

UNCTAD/ITE/IIT/10(Vol. III)

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

MOST-FAVoured-NATION TREATMENT

UNCTAD Series
on issues in international investment agreements



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NOTE

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to foreign direct investment and transnational corporations. In the past, the Programme on Transnational Corporations was carried out by the United Nations Centre on Transnational Corporations (1975-1992) and the Transnational Corporations and Management Division of the United Nations Department of Economic and Social Development (1992-1993). In 1993, the Programme was transferred to the United Nations Conference on Trade and Development. UNCTAD seeks to further the understanding of the nature of transnational corporations and their contribution to development and to create an enabling environment for international investment and enterprise development. UNCTAD's work is carried out through intergovernmental deliberations, research and analysis, technical assistance activities, seminars, workshops and conferences.

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Two dots (..) indicate that data are not available or are not separately reported. Rows in tables have been omitted in those cases where no data are available for any of the elements in the row;

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A slash (/) between dates representing years, e.g. 1994/95, indicates a financial year;

Use of a hyphen (-) between dates representing years, e.g. 1994-1995, signifies the full period involved, including the beginning and end years.

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The material contained in this study may be freely quoted with appropriate acknowledgement.

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IIA Issues Paper Series

The main purpose of the UNCTAD Series on issues in international investment agreements is to address key concepts and issues relevant to international investment agreements and to present them in a manner that is easily accessible to end-users. The series covers the following topics:

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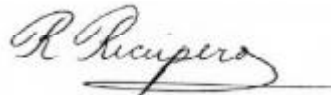
Preface

The United Nations Conference on Trade and Development (UNCTAD) is implementing a work programme on a possible multilateral framework on investment, with a view towards assisting developing countries to participate as effectively as possible in international investment rule-making at the bilateral, regional, plurilateral and multilateral levels. The programme embraces capacity-building seminars, regional symposia, training courses, dialogues between negotiators and groups of civil society and the preparation of a series of issues papers.

This paper is part of this series. It is addressed to government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers. The series seeks to provide balanced analyses of issues that may arise in discussions about international investment agreements. Each study may be read by itself, independently of the others. Since, however, the issues treated closely interact with one another, the studies pay particular attention to such interactions.

The series is produced by a team led by Karl P. Sauvant and Pedro Roffe, and including Victoria Aranda, Anna Joubin-Bret, John Gara, Assad Omer, Jörg Weber and Ruvan de Alwis, under the overall direction of Lynn K. Mytelka; its principal advisors are Arghyrios A. Fatouros, Sanjaya Lall and Peter T. Muchlinski. The present paper is based on a manuscript prepared by Joachim Karl. The final version reflects comments received from Mark Koulen and Hamid Mamdouh. The paper was desktop published by Teresita Sabico.

Funds for UNCTAD's work programme on a possible multilateral framework on investment have so far been received from Australia, Brazil, Canada, the Netherlands, Norway, Switzerland, the United Kingdom and the European Commission. Countries such as India, Morocco and Peru have also contributed to the work programme by hosting regional symposia. All of these contributions are gratefully acknowledged.



Rubens Ricupero
Secretary-General of UNCTAD

Geneva, December 1998

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Executive summary

The most-favoured-nation treatment (MFN) standard is a core element of international investment agreements. It means that a host country treats investors from one foreign country no less favourably than investors from any other foreign country. The MFN standard gives investors a guarantee against certain forms of discrimination by host countries, and it is crucial for the establishment of equality of competitive opportunities between investors from different foreign countries.

The MFN standard may also have implications for host countries' room for manoeuvre in respect of future investment agreements, because it can create a so-called "free rider" situation in that the MFN standard commits a host country to extend unilaterally to its treaty partners any additional rights that it grants to third countries in future agreements. Furthermore, as the globalization of investment activities makes corporate nationality more difficult to use as a ground for distinguishing between companies, it may become equally more difficult to identify the nation that actually benefits from MFN.

While the MFN standard has for decades been a common feature of bilateral investment treaties (BITs), efforts have been undertaken in recent years to translate this standard in a multilateral framework.¹ Moreover, some recent agreements extend the MFN standard to both the pre- and post-establishment phases. On the other hand, there are several exceptions to the MFN standard which could be general exceptions (e.g. for national security reasons), exceptions based on reciprocity considerations (for example in the area of taxation and intellectual property) and individual country-specific exceptions. The annex provides a diagram of MFN clauses with illustrations of the extension of the MFN standard, its beneficiaries, scope and exceptions.

The MFN standard interacts with various other investment issues and concepts addressed in this series of papers, in particular the so-called international minimum standard and the standard of national treatment (NT). While MFN is generally more than the minimum standard required under customary international law, it does not go so far as to put the foreign investor on an equal footing with domestic investors in the host country.

Although international investment agreements allow for exceptions from MFN, it seems that contracting parties have hitherto not used this freedom to discriminate among foreign investors from different countries beyond those policy areas where differential treatment is explicitly recognized (for instance, taxation, intellectual property or mutual recognition). However, the possibility of using exceptions to MFN introduces an element of flexibility in taking account of development objectives where this may be appropriate.

Note

- ¹ Unless otherwise noted, all instruments cited herein may be found in UNCTAD, (1996a).

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