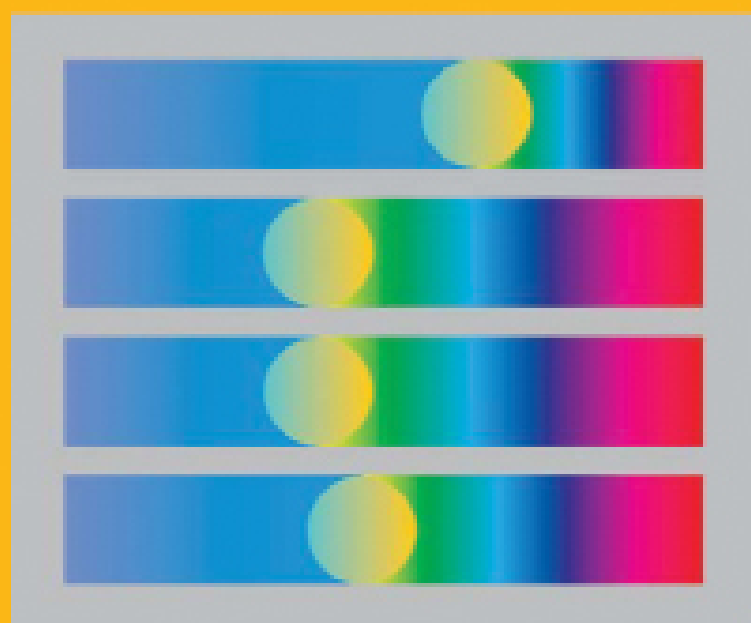


UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

# INVESTMENT PROMOTION PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS

UNCTAD Series on  
International Investment Policies for Development



UNITED NATIONS

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**UNITED NATIONS  
New York and Geneva, 2008**

### NOTE

As the focal point in the United Nations system for investment and technology, and building on 30 years of experience in these areas, UNCTAD, through DITE, promotes understanding of key issues, particularly matters related to foreign direct investment and transfer of technology. DITE also assists developing countries in attracting and benefiting from FDI and in building their productive capacities and international competitiveness. The emphasis is on an integrated policy approach to investment, technological capacity building and enterprise development.

The term “country” as used in this study also refers, as appropriate, to territories or areas; the designations employed and the presentation of the material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. In addition, the designations of country groups are intended solely for statistical or analytical convenience and do not necessarily express a judgement about the stage of development reached by a particular country or area in the development process.

The following symbols have been used in the tables:

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;

A dash (-) indicates that the item is equal to zero or its value is negligible;

A blank in a table indicates that the item is not applicable;

A slash (/) between dates representing years, e.g. 1994/1995, 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.

Reference to “dollars” (\$) means United States dollars, unless otherwise indicated.

Annual rates of growth or change, unless otherwise stated, refer to annual compound rates.

Details and percentages in tables do not necessarily add to totals because of rounding.

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## PREFACE

The secretariat of the United Nations Conference on Trade and Development (UNCTAD) is implementing a programme on international investment arrangements. It seeks to help developing countries to participate as effectively as possible in international investment rulemaking. The programme embraces policy research and development, including the preparation of a series of issues papers; human resources capacity-building and institution-building, including national seminars, regional symposia, and training courses; and support to intergovernmental consensus-building.

This paper is part of the *Series on International Investment Policies for Development*. It builds on, and expands, UNCTAD's *Series on Issues in International Investment Agreements*. Like the previous one, this new series is addressed to Government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers.

The *Series* seeks to provide a balanced analysis of issues that may arise in the context of international approaches to investment rulemaking and their impact on development. Its purpose is to contribute to a better understanding of difficult technical issues and their interaction, and of innovative ideas that could contribute to an increase in the development dimension of international investment agreements.

The *Series* is produced by a team led by James Zhan. The members of the team include Bekele Amare, Hamed El-Kady, Anna Joubin-Bret, Joachim Karl, Marie-Estelle Rey and Joerg Weber. Members of the Review Committee are Mark Kantor, John Kline, Peter Muchlinski, Antonio Parra, Patrick Robinson, Karl P. Sauvant, Pierre Sauvé, M. Sornarajah and Kenneth Vandavelde.

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Supachai Panitchpakdi  
Secretary-General of UNCTAD

June 2008



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## ABBREVIATIONS

<b>ACP</b>	African, Caribbean and Pacific Group of States
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>BIT</b>	Bilateral investment treaty
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>DTT</b>	Double taxation treaty
<b>EFTA</b>	European Free Trade Association
<b>EU</b>	European Union
<b>FET</b>	Fair and equitable treatment
<b>FTA</b>	Free trade agreement
<b>HCMs</b>	Home country measures
<b>IAIGC</b>	Inter-Arab Investment Guarantee Corporation
<b>IIA</b>	International investment agreement
<b>IPA</b>	Investment promotion agency
<b>MFN</b>	Most favoured nation
<b>MIGA</b>	Multilateral Investment Guarantee Agency
<b>NAFTA</b>	North American Free Trade Agreement
<b>OECD</b>	Organization for Economic Co-operation and Development
<b>SMEs</b>	Small and medium-sized enterprises
<b>TIFA</b>	Trade and investment framework agreement
<b>TNC</b>	Transnational corporation
<b>TRIMs</b>	Trade-Related Investment Measures
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>WIR</b>	World Investment Report
<b>WTO</b>	World Trade Organization



## **EXECUTIVE SUMMARY**

Investment promotion is a key challenge in the global competition for foreign investment. International investment agreements (IIAs) are an element of investment promotion strategies as contracting parties seek to encourage foreign investment through the granting of investment protection. Notwithstanding the great importance of a stable and predictable international legal framework for attracting foreign investment, existing IIAs might not live up to their full potential as regards their investment promotion objective. Despite the fact that these agreements seek both investment promotion and protection, their content clearly focuses on the latter part with investment promotion primarily perceived as a side effect of investment protection. However, this effect – an increase in investment flows – remains often behind the expectations of the contracting parties.

Only a small minority of IIAs includes specific provisions on investment promotion in addition to investment protection. A survey of these agreements shows that they have taken various approaches with regard to strengthening the investment promotion component of IIAs. Promotion activities agreed upon in the IIA cover such diverse issues as measures to improve the overall policy framework for foreign investment, or the granting of financial or fiscal incentives to individual investors. Promotion measures may cover all economic sectors or focus on specific economic activities. They may be limited to confirming the applicability of already existing promotion schemes of the contracting parties or provide for the setting up of new investment promotion instruments. They may address promotion activities of the home country or of the host country, and may likewise provide

for joint activities. Investment promotion provisions may be stand-alone provisions or establish a follow-up mechanism to monitor their operation in practice. Finally, investment promotion provisions may be drafted as voluntary commitments or as legally binding obligations.

The promotional effect might be particularly strong if contracting parties were to agree upon *new* investment promotion activities in the IIA. However, even if investment promotion provisions only confirm the existence of domestic promotion programmes that contracting parties have already put in place, their added value could be significant. Not only would they increase transparency, but it would also give potential foreign investors more assurance on what they can reasonably expect in the host country.

Nonetheless, supplementing investment protection in IIAs by agreeing upon investment promotion provisions would not be without any costs to the contracting parties, especially if they include new promotion activities. First of all, such programmes might be expensive, in particular if financial or fiscal incentives are involved. Second, developing countries might face capacity constraints during the implementation phase. And investment promotion provisions agreed upon in an IIA might be at odds with the contracting parties' desire to retain a maximum of flexibility in the design and operation of their national investment promotion schemes. Furthermore, inserting investment promotion provisions in IIAs is no guarantee that investment flows will actually increase.

