent, with phrases such as “all types of assets and rights of any nature” or “all assets directly or indirectly owned or controlled”. Reference is made to elements such as intellectual property rights, concessions, licences, authorisations, permits and similar rights, and commercial agreements for the sale of goods and services, etc. Specific provisions on the promotion of sustainable development as a strategic aim of any kind of investment are not generally included.

[6] ICSID was set up in 1966 by the Convention on the Settlement of Investment Disputes between States, signed by 153 countries and ratified by 134 before the World Bank. Recourse to ICSID conciliation and arbitration is entirely voluntary. It is recognised as an arbitration forum by 1500 IPPAs. The first case was filed in 1987. Other institutions are the International Chamber of Commerce (Paris), the Stockholm Chamber of Commerce and the UN Commission on International Trade Law (UNICTRAL).

[7] For the countries of the region, the commitments undertaken bilaterally, through FTAs, set precedents for future negotiations (including bilateral negotiations with other countries; for example, the EU will take the concessions made in Central America, within the framework of the FTA with the United States, as a "floor"), as well as for the positions taken in multilateral negotiations, affecting the possibility of strengthening group positions taken by countries of the South.

2. Settlement mechanisms for disputes (between States and investors). International arbitration replaces national legislation, with the participation of the courts of the FDI host countries. This may imply a de facto waiving of national laws and regulations. This is the chapter where there is a strong slant in favour of foreign investors, in the sense that they are given special discretionary rights to use international tribunals rather than answering to the domestic courts and laws of each country. Governments are forced to spend resources on defending their own legal and legislative processes. The "judges" are chosen by the parties to the agreement, and are not subject to ethical and common legal rules, and do not have to account for their decisions. The public is totally excluded from these proceedings. There are no appeal bodies to ensure that errors in the interpretation of laws can be corrected. This is often the clause where the nature of international law is altered. The parties tend to opt for arbitration under the rules of ICSID and cases are often investigated by means of non-transparent internal processes.

3. Expropriation. The traditional term of expropriation is often used, on which national laws contain provisions regarding the fair and timely compensation of the party affected by these extraordinary measures. However, the aim is to protect the investor from indirect expropriations (measures "equivalent to expropriation") arising from changes in the country's regulatory framework. It allows the foreign companies and individual investors to take action in the face of any government act "deemed not to be backed by public interest legislation" and which could consequently diminish projected profits or affect their property.

4. **National and most-favoured-nation treatment**. The inclusion of "non-discriminatory" principles in the agreements, such as most-favoured-nation treatment (MFNT), which allows developed countries to be granted all the benefits that their partner acquires through free trade, or that of national treatment, whereby foreign investors receive the same benefits as national companies as regards establishment, acquisition, expansion, administration, conduct, operation, sales or other investment provisions, have only served to eliminate any form of discrimination in favour of national investors and reinforce the benefits granted to foreign companies.[8] In this type of clauses, governments are forced to rely almost exclusively on the exceptions and reservations specifically made by each one of them to protect important areas of their own economies and development policies. The problem is that any measure, area or sector that is not explicitly and specifically mentioned loses the possibility of being exempted. Furthermore, no flexibility is usually provided so that governments can adopt new measures in specific sensitive areas such as health, education and social services.

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[8] The problem with the liberal focus of FTAs and IPPAs, as well as that of GATS, is the failure to recognise the development gap between the countries signing such agreements. The commitments received reproduce and amplify, at bilateral level, the unequal terms on which the countries signing the agreement compete.

5. **Capital controls.** Countries are obliged not to impose capital controls, and to allow investment capital transfers to be made freely and without delay. The broadest definition of investment capital transfers includes: capital contributions and royalties, fees and any other type of payment relating to intellectual property rights, and royalties arising from the exploitation of natural resources.