What option contracting parties might finally choose depends on various factors. Countries that basically pursue a *laissez-faire* policy with regard to foreign investment might

favour promotion strategies aimed at improving the general policy and institutional framework, while governments applying strategic investment policies might have a preference for sector-specific or activity-specific promotion measures, or those aimed at fostering linkages between foreign investors and domestic companies. Financial considerations may also play a role, since many developing countries may not have the means to agree upon expensive promotion programmes, such as investment incentives, in IIAs.

Recent developments in the evolution of the IIA universe might be an indication that countries are interested in exploring new approaches in international investment rulemaking. An increasing number of countries are amending existing treaty language with regard to some core investment protection provisions, such as the ones on fair and equitable treatment, expropriation, and dispute settlement. It is worthwhile considering such innovative traits also in respect of investment promotion.



## INTRODUCTION

Investment promotion covers all activities and measures aimed at creating favourable determinants for foreign investment in the host country. These determinants include the policy framework for foreign investment, economic determinants, and business facilitation (UNCTAD, 1998a). Each of these elements can act as a promoter or deterrent of investment and it is the specific combination of them in a concrete case which is critical for a company's decision of whether to invest in a particular country or not.

Foreign investment can be promoted in two principal ways: either through unilateral action of the capital-exporting country or the capital-importing country, on the one hand, or through international – bilateral or multilateral – cooperation, on the other hand. As far as the first avenue is concerned, investment guarantees are the most important means of investment promotion by the home country of the foreign investor. Many more options exist when it comes to investment promotion by the host country, since they may cover the whole range of the three foreign investment determinants mentioned in the previous paragraph. Among the most typical investment promotion activities of host countries are financial and fiscal incentives, advertisement and publicity campaigns, and the setting up of investment promotion agencies to facilitate the establishment of foreign investors.

This paper focuses on the second category of investment promotion and – more particularly – on international agreements on the promotion and protection of foreign investment. The principal means to promote foreign investment in international investment agreements (IIAs) is to



protect it against certain political risks in the host country. To this purpose, contracting parties undertake a number of obligations concerning the protection of such investment in their territory, such as, for instance, to grant fair and equitable treatment and to refrain from discrimination, illegal expropriation and transfer restrictions. IIAs therefore promote foreign investment primarily indirectly through the protection provisions.

The objective of the study is *not* to discuss the issue of investment promotion as such, and, in particular, the question as to what extent countries should actively undertake investment promotion. This would be a much broader subject. The goal of this paper is more limited. It is about the issue of what role IIAs could play *once countries have decided* to apply some specific investment promotion measures. In this case, the question arises of how IIAs could be made instrumental as a means to enhance such promotion efforts. Whereas up to now, investment protection, on the one hand, and active investment promotion going beyond the granting of investment protection, on the other hand, has largely lived separate lives, the study makes the case for considering joining efforts in this respect.

Furthermore, this study is also *not* about the impact that investment *protection* provisions in IIAs have on the operation of investment promotion programmes of contracting parties. Several IIA obligations, such as the principle of non-discrimination, the standard of fair and equitable treatment and prohibitions of certain performance requirements – such as those stipulated in the WTO Agreement on Trade-Related Investment Measures (TRIMs) – may limit a contracting

party's discretion concerning the design and application of its domestic investment promotion schemes. These issues are dealt with in other UNCTAD publications.<sup>1</sup>

Only a small minority of IIAs includes specific investment promotion provisions. This might come as a surprise, since the title of these agreements suggests that they equally aim at investment promotion and protection. The stronger emphasis on the protection purpose might be an indication that – despite the label used – contracting parties consider specific investment promotion provisions as less imperative for an IIA as investment protection. The heavier weight of investment protection in IIAs might also reflect a certain routine in investment rulemaking according to which countries continue with a well-established treaty structure without giving much thought to possible new approaches.

The purpose of this study is to provide an overview as to what extent current IIA practice explicitly deals with investment promotion and to explore ways on how the investment promotion aspect of IIAs could be enhanced. Against the background of recurrent concerns that IIAs do not do enough to promote foreign investment or do not result in a substantive increase in investment flows, there is a need to examine whether there are additional means at hand to strengthen the promotional function of IIAs, and thereby their development dimension.<sup>2</sup> In doing so, the study also seeks to fill a gap in research and policy analysis.

The study is structured along the lines established in the first generation series on *Issues in International Investment Agreements* and covers the following issues:

- Explanation of the issue of investment promotion in IIAs;
- Survey of investment promotion provisions in IIAs, such as bilateral investment treaties (BITs), regional and free trade agreements (FTAs), to present a general pattern of investment promotion provisions in the IIA universe;
- Analysis of the pros and cons of investment promotion provisions in IIAs, together with some recommendations on how the investment promotion component in IIAs could be strengthened.

#### Notes

<sup>1</sup> See the list of references. Several of these publications are available at [www.unctad.org/ia](http://www.unctad.org/ia).

<sup>2</sup> For a discussion of the impact of IIAs on investment flows, see UNCTAD (forthcoming), as well as Neumayer and Spess (2005), and Tobin and Rose-Ackerman (2006).

## **I. EXPLANATION OF THE ISSUE**

### **A. Definition of investment promotion provisions**

For the purpose of this publication, investment promotion is defined as those provisions in IIAs that directly aim at encouraging outward or inward foreign investment through particular measures of the contracting parties. General provisions – as they can often be found in the preambles of IIAs – that do not specify any particular measure, such as a mutual commitment that "each party shall encourage and promote investments in its territory by investors of the other party" are therefore not taken into consideration.

Investment promotion provisions have a number of characteristics:

- ***Great variety***

One feature of investment promotion provisions is their considerable variety. They may address a broad range of activities of the host country, such as exchange of information on investment conditions and opportunities, the removal of informal investment barriers, improved access to capital and technology transfer, the establishment of investment promotion agencies, or the granting of incentives to foreign investors. Promotion provisions may also relate to activities of the home country or to joint promotion programmes of the contracting parties.

Contracting parties therefore can chose between numerous options when considering incorporating investment promotion provisions in their IIAs. They can agree upon one

specific promotion activity that they regard as particularly appropriate or put together a whole package of measures. They can assume relative far-reaching commitments or limit themselves to less substantial undertakings.

- *Discretionary application*

Most investment promotion provisions leave contracting parties with ample discretion on how to apply and implement them. For example, if an IIA provides that contracting parties should exchange information on investment opportunities or organise joint promotion activities, they have various possibilities on how to comply with this commitment. Likewise, a general treaty commitment to facilitate foreign investment leaves it open as to what kind of investment obstacles should be tackled and in what way. Such discretion might make it easier for contracting parties to accept investment promotion-related commitments in IIAs. On the other hand, it might also cause difficulties when it comes to their implementation (see section IV.B.3).

- *"Active" commitments*

Investment promotion provisions stand out as a special category in IIAs since – contrary to the treaty obligations concerning investment protection – they establish a commitment of the contracting parties *to do something*. While investment protection is geared to prevent contracting parties from taking certain measures – e.g. to discriminate against investors or to expropriate them without proper compensation – investment promotion goes further and demands from contracting parties to become active.<sup>1</sup> This distinction is not

only of theoretical nature, but may have significant consequences for the readiness of IIA negotiators to include investment promotion provisions in the treaty (see below section IV.A.2).

Investment promotion may also imply some form of cooperation between the contracting parties. This is another striking difference to investment protection, in relation to which each contracting party fulfils its obligations independently. Most obvious is the need for cooperation in the case of organising some joint activities, for instance an investment fair.

## **B. Main policy issues**

Investment promotion provisions may be an important policy tool in the global competition for foreign investment. This raises two main questions concerning their treatment in IIAs.

### **1. Should IIAs include specific investment promotion provisions?**

As said before, the vast majority of IIAs promotes foreign investment only indirectly through the provision of investment protection. A first issue therefore is whether IIAs should include specific investment promotion provisions or not. The answer ultimately depends on a cost-benefit analysis of the contracting parties. Establishing investment promotion commitments in the IIA may increase the chances of the host country to attract foreign investment and may also be beneficial to the home country, because its investors may take advantage of the international divisions of labour. However,

investment promotion provisions may also have some inconveniences as far as the financial costs, the potential loss of regulatory flexibility and capacity constraints in developing countries are concerned. There is also the question of the added value of investment promotion provisions if they only confirm already existing promotion activities of contracting parties (see section IV.B.2 below).

## **2. What kind of investment promotion provisions should be included?**

There is the other issue of what type of investment promotion provisions one might wish to include in IIAs. This obviously depends on the individual circumstances of each country, and the intentions of the contracting parties. A number of key questions can be identified in this respect:

- *Should the emphasis be on the improvement of the general policy framework for foreign investment or on support for individual investments?*

The existence of a stable and predictable general policy framework is a crucial prerequisite for a favourable investment climate in the host country. Thus, investment promotion efforts aiming at improving these general conditions (such as more transparency, consistent legislation, efficient administration, and a stable financial system) may be particularly important. However, contracting parties may also wish to promote foreign investment at the micro-level, for instance through financial or fiscal incentives to individual enterprises.

- *Should the promotion measures extend to all economic sectors or concentrate on specific economic activities?*

The attitude of countries towards investment promotion provisions in IIAs will depend on whether they generally follow a *laissez-faire* policy with regard to foreign investment or whether they prefer a more interventionist approach. Developing countries in particular often adopt strategic investment policies under which they seek: (1) to steer foreign investment into certain priority sectors; and (2) to have a certain impact on the investment activities after establishment. Consequently, such countries are likely to be more favourable towards sector-specific investment promotion provisions than those seeking to attract foreign investment across the board.

- *Should investment promotion provisions be limited to already existing measures of contracting parties or provide for the establishment of new promotion instruments?*

Investment promotion provisions often have a declaratory nature – that is they confirm the existence, maintenance and applicability of investment promotion measures that contracting parties already have in place. While not setting up any new investment promotion activities, such investment promotion provisions may nevertheless have the important effect of establishing an *international commitment* of contracting parties to continue with this practice – in addition to the political message underlining its significance for the contracting parties. However, it is also possible that investment promotion provisions establish *new* promotion activities of contracting parties. Compared to the category



covering already existing investment promotion measures, these provisions may be more likely to trigger a separate promotional effect in practice. On the other hand, the fulfilment of commitments related to new promotion efforts may be more difficult than in the case of a mere continuation of already existing ("self-executing") investment promotion measures (see section IV.B.2 below).

- ***Should the investment promotion provisions be drafted as voluntary commitments or as legally binding obligations?***

Contrary to the investment protection articles of IIAs, investment promotion provisions are often not legally binding. Even if the IIA uses language that indicates legally binding obligations ("The contracting parties *shall*..."), the investment promotion-related commitments are typically formulated in such a general manner that they leave contracting parties ample discretion in how to fulfil them.

This phenomenon can be interpreted in different ways. It might mean that contracting parties attach less importance to the issue of investment promotion compared to investment protection. The different emphasis placed on the issue would be reflected in the different levels of legal strictness. Another explanation could be that contracting parties do not consider binding obligations necessary for the purpose of investment promotion. Whereas they would hold the view that for investment protection to be effective, legally binding commitments are required, they would regard voluntary commitments sufficient in the area of investment promotion. Yet another reason could be that countries do not want to lose

discretion and flexibility when deciding on whether to undertake investment promotion activities and in what form.

- *Should investment promotion provisions be limited to host-country measures or extend to home-country measures?*

Investment promotion provisions can be inward-related or outward-related. Inward-related investment promotion provisions cover activities of the host country intended to attract investments of investors of the other contracting party in its territory. Vice versa, outward-related investment promotion provisions are those aiming at the promotion by the home country of investment in the other contracting party. However, there can also be joint investment promotion measures of the contracting parties covering both outward - and inward-related investment.

This distinction might be of relevance with regard to the readiness of contracting parties to undertake promotion commitments. Host countries are, in general, keen on promoting inward foreign investment, since it may contribute to the creation of employment, the import of capital, technology and know how, and a better integration of the host country into the global economy. By contrast, capital-exporting countries might have greater hesitations to promote outward investment, as there may be concerns that this contributes to "job exports" and weakens the domestic resource base.

- *Should there be a follow-up mechanism with regard to IIA provisions on investment promotion?*

Most existing investment promotion provisions do not provide for any follow-up mechanism that would allow contracting parties to monitor compliance with and the effectiveness of the agreed upon investment promotion activities. This raises the question of whether one could do more to strengthen the implementation process.

#### **Note**

<sup>1</sup> However, there is one type of investment promotion provisions that falls into the category of passive obligations, i.e. those that require contracting parties from refraining to do something. These are provisions proscribing or limiting the use of certain investment incentives. These are "passive" investment promotion provisions insofar as they do not encourage the use of promotional activities, but – on the contrary – prohibit or otherwise restrict them. Some IIAs expressly deal with them in the context of the WTO Agreement on Trade-Related Investment Measures (TRIMs). They may also be prohibited under competition rules.

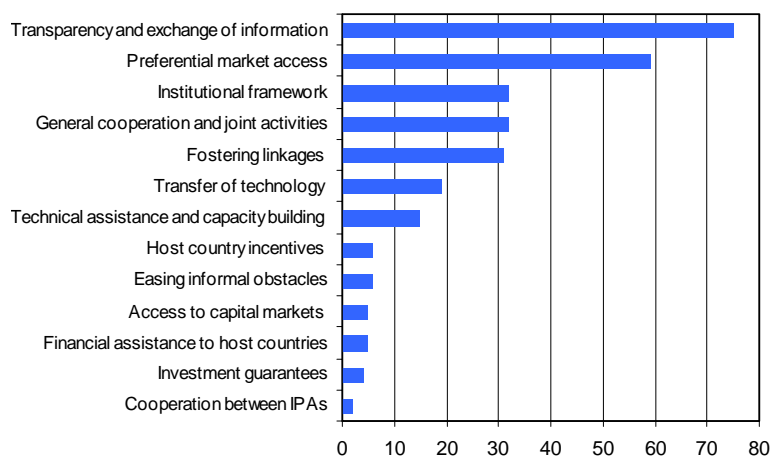
## II. STOCKTAKING AND ANALYSIS

Most IIAs do not contain any specific investment promotion provisions at all. An UNCTAD sample conducted for this study, comprising approximately 500 BITs and 200 FTAs with investment provisions, reveals that investment promotion provisions are found in about 19 percent of the BITs and 70 percent of the FTAs.<sup>1</sup> Furthermore, the limited number of agreements that explicitly deal with investment promotion issues uses very general treaty language with few, if any, binding obligations. While the form of investment promotion provisions varies in terms of scope and coverage, it is nevertheless possible to discern some common patterns.

Among the most frequently used approaches are provisions relating to fostering transparency and exchange of information on investment legislation and investment opportunities, market access for goods or services produced by the foreign investor in the host country, the setting up of an institutional framework to coordinate mutual cooperation between the contracting parties concerning investment promotion, the organization of investment seminars and exhibitions, or the fostering of linkages between domestic and foreign investors.<sup>2</sup> Only a few of the IIAs that contain investment promotion provisions go one step further, for instance, by specifically seeking to promote the transfer of technology, to provide for training and capacity building, to improve conditions for access to capital markets by companies and nationals of the other contracting party for the financing of investment projects, or to grant incentives. Some of these promotion activities relate to measures of home countries. Trade and investment promotion agencies (IPAs) are sometimes called upon in the IIAs to play an active role in

promoting investments between the parties. General framework agreements on economic cooperation, such as those concluded by the European Union, encourage the conclusion of BITs and double taxation agreements as a follow-up to fostering economic linkages (figure 1).