6. Performance requirements. These are the conditions imposed on investors to ensure that the host country benefits from the investment. Broad prohibition of such requirements is often sought on the basis that they "distort the market". The requirements often eliminated are: exporting a certain level or percentage of goods or services; reaching a certain degree or percentage of national content; purchasing, using or giving preference to goods produced or services provided in the country; linking, in any way, the volume or value of imports with the volume of value of the exports, or with the total foreign currency inflows related to the investment in question; restricting sales in the host country of the goods or services that this investment produces or provides; establishing any form of link between such sales and the volume or value of exports or the profits generated in foreign currency; transferring persons, technology and productive processes or other reserved information, except when the requirement is imposed, or the commitment or initiative is enforced by a legal or administrative court or an authority with the competence to remedy an alleged violation of competition laws, or to act in a way that is not incompatible with the other provisions of the treaty; acting as an exclusive supplier of the goods produced or the services provided for a specific market, whether regional or global. In some treaties, the bias towards the foreign investor is even greater, as performance requirements are only established for national companies, thus creating a double standard benefiting multinationals.

IV. Basic trade union strategy

The strategy of the international trade union movement (formerly the ICFTU, which has been part of the current ITUC since last year) in relation to investment agreements can be identified in terms of its response to concrete developments, such as the MAI negotiations within the OECD, WTO measures, and, more recently, the OECD guidelines.

III.1 TUAC and ICFTU response to MAI negotiations in the OECD. In response to the MAI negotiations, TUAC (together with the ICFTU), established general criteria for dealing with the subject of investment in multilateral agreements, emphasising the need to incorporate the OECD Guidelines on Multinational Enterprises, by:

- Making explicit reference to them in the Preamble.
- Appending the OECD Guidelines in full.
- The inclusion of a specific article regarding the fact that investors from non-OECD member countries should automatically adopt the Guidelines.

- Establishing National Contact Points to enforce the Guidelines, which should be a legally binding element of the Agreement for all Parties without exception.

TUAC also recommended the inclusion of a binding clause in the MAI, subject to dispute settlement, to ensure that governments do not try to attract investors by suppressing national labour standards or by violating internationally recognised core labour standards. This clause would also include environmental standards[9].

Later, in response to the new “Framework” initiative, the trade union movement reiterated its concern, given the imbalanced and excessive emphasis on investors’ rights, and the lack of guarantees, especially for non-members of the OECD, that pro-FDI policies will not affect the citizens’ social and labour rights. In addition, the chapter on human resources continued to insist that labour market institutions, especially trade unions and collective bargaining, are an obstacle to improving the investment climate, productivity and job creation, as asserted by the World Bank in its report entitled “Doing Business”[10]

III.2 The ICFTU response to the WTO. The general ICFTU approach in response to the WTO was that any international agreement should contain a development clause, to allow developing (and transition economy) countries to give national companies time and space to develop, before fully exposing them to the force of international competition from multinational enterprises (Seattle, 1999). Later (Cancun, 2003), it directly rejected the proposal that an investment treaty be negotiated within the body, considering it to be inappropriate, given that its principles are based on trade negotiations strictly between governments, whilst investment includes Investor-State negotiations. In any event, the adoption of a multilateral investment agreement should take place within the context of the UN, to ensure the inclusion of a pro-development angle. It also considered that the terms of the negotiation would lead to a repeat of the MAI model.

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[9] During the MAI negotiations, which ended up being suspended, the ICFTU noted that there was a degree of consensus in favour of this approach, with the exception of Korea, Australia, New Zealand and Mexico.