**Figure 1. Forms of investment promotion measures used in IIAs**  
Percentage of reviewed IIAs containing investment promotion provisions



Source: UNCTAD

The following gives an overview of the most frequently used types of investment promotion provisions in IIAs.

### A. Transparency and exchange of information

Transparency may help to promote foreign investment through the dissemination of information on investment conditions and opportunities in the host country. Moreover, transparency in investment regulations is often seen as an important indication of the more general concept of “good investment governance”. A non-transparent host country business environment may raise information costs and divert corporate efficiency.<sup>3</sup>

One of the most common formulations of investment promotion provisions in IIAs relate to the publication of policies and regulations on foreign investment. An example is the Economic Partnership Agreement between Japan and Thailand (2007):

*“Article 101*

*Transparency*

1. *Each Party shall ensure that its laws, regulations, administrative procedures, and administrative rulings of general application with respect to any matter covered by this Chapter [Investment] are published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.*
2. *To the extent possible under its domestic laws and regulations, each Party shall:*
  - (a) *publish any such laws, regulations, administrative procedure and administrative*

*rulings of general application that it adopts; and [...]*" (emphasis added).

The parties to an IIA may also agree to foster cooperation through the exchange of information on investment opportunities. The Agreement on Partnership and Cooperation between the European Communities and the Russian Federation (1994) is an illustration:

*"Article 58*

*Investment promotion and protection*

1. *Bearing in mind the respective powers and competences of the Community and the Member States, cooperation shall aim to establish a favourable climate for investment, both domestic and foreign, especially through better conditions for investment protection, the transfer of capital and the **exchange of information on investment opportunities**.*
2. *The aims of this cooperation shall be in particular: [...]*
  - *to **exchange information on investment opportunities** in the form of inter alia trade fairs, exhibitions, trade weeks and other events,*
  - *to exchange information on laws, regulations and administrative practices in the field of investment."* (emphasis added).

The BIT between China and Kuwait (1985) goes one step further by seeking to determine the areas where investment would be most beneficial for both contracting parties:

*"Article 2*

*Promotion and Protection of Investments*

[...]

- (3) *The Contracting States shall periodically consult between themselves concerning investment opportunities within the territory and maritime zones of each other in various sectors of the economy to determine where investments from one Contracting State into the other may be most beneficial in the interest of both Contracting States, and accord them appropriate facilities, incentives and other forms of encouragement to such an extent and on such terms and conditions as shall, from time to time, be determined by agreement between the Contracting States hereto.*" (emphasis added)

Another approach is to limit the scope of the exchange of information clause by relating it to measures that might have an impact on the investment. Canadian BITs signed before 1998 contain such a provision. An example is the BIT between Armenia and Canada (1997):



## “Article XIV

*Consultations and Exchange of Information*

*Each Contracting Party may request consultations on the interpretation or application of this Agreement. The other Contracting Party shall give sympathetic consideration to the request. Upon request by either Contracting Party, information shall be exchanged on **the measures of the other Contracting Party that may have an impact on new investments, investments or returns covered by this Agreement.**” (emphasis added).*

Exchange of information may also be related to other measures, such as provisions on technical assistance and investment insurance by the *home country* of the investor. The FTA between the European Free Trade Association (EFTA) and Egypt (2007) exemplifies this approach:

## “Article 25

1. *The Parties recognize the importance of promoting cross-border investment and technology flows as a means for achieving economic growth and development.*

*Cooperation in this respect may include:*

[...]

- (b) the provision of information on the Parties’ measures to promote investment abroad (technical assistance, financial support, investment insurance, etc.); [...]* (emphasis added).

It is noteworthy that for investment promotion purposes, the need for transparency is primarily viewed from the perspective of foreign investors. Thus, emphasis is placed on the desire of foreign investors to have full access to a variety of information in the host country that may influence the terms and conditions under which the investor has to operate. However, transparency issues may also be of particular concern to the host country in an investment relationship. The host country may wish, for example, to have access to information on foreign investors as part of its policy-making processes and for regulatory purposes (UNCTAD, 2004a, chapter 10). In addition, transparency can be a concern for the home country, particularly in terms of host country policies in areas such as information and regulatory disclosures that could affect taxation issues (e.g. tax havens).

#### **B. Preferential market access**

The granting of preferential market access to the *home country* through the elimination of tariff and non-tariff trade barriers may create trade-related incentives for foreign investors wishing to use the host country as an export platform back to the home country. Along with market size, openness to trade has been identified as one of the most reliable indicators of the attractiveness of a location for foreign investment (Banga, 2003). By lowering trade barriers and creating trade preference schemes between countries, for example through FTAs, investors of one party with export-oriented projects may be encouraged to invest in the territory of the other party in order to lower manufacturing costs and to benefit from duty reductions on goods exported back to the home country.

Rules of origin may also have an effect on foreign investment flows between countries. In the context of an FTA, for instance, setting criteria to define where a product was made and whether it should benefit from the terms of the agreement may encourage investors from one party to use local contents from the other party when producing goods. For example, rules of origin contained in NAFTA reportedly influenced TNCs of the United States to invest in new facilities and to shift production from Asia to Mexico (UNCTAD 2004a). Also, more access to developed countries markets may encourage developing countries to offer more protection to the formers' investors. This may call for the more frequent conclusion of FTAs, or other treaties on economic cooperation that follow an integrated approach towards trade and investment issues.

NAFTA is an example of preferential market access. Chapter three of the NAFTA agreement on national treatment and market access for goods specifies that the parties agree not to increase any existing customs duty, and to progressively eliminate their customs duties on originating goods.

*“Chapter Three  
National Treatment and Market Access for Goods*

*Article 302: Tariff Elimination*

- 1. Except as otherwise provided in this Agreement, no Party may increase any existing customs duty, or adopt any customs duty, on an originating good.*

2. *Except as otherwise provided in this Agreement, each Party shall progressively eliminate its customs duties on originating goods in accordance with its Schedule to Annex 302.2.”*

### **C. Institutional framework to follow up on investment promotion measures**

A major deficiency in most IIAs dealing with investment promotion is their lack of specificity. They often provide no details on the pre-conditions and modalities of the investment promotion activities agreed upon, nor do they include any follow-up mechanism that would allow monitoring as to what extent the promotion measures have been put in place and are effective.

The minority of IIAs dealing with this issue focuses on establishing an institutional framework between the contracting parties to overlook the implementation of the agreement. For instance, some agreements provide for the setting up of a council or a committee. Among its tasks is to forward proposals on how best to promote foreign investment between the parties.

This body may also have the duty of monitoring investment relations and identifying new investment opportunities. The trade and investment framework agreements (TIFAs) concluded by the United States and third parties establish such a mechanism. An example is the TIFA between Liberia and the United States (2007), which states that the parties agree to establish a Council on Trade and Investment, and that the Council shall identify investment opportunities and work towards removing investment

obstacles.<sup>4</sup> Along similar lines, the Economic Partnership Agreement between Japan and Mexico (2004) establishes a sub-committee on trade and investment promotion to review the implementation of the investment promotion measures:

*"Article 139*

*Cooperation in the Field of Trade and Investment  
Promotion*

1. *The Parties shall cooperate in promoting trade and investment activities by private enterprises of the Parties, recognizing that the joint efforts of the Parties to facilitate exchange and collaboration between private enterprises will act as a catalyst to further promote trade and investment between the Parties.*  
[...]
2. *For the purposes of the effective implementation and operation of this Article, a **Sub-Committee on Cooperation in the Field of Trade and Investment Promotion** (hereinafter referred to in this Article as "the Sub-Committee") shall be established pursuant to Article 165 [Joint Committee].*
3. *The functions of the Sub-Committee shall be:*
  - (a) *reviewing the implementation and operation of this Article;*
  - (b) *discussing any issues related to this Article;*
  - (c) *reporting the findings of the Sub-Committee to the Joint Committee; and*
  - (d) *carrying out other functions which may be delegated by the Joint Committee pursuant to Article 165.*" (emphasis added)

The BIT between China and the Republic of Korea also (1992) contains a provision on the establishment of a joint committee in charge of reviewing the implementation of the agreement to promote investment between the two countries. The committee meets in both capitals alternatively to make appropriate recommendations in particular with respect to receiving of foreign investments. The agreement states:

*“Article 14*

- 1. In order to facilitate the implementation of the present Agreement, the Contracting Parties agree to set up a Joint Committee composed of the representatives of the Contracting Parties.*
- 2. The functions of the Joint Committee shall include, in particular:*
  - (a) reviewing the implementation of the Agreement and the matters related to investment between the two States;*
  - (b) holding consultations on the operation and the matters related to the operation of the present Agreement in connection with the development of legal systems or of policies of either or both of the two States with respect to the receiving of foreign investment;*
  - (c) making appropriate recommendations to the Governments of both States.*
- 3. The Joint Committee shall meet alternately in Seoul and Beijing at the request of either Contracting Party.”*

In a similar spirit, some IIAs also provide that the parties meet to resolve disputes relating to investments. The BIT between China and Côte d'Ivoire (2002) is a case in point:

*“Article 13  
Consultations*

1. *The representatives of the Contracting Parties shall hold meetings from time to time for the purpose of:*
  - (a) *reviewing the implementation of this Agreement;*
  - (b) *exchanging legal information and investment opportunities;*
  - (c) ***resolving disputes arising out of investments;***
  - (d) *forwarding proposals on promotion of investment;*
  - (e) *studying other issues in connection with investment.”* (emphasis added)

**D. General cooperation and joint activities**

Some IIAs provide in a very general manner that contracting parties should undertake joint activities to promote trade and investment between them. No further specification is given on how such cooperation should take place and what activities should be included. One example of this approach is the treaty establishing the East African Community (1999):

*“Article 129  
Co-operation among Business Organisations and  
Professional Bodies*

1. *The Partner States undertake to co-operate in promoting common measures to ensure the strengthening of linkages among their business organisations, employees' and employers' organisations and professional bodies. To this end, the Partner States agree to:*
  - (a) ***support joint activities which will promote trade and investment among the Partner States; [...]*** (emphasis added).

In the FTA between China and Pakistan (2006), the contracting parties agree to hold periodic consultations for the purpose of forwarding proposals on ways to promote investment. A similar approach can be found in the Trans-Pacific Strategic Economic Partnership Agreement between Brunei Darussalam, Chile, New Zealand and Singapore (2005) that sets up a Commission to explore measures to expand investment among the parties and to identify new areas of commercial and industrial cooperation.

In very few IIAs, the parties agree to adopt programmes to promote FDI, but the provisions rarely specify what the programmes consist of, and how they would be implemented. The COMESA Treaty (1993), for example, states:

*“Article 159*

*Investment Promotion and Protection*

1. *In order to encourage and facilitate private investment flows into the Common Market, Member States shall:*  
[...]



*(b) adopt a programme for the promotion of cross-border investment”.*

Some IIAs promote foreign investment through the organization of joint seminars, conferences, workshops, fairs and similar events. The promotion may have a general purpose or occur with regard to specific investment projects. The FTA between Panama and Singapore (2006), for example, states in article 16.3 that investment promotion shall include “*organizing joint investment promotion activities, e.g. conferences, seminars, workshops, meetings, outreach/ education programs, and joint promotion of specific projects of interest*”.

#### **E. Fostering linkages**

Another category of investment promotion measures in IIAs is to encourage investment flows through the provision of frameworks, procedures and programmes to foster linkages and to stimulate joint ventures, in particular with small and medium-sized enterprises (SMEs). Linkages between foreign affiliates and domestic firms are important channels through which assets, know-how and technology may be transferred from the former to the latter (UNCTAD, 2001). They may contribute to the upgrading of domestic enterprises and to integrating foreign affiliates more firmly into the host economies.

Some agreements also call for the sharing of expertise on entrepreneurship and management and encourage the publication of documents on SMEs. The FTA between EFTA

and Lebanon (2004), for example, states in Article 26 (d) that investment promotion activities between the parties should take the form of “*development of mechanisms for joint investments, in particular with small and medium enterprises of the Parties*” (emphasis added).

The FTA between Tunisia and Turkey (2004) goes further by identifying specific steps for the parties to undertake in order to promote business and investment opportunities, as well as joint ventures between SMEs.

*"Article 37*

- 1. With the view to further enhance trade and economic activities, the Parties shall give priority to promoting business and investment opportunities as well as joint ventures between small and medium sized enterprises (SMEs) of the two countries. Within this context, the Parties will:*
  - a) exchange expertise on entrepreneurship, management, research and management centers, quality and production standards;*
  - b) provide market information to create investment opportunities;*
  - c) furnish published documents concerning SMEs.”*

(emphasis added).

The agreement also provides for a unilateral investment promotion measure by stating that: “*2. Turkey shall support Tunisia's efforts towards capacity building for the related private sector institutions*” (emphasis added).

Promotion of local joint venture partners is also covered by the above-mentioned agreement between the EU and India (1993). Another example is Article 76 of the Partnership and Cooperation Agreement between the EU and the Russian Federation (1994). It calls on the parties to develop and strengthen SMEs and to promote cooperation between SMEs of the Community and Russia. The Parties also agree to encourage the exchange of information and know-how in areas such as taxes, finances and other conditions necessary for the setting up and expansion of SMEs.

#### **F. Transfer of technology**

Numerous IIAs include provisions on the transfer of technology from developed to developing countries. For instance, the economic cooperation and association agreements concluded by the EU with third parties often contain provisions facilitating the access and transfer of technology. Some of these articles exclusively focus on benefiting the least developed partner. An illustration is the Cooperation Agreement concluded between the EU and Sri Lanka (1994):

*“Article 4  
Economic Cooperation*

*The Contracting Parties agree that economic cooperation will involve [...]: (a) improving the economic environment in Sri Lanka by **facilitating access to Community know-how, technology and capital [...]**” (emphasis added).*

The same agreement also contains a general provision on the promotion of technology transfer.

*"Article 9  
Science and Technology*

1. *The Contracting Parties will, in accordance with their mutual interest and the aims of their development strategy in this area, **promote scientific and technological cooperation with a view to: (a) fostering the transfer of know-how and stimulating innovation**" (emphasis added).*

Most provisions on technology transfer in IIAs lack details as to the modalities and the means through which the transfer of technology should actually be promoted. The reason behind such general language might be that countries prefer to avoid more substantive provisions with potentially legally binding commitments to transfer technology. One example of an IIA containing somewhat more specific provisions is the Energy Charter Treaty (1994).

*"Article 8  
Transfer of Technology*

- (1) *The Contracting Parties agree to promote access to and transfer of energy technology on a commercial and non-discriminatory basis to assist effective trade in Energy Materials and Products and Investment and to implement the objectives of the*

*Charter subject to their laws and regulations, and to the protection of Intellectual Property rights.*

- (2) Accordingly, to the extent necessary to give effect to paragraph (1) the Contracting Parties shall eliminate existing and create no new obstacles to the transfer of technology in the field of Energy Materials and Products and related equipment and services, subject to non-proliferation and other international obligations.”*

Another approach is to link the transfer of technology specifically to investment and joint ventures. One example of this is the FTA between Tunisia and Turkey (2004):

*"Article 38*

*Trade co-operation shall primarily focus on:*

*[...]*

- i) exchanges of information on market requirements know-how and technology transfer through investment and joint-ventures;”*

### **G. Technical assistance and capacity building**

Promotional measures may take the form of technical assistance to developing countries to help them improve their regulatory regimes and enhance their institutional capacity to attract and benefit from foreign investment. Provisions on technical assistance and capacity-building in relation to less advanced parties are occasionally used in IIAs. However, as is the case in most other investment promotion provisions, they appear primarily in the form of general clauses, with variations

in terms of their scope and coverage. An example is Article 6.2 of the Economic Framework Agreement concluded between ASEAN and India (2003), which states that "[t]he Parties agree to **implement capacity building programmes and technical assistance**, particularly for the New ASEAN Member States, in order to adjust their economic structure and expand their trade and investment with India" (emphasis added).