[10] The main instrument used by the World Bank to promote labour market reforms is the model established in the annual report, Doing Business, prepared by the Bank’s Private Sector Development department, in which investors’ rights clearly take precedence over workers’ rights and decent work objectives. The basic outlook of Doing Business is that any labour law or regulation that may be deemed an obstacle to the unrestricted rights of private investors should be suppressed. In many countries, this publication has been used to make specific recommendations aimed at deregulating the labour market and, in some cases, such recommendations are imposed as conditions for World Bank or IMF loans. In the section on hiring and firing workers, countries are assessed according to a wide range of labour regulations, including working hours, minimum wages, notice requirements and the difficulties and costs involved in dismissing workers. Doing Business gives bad marks to countries with even very basic protection, often well below the standards set by ILO Conventions, on the basis that it is against the interest of investors. For example, countries are considered to be unfavourable to investors if the number of legal working hours per week is below 66, or if workers are allowed to question dismissals that they consider unfair or discriminatory. Accordingly, Palau (a republic comprising a group of islands in the Pacific, with 21.000 inhabitants, which has no labour law and is not a member of the ILO) is classed as a “best performer”, based on “exemplary” features such as allowing a 24-hour working day and a seven-day working week. Likewise, a worker with 20 years seniority can be given zero annual leave. See the trade union statement in response to the 2006 annual meetings of the IMF and the World Bank (Singapore, 19-20 September 2006).

It further asserted that any investment agreement should:

- allow governments to incorporate binding compensation mechanisms ("governing responsibilities")
- contain transparent mechanisms for State-State dispute settlement
- avoid including provisions on expropriations and National Treatment (pre/post establishment) that may limit the implementation of local, regional and national development strategies.
- promote performance requirements fostering decent employment and the rise of new industries.

III.3 The ECOSOC declaration. From a trade union perspective, this declaration opens a debate about investments made outside strictly commercial sectors and places greater emphasis on the theme of sustainable development but leaves out the question of which forum is the most appropriate for discussing and defining a multilateral framework on regulated investment.

III.4 . The American perspective. ORIT, as the American regional organisation of the ICFTU, then the ITUC, set out its demands in the Plataforma Laboral de las Américas, drawn up in collaboration with other independent trade union organisations and those affiliated to other international trade union centres, and presented it at the IV Summit of the Americas (Mar del Plata, November 2005). It asserted that:

- foreign investors should comply with labour standards and submit to national laws and courts; States, at the same time, should demand that they reinvest their profits.
- Multinational companies should assume their social responsibilities and commitment to the integral development of society, adapting, without exception, their conduct to the OECD Guidelines, the UN Global Compact, the ILO Declaration on Multinational Enterprises and the International Framework Agreements in force.

More recently, within the framework of regional and international activities, ORIT has been advocating consideration for strategic "symmetry" in trade and investment negotiations involving any of the "three giants" (North America, EU, and Asia Pacific), in the current context of multiple bilateral, sub-regional and even bi-regional negotiations. In this respect, the trade union movement makes the observation that the offers made by these countries are basically the same, and thus require, as a counterbalance, the deployment of a single strategy, based on the parameters mentioned above.

The Latin American trade union movement has also emphasised two key elements in the argument against free investment treaties: the ineffectiveness of such treaties in the promotion of investment and the difficulties raised by international arbitration mechanisms, as seen in positions of the Coordinadora de Centrales Sindicales del Cono Sur (CCSCS) ("Press Release on the IPPA between Uruguay and the US, June 2005)[11].

V. Additional criteria

The previous sections provide an overview of the conventional clauses contained in free investment treaties and how they have developed in practice, along with the basic strategic positions of the international trade union movement in response to some of their manifestations. Expanding on this approach, this final section presents some of the criteria in the area of regulated investment that should be included in any investment agreement seeking to be compatible with sustainable development goals.

To this effect, the basic trade union approach has been taken and new elements have been added, based on a recent contribution from the Americas, made by the IISD International Institute for Sustainable Development: "IISD Model International Agreement on Investment for Sustainable Development" April 2005. This proposal is based on an analysis of existing agreements, concrete practices observed in international arbitration, and ideas contributed by international bodies working in various fields (UN, ILO, OECD, WTO, World Bank). In addition to the aforementioned elements contributed by the ICFTU and TUAC, the following strictly economic factors are stressed:

- The use of restrictive criteria to define investment, the main criteria being physical presence and the ability to contribute to development, thus breaking away from the commercial formulas of the WTO. Portfolio type investments are excluded, intellectual property rights being considered as an investment per se, as are goods purchased for personal reasons.
- Exact definition both of the "host State" and the "home State" for jurisdictional purposes, in order to remove one of the major asymmetries of international law: the fact that foreign investors enjoy special rights but are, at the same time, free from any responsibility toward the State where the investment is originally located.

[11] These two elements can be found in the analysis of UNCTAD (WIR, 1998 and 2006), which points out that the effectiveness of IPPAs is questionable, in the absence of any conclusive evidence about the causal relation between the signing of an IPPA and FDI flows. It is thought that IPPAs have a minor impact and that the most decisive factors influencing the decision to invest in a country are probably the size of the market, strategic motives or the availability of natural resources. The key aim of these agreements is not, apparently, to act as a catalyst for new investment flows, but rather to protect existing and future investments in countries that are already major receivers of FDI. IPPAs therefore appear to be the result of investment flows, rather than the contrary. Furthermore, ICSID and other arbitration mechanism have numerous flaws: the high financial cost of their litigation procedures, the ease with which companies can file complaints against States allegedly committing violations, the commercial bias of the arbitration procedure, the failure to consolidate similar cases, and barriers to the participation of civil society.

- Setting of obligations and duties to be fulfilled by foreign investors, based on the basic understanding that the investments are subject to the laws and regulations of the host State. Investors shall strive to support the host states and local communities in ways consistent with their sustainable development goals and planning.
- Use of an "investment opportunity announcement" approach, rather than creating a "general right of entry" for foreign investors. In this way, host States can indicate which sectors are more open to FDI than others, and which are considered strategic and are therefore excluded.
- Promotion of mechanisms to temporarily assess the commitments undertaken by States concerning FDI, with a view to possible changes to regulatory frameworks, thus avoiding the establishment of permanent commitments or the granting of permanent rights to foreign investors.
- Setting a standard for the treatment of foreign investors. The possible impact of development inequalities between countries should be established, and rather than simply comparing foreign and national investors, these should be considered "in like circumstances". As regards the issue of Most Favoured Nation Treatment, this should be limited to the application of this principle to future agreements, with greater emphasis being placed on a wide range of national measures to be covered by the foreign investors.
- Evaluation of the environmental, labour and social impact of the pre-establishment phase of the investment, based on the strictest of the rules and minimum standards of the two States. The information gathered and evaluated should be made public and accessible to the interested parties in the local communities where the investment is to be made, and prior to the host State taking a final decision on the investment.
- Safeguarding expropriation rights, without tying them to specific conditions, including non-discrimination. Expropriation is considered as a measure to protect or enhance legitimate public welfare objectives. An investor must prove that the measure is not bona fide, for example, that there is a hidden objective, that it is irrelevant to the objectives announced, or that it has been adopted by means of corruption, etc. This differs greatly from the idea of a regulatory "exception", whereby regulations could be defined as expropriations, unless the host State were to demonstrate that they could be categorised as an exception.
- Questioning of the rights of investors to initiate dispute settlement proceedings before a court in the face of persistent violations, eventually constituting a formal revocation. Authorisation to invalidate the process in case of violations of anticorruption obligations.
- Recognition of the State's right to use its own domestic courts to enforce the obligations related to the investment, by incorporating them into its own domestic laws. Fostering the role of local communities and civil society organisations in such processes.
- Habilitation of State-State disputes between the Parties to proceed with the arbitration process established in the investment agreements.

- Initiation of proceedings by the Host state to claim for damages by means of counterclaims.
- Transparency of the proceedings as a basic principle, so that all disputes are open to the public: public hearings, public access to documents.
- Requirement that the rulings of arbitration processes or other international dispute settlement mechanisms be enforceable by domestic legal processes.
- Emphasis on the role of the National Contact Point for the OECD Guidelines in mechanisms for the prevention of disputes and mediation.