The FTA concluded between EFTA and Lebanon (2004) takes a slightly different approach according to which the parties agree to establish guidelines in the future for the implementation of technical assistance and cooperation between their respective authorities. There is, however, no timetable for this undertaking.

Furthermore, most of the IIAs concluded by the European Union (EU) with third parties include provisions on technical assistance and training programmes. Such provisions may also relate to fostering linkages between the parties' research and academic centres. An illustration is the 1993 Cooperation Agreement between the EU and India on Partnership and Development:

*"Article 4*

*Economic cooperation*

[...]

2. *The Contracting Parties agree that economic cooperation will involve three broad fields of action:*

[...]

*(b) facilitating contacts between economic operators and other measures designed to*

*promote commercial exchanges and investments;*

[...]

3. *In the broad fields described above, the aims shall be in particular to:*

[...]

- *encourage the two-way flow of Community-Indian trade and investments,*

[...]

4. *The Contracting Parties shall consider in particular the following means to achieve these aims:*

- *exchange of information and ideas,*
- *preparation of studies,*
- *provision of technical assistance,*
- *training programmes,*
- *establishment of links between research and training centres, specialized agencies and business organizations,*
- *promotion of investment and joint ventures.”*  
(emphasis added).

The investment promotion article of the Cotonou Agreement (2000) calls specifically on the parties to “**support capacity building** for domestic investment promotion agencies and institutions involved in promoting and facilitating foreign investment” (emphasis added).

Technical assistance provisions may also be geared towards the establishment of transnational corporations in developing countries. One rare example of such an approach, which might only be applicable in a regional context, is the

Treaty establishing the African Economic Community (1991/2001) that mentions in Article 49 the need to facilitate the establishment of "African Transnational Corporations" by providing financial and technical assistance to African entrepreneurs.

Furthermore, some IIAs call for capacity-building and institutional support concerning the reduction of commercial risks for foreign investors. One example is the Partnership Agreement between the ACP States and the EU (2000):

“Article 77

[...]

3. *Cooperation shall also provide support to capacity-building, institutional support and participation in the core funding of national and/or regional initiatives **to reduce the commercial risks for investors** (inter alia guarantee funds, regulatory bodies, arbitration mechanisms and judiciary systems to enhance the protection of investments improving the export credit systems) [...]* (emphasis added).

## H. Host country incentives

Among the broad range of host country measures concerning the promotion of inward foreign investment, financial and fiscal incentives are those most frequently employed. Host developing countries often prefer fiscal instruments, such as tax holidays, concessionary tax rates, accelerated depreciation allowances, duty drawbacks and exemptions. This is mainly due to the weak financial capacity of many host developing countries that cannot afford to use



upfront subsidies for inward investment; at best, they can afford to ease the tax burden *ex post* (UNCTAD 2004a, chapter 15).

Some IIAs link the granting of incentives and other facilities particularly to the early stages of an investment project. This is meant to encourage investors in the beginning of their investment operations. The Agreement on Promotion, Protection and Guarantee of Investments between the Member States of the Islamic Conference (1981) exemplifies this approach:

“Article 4

*The contracting parties will endeavour to offer various incentives and facilities for attracting capitals and encouraging its investment in their territories such as commercial, customs, financial, tax and currency incentives, especially during the early years of the investment [...].”(emphasis added).*

The BIT between the Czech Republic and the United Arab Emirates (1994) goes even further. It grants foreign investors a right to such facilities, incentives and other forms of encouragement and permissions in accordance with the host country's legislation:

“Article 2

*Promotion and Protection of Investments*

[...]

(4) (i) *Each Contracting State shall endeavour to take the necessary measures in accordance with its*

*legislation for granting of appropriate facilities, incentives and other forms of encouragement for investments [...]*

- (ii) *Investors of either Contracting State shall be entitled to apply to the competent authorities in the host State for the appropriate facilities, incentives and other forms of encouragement and **the host State shall grant them all assistance, consents, approvals, licenses and authorizations to such an extent and on such terms and conditions as shall, from time to time, be determined by the laws and regulations of the host State.***” (emphasis added)

Another example is the BIT between China and Kuwait (1985) that singles out tax relief as one of the incentives to encourage FDI flows. Article 2 of the protocol states:

- “1. *With respect to Article 2: Investors of either Contracting State shall be entitled to apply to the competent authorities in the host State for the appropriate facilities, incentives and other forms of encouragement (**including inter alia, tax relief**) to such an extent and on such terms and conditions as shall, from time to time, be determined by the laws and regulations of the host State or by agreement between the Contracting States thereto as the case may be*”. (emphasis added).

As illustrated above, most IIA provisions on incentives and other facilities are drafted in a general manner, often

without sufficient clarification as to the conditions under which such measures should be granted, and to what extent. This may create difficulties when the agreement enters the implementation phase (see section IV).

The granting of investment incentives by the host country might be conditioned to the fulfilment of some performance requirements. These are stipulations imposed on the investors, requiring them to achieve certain objectives during their operations in the host countries (UNCTAD 2003). Most countries grant certain incentives to attract foreign investment, and then impose some kind of conditionality on foreign investors in order to maximize the beneficial impact of foreign investment on national development objectives. Some types of trade-in-goods related performance requirements in the form of investment measures are prohibited under the WTO Agreement on Trade-Related Investment Measures (TRIMs). Some service-related performance requirements are prohibited, conditioned or discouraged by other IIAs – notwithstanding the fact that the WTO General Agreement on Trade in Services (GATS) (Article XIX.2) calls for appropriate flexibility for individual developing member countries for "*opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, **attaching to such access conditions aimed at achieving the objectives referred to in Article IV** [Increasing participation of developing countries]*" (emphasis added).

If certain performance requirements were absolutely prohibited, the investment promotion programmes of many

host countries would be severely affected, since they consider conditionality as a key prerequisite for the granting of incentives. Accordingly, numerous IIAs, such as some United States' BITs, as well as recent FTAs, explicitly allow contracting parties to impose certain performance requirements on the foreign investor as a condition for the receipt of some benefits and incentives. The Japan-Singapore FTA (2002) exemplifies this approach:

*“Article 75  
Performance Requirements*

1. *Neither Party may impose or enforce any of the following requirements as a condition for the establishment, acquisition, expansion, management, operation, maintenance, use or possession of investments in its territory of an investor of the other party:*
  - [...]
  - f) *to transfer technology, a production process or other proprietary knowledge to a natural or legal person of the former Party, except when the requirement:*
    - i) *is imposed or enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws; [...]*
  - g) *to locate its headquarters for a specific region or the world market in the territory of the former Party;*
  - h) *to achieve a given level or value of research and development in the territory of the former party; or*

- i) *to supply one or more of the goods that it produces or the services that it provides to a specific region outside the territory of the former Party exclusively from the territory of the former Party.*
2. *Each Party is not precluded by paragraph 1 above from conditioning the receipt or continued receipt of an advantage, in connection with investments in its territory of an investor of the other Party, on compliance with any of the requirements set forth in sub-paragraphs (f) through (i) of paragraph 1 above.*" (emphasis added).

### **I. Easing informal obstacles to investment**

Informal obstacles include a large array of impediments that may arise from administrative procedures and unpublished policies of the host country, structural rigidities of the market, and political, cultural and social institutions that work to deflect foreign investment.<sup>5</sup> Such obstacles may take the form of excessive or redundant regulations or other practices that may hinder or even prevent the establishment and operation of an investment. Examples of informal investment barriers are excessive "red tape", an incompetent or inefficient administration, lack of transparency, inconsistent, missing or frequently changing legislation, improper implementation of existing laws and regulations, a non-functioning or non-independent judiciary, corruption, lack of security, or a general non-respect of the rule of law.

Informal barriers are often more difficult to remove than formal investment obstacles, because they may reflect deep-rooted social and cultural traditions. They may also have their origin in the general political system of a country, or in the interest of powerful pressure groups to maintain them – or their removal may be beyond the power of the prevailing political system due to social or economic reasons. In some cases, informal investment barriers may also serve as intentional obstacles to foreign investment.

Most IIAs do not explicitly address the issue of informal barriers to investment. Under certain conditions, they may, however, be challenged under the investment protection provisions of these treaties, such as the principle of fair and equitable treatment, or the principle of non-discrimination.<sup>6</sup> In addition, some agreements mention in general terms the desire of the parties to reduce or to eliminate administrative and bureaucratic obstacles as far as possible, and to develop uniform and simplified procedures for foreign investors and their investments. An example is the FTA between the European Free Trade Association (EFTA) and Lebanon (2004):

*“Article 26*

*Investment promotion between the Parties*

*The EFTA States and Lebanon shall aim to promote an attractive and stable environment for reciprocal investment. Such promotion should take the form, in particular, of*

*[...]*

*(c) development of uniform and simplified administrative procedures*

[...]” (emphasis added).

A similar example is the treaty which established the Common Market for Eastern and Southern Africa (COMESA) in 1993:

“Article 159

1. *In order to encourage and facilitate private investment flows into the Common Market, Member States shall:*

[...]

(d) *remove administrative, fiscal and legal restrictions to intra-Common Market investment; and*

(e) *accelerate the deregulation of the investment process.*” (emphasis added).

Informal investment barriers can be a heavy burden and a severe disincentive for foreign investors. Tackling such barriers in IIAs gives a positive signal about the willingness of host countries to ease investment procedures and conduct business. However, the provisions aimed at addressing this problem in IIAs, in their present form, do not specify the steps or the guidelines through which the objectives could be achieved. More details on how to deal with informal barriers to investment in IIAs could considerably strengthen the investment promotion dimension of these provisions (see below section IV.B.2, 3).

## J. Access to capital markets

Maintaining an open and free capital market may encourage and promote foreign investment flows by lowering the cost of capital. Some IIAs recognize the importance of having access to capital markets for investment purposes. The Energy Charter Treaty (1994), for example, calls on each party in Article 9 to “[...] *endeavour to promote conditions for access to its capital markets by companies and nationals of other contracting parties, for the purpose of [...] Investment in Economic Activity in the Energy Sector [...]*” (emphasis added). Similarly, the investment promotion article of the Association Agreement between the EU and Jordan (2002) states that the parties agree to provide “*access to the capital market for the financing of productive investments*” (emphasis added).

## K. Financial assistance to the host country

Other measures to promote outward investment flows between the parties to an IIA may take the form of financial support provided by the home country to the host country in order to implement the overall objectives of the treaty. A case in point is the FTA between EFTA and Egypt (2007):

“Article 34

1. *The EFTA States declare their readiness to **provide technical and financial assistance** to Egypt, in accordance with their national policy objectives, in order to:*
  - (a) *facilitate the implementation of the overall objectives of this Agreement, in particular to*



*enhance trading and investment opportunities arising from this Agreement; and*  
(b) *support Egypt's own efforts to achieve sustainable economic and social development.*"  
(emphasis added).

The agreement, however, leaves open what kind of financial assistance is meant, and under what conditions it may be provided.

Another approach is to deal with financial support, fiscal incentives and similar measures by the home country in the context of transparency commitments. The Association Agreement between Egypt and the EU (2001) is an example:

*"Article 46*

*Co-operation shall aim at increasing the flow of capital, expertise and technology to Egypt through, inter alia: "providing information on European investment regimes (such as technical assistance, direct financial support, fiscal incentives and investment insurance) related to outward investments and enhancing the possibility for Egypt to benefit from them."* (emphasis added).

Financial incentives to encourage outward investment may also be provided to investors by their home countries. This is, however, mostly addressed in national programmes rather than in IIAs. For example, Germany sponsors programmes that provide financial assistance for FDI in developing countries through both equity capital participation

in FDI projects, through the German Finance Company for Investment in Developing Countries, and loans for German investors from the Kreditanstalt für Wiederaufbau. Similarly, the Export-Import Bank of Japan makes loans directly to Japanese enterprises for FDI or for operating overseas projects (UNCTAD 2004a).

#### **L. Investment guarantees**

Provisions on investment insurance are rarely included in IIAs, and are usually found in the national laws of the *home country*. At the international level, this issue is dealt within the framework of specialized agencies, such as the Multilateral Investment Guarantee Agency (MIGA) (1988) and the Inter-Arab Investment Guarantee Corporation (IAIGC) (1971).<sup>7</sup> The MIGA basically provides insurance to foreign investors against transfer restrictions, expropriation, war and civil disturbance and breach of State contracts, while the IAIGC provides protection against certain non-commercial risks that may confront inter-Arab investments.<sup>8</sup>

The Partnership Agreement concluded between the ACP States and the EU (2000) is an example of the few IIAs that include specific provisions on investment insurance:<sup>9</sup>

*"Article 77*

- 1. Investment guarantees are an increasingly important tool for development finance as they contribute to reducing project risks and inducing private capital flows. Cooperation shall therefore ensure the increasing availability and use of risk*

*insurance as a risk-mitigating mechanism in order to boost investor confidence in the ACP States.*

**2. Cooperation shall offer guarantees and assist with guarantees funds covering risks for qualified investment. Specifically, cooperation shall provide support to:**

**(a) reinsurance schemes to cover foreign direct investment by eligible investors; against legal uncertainties and the major risks of expropriation, currency transfer restriction, war and civil disturbance, and breach of contract. Investors may insure projects for any combination of the four types of coverage;**

**(b) guarantee programmes to cover risk in the form of partial guarantees for debt financing. Both partial risk and partial credit guarantee shall be available; and**

**(c) national and regional guarantee funds, involving, in particular, domestic financial institutions or investors for encouraging the development of the financial sector.**

[...]

**4. Cooperation shall provide such support on the basis of complementary and added value with respect to private and/or public initiatives and, whenever feasible, in partnership with private and other public organisations. The ACP and the EC will within the framework of the ACP-EC Development**

*Finance Cooperation Committee undertake a joint study on the proposal to set up an ACP-EC Guarantee Agency to provide and manage investment guarantee programmes.” (emphasis added).*

### **M. Cooperation between investment promotion agencies**

Joint promotion activities may take the form of closer cooperation between investment promotion agencies of the contracting parties. While most IIAs do not mention investment promotion agencies and their role in promoting foreign investment, there are, however, a few agreements that call for closer collaboration in this respect. One example is the Framework Agreement on the Association of Southeast Asian Nations (ASEAN) Investment Area (1998). It not only provides for regular consultations between domestic investment promotion agencies, but also gives further details of what these agencies could do together to promote foreign investment. The Agreement states in its Schedule II on Promotion and Awareness Programme:

*“In respect of the Promotion and Awareness Programme, Member States shall;*

- 1. Organise joint investment promotion activities e.g., seminars, workshops, inbound familiarisation tours for investors from capital exporting countries, joint promotion of specific projects with active business sector participation;*
- 2. Conduct regular consultation among investment agencies of ASEAN on investment promotion matters;*

3. *Organise investment-related training programmes for officials of investment agencies of ASEAN;*
4. *Exchange lists of promoted sectors/industries where Member States could encourage investments from other Member States and initiate promotional activities; and*
5. *Examine possible ways by which the investment agencies of Member States can support the promotion efforts of other Member States.”*  
(emphasis added).

Another similar example is the FTA between the Republic of Korea and Singapore (2005). It stipulates that cooperation between the Korean Trade-Investment Promotion Agency (KOTRA) and the Singapore International Enterprise Board (IE Singapore) should include specific investment promotion measures and that the Parties should encourage and facilitate such cooperation. Also, the parties agree to establish business support centres in their territories to explore new market opportunities and to promote business contacts between the private sectors of the parties. Section 1 of Annex 18A of the agreement states that:

*“Section 1: Trade and Investment Promotion*

1. *The co-operation between the Korea Trade-Investment Promotion Agency (“KOTRA”) and the International Enterprise Singapore Board (“IE Singapore”) [...] shall include the following:*

- 
- (a) *joint organisation of industry specific business missions and activities which are focused on mutually agreed high growth sectors, including but not limited to, the information technology, electronics, automotive, food & beverage and the logistics sectors;*
  - (b) *electronically linking the online business matching databases of the Parties to bring together companies keen on establishing business ties with each other;*
  - (c) *facilitation of Korean enterprises to explore new markets in the region through Singapore and business collaboration with Singaporean companies by setting up a Korean Business Support Centre in Singapore, and subject to there being sufficient demand and interest by Singaporean companies, Singapore will establish a Business Centre in Korea; and*
  - (d) *using all reasonable efforts to encourage each Party's companies to participate in exhibitions organised by the other Party, in particular if the exhibitions pertain to sectors which the Party is actively promoting in its country.*
2. *The Parties shall, where appropriate, facilitate such co-operation between KOTRA and IE Singapore.*

3. *The Parties shall, where appropriate, facilitate co-operation between the Korea Export Insurance Corporation (“KEIC”) and Export Credit Insurance Corporation of Singapore (“ECICS”) in the areas including, but not limited to, export credit insurance.”* (emphasis added).

Closer collaboration between investment promotion agencies may provide for a platform for exchanging experience on best practices in investment promotion and may also highlight investment opportunities in the territories of the parties. Such activities may bring together investors of both parties, and may, for example, result in joint ventures and strategic partnerships. Approaches that build on joint programmatic undertakings, such as cooperative information exchange, combined outreach to home country business groups, or foreign investment-related seminars and fairs, may also have the advantage that they focus on promotion activities in those business sectors where contracting parties see a priority need and where they see the best chances that a united effort may achieve some tangible results.

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**Notes**

- <sup>1</sup> A possible explanation why investment promotion provisions are more frequent in FTAs could be that the parties keep investment protection as their main objective when negotiating a BIT, while in FTAs, a more integrated approach is adopted, possibly allowing for more space for taking promotion aspects into account. Moreover, FTAs often contain provisions concerning the establishment of foreign investment - an area that is particularly relevant for investment promotion.
- <sup>2</sup> Market access provisions are exclusively included in FTAs. Therefore, by their very nature, FTAs have an indirect promotional effect on import, or export-oriented foreign investment.
- <sup>3</sup> For a discussion, see Ögütçü 2002.
- <sup>4</sup> The United States has concluded TIFAs with over 30 countries and regional economic integration organizations; all of them establish an institutional mechanism to monitor and to promote trade and investment relations between the parties. For more information, please visit:  
([http://www.ustr.gov/Trade\\_Agreements/TIFA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/TIFA/Section_Index.html))
- <sup>5</sup> For a discussion, see Industry Canada (1994).
- <sup>6</sup> For more details on the issue of informal obstacles to investment, see Karl (2006).
- <sup>7</sup> For more details, see: <http://www.miga.org/>, and [www.iaigc.org](http://www.iaigc.org).
- <sup>8</sup> The IAIGC is authorized to offer direct insurance and reinsurance for inter-Arab FDI, and provides reasonable compensation for losses caused by covered risks (UNCTAD 2004a, chapter 22).
- <sup>9</sup> The United States has also concluded a large number of investment incentive agreements with third countries with the aim to support investment in the form of investment insurance, reinsurance, debt and equity investments and investment guaranties. See, for instance, the agreement between the Governments of the United States and India, in force since 16 April 1998. The text is available at [www.opic.gov/doingbusiness/ourwork/asia/documents/indiabilateral.pdf](http://www.opic.gov/doingbusiness/ourwork/asia/documents/indiabilateral.pdf).





### III. INTERACTION WITH OTHER ISSUES AND CONCEPTS

Investment promotion provisions in IIAs interact with other concepts analysed in other UNCTAD publications and notably the series on issues in international investment agreements.<sup>1</sup> This section briefly discusses the interaction between these various concepts.

**Table 1. Interaction across issues and concepts**

Concepts in other papers provisions	investment promotion
Admission and establishment	++
Dispute Settlement	+
Fair and equitable treatment	+
Home country measures	++
Host country measures	++
Incentives	++
Investment-related trade measures	+
National treatment	+
Most-favoured-nation treatment	+
Social responsibility	+
State contracts	++
Taking of property	+
Taxation	++
Transfer of technology	++
Transparency	++

*Source:* UNCTAD.

Key: + = moderate interaction  
++ = extensive interaction

**Admission and establishment**

Investment promotion measures are usually applied in connection with the admission or establishment of foreign investors in the host country (UNCTAD 2004a). Thus, to the extent that IIAs include obligations of contracting parties concerning the admission and establishment of foreign investment, they might also apply to investment promotion measures in this context. For example, if a host country grants financial or fiscal aid to foreign investors in connection with their establishment, and the IIA stipulates that the non-discrimination principle applies with regard to the establishment, foreign investors may claim national treatment and most-favoured nation treatment with regard to such aid. It needs to be stressed, however, that most IIAs only contain a so-called admission clause that make the entry of foreign investors subject to the national laws of the host country. In these cases, foreign investors could claim investment promotion only in accordance with the host country's laws and regulations.

**Dispute settlement**

To the extent that IIAs establish binding obligations on the contracting parties concerning the provision of certain investment promotion measures, the dispute settlement mechanisms agreed upon in the treaty may become applicable. Both State-State dispute settlement and investor-State dispute settlement may be relevant (UNCTAD 2004a). For instance, if foreign investors claim that the host country denied them certain investment incentives to which they are entitled under the IIA, they may invoke the investor-State dispute settlement

rules. If there is a dispute on whether the home country has fulfilled its obligation to provide technical assistance to the host country, the latter might consider taking action under inter-State dispute settlement procedures.

#### **Fair and equitable treatment, most-favoured nation treatment, national treatment**

Most IIAs contain provisions on fair and equitable treatment and non-discrimination (national treatment and/or most-favoured nation treatment) (UNCTAD 2004a). Investment promotion provisions of the host country therefore have to be in accordance with these obligations. While provisions on non-discrimination and fair and equitable treatment provide legal assurance to foreign investors concerning the granting of investment promotion measures, such as financial or fiscal support, they may also reduce a host country's regulatory flexibility in the design and operation of its domestic investment promotion programme (UNCTAD 2006).

One possible constraint for the host country's investment promotion policies may result from the principle of fair and equitable treatment. There has recently been considerable debate about the scope and content of this IIA provision (UNCTAD 2005). Recent arbitration awards have tended to interpret this clause in a relatively broad manner by protecting the "reasonable expectations" of foreign investors (Schreuer 2005). Thus, for example, it could not be excluded that a sudden change in the investment promotion programme of a host country that reduces the aid given to foreign investors might violate the fair and equitable treatment standard.

As far as the non-discrimination principle is concerned, a key question is whether foreign investors in the host country are "in like circumstances" as regards the conditions under which investment promotion measures may be granted. Only in this case does the non-discrimination principle apply. Promotion schemes may be reserved, for example, to investments of a particular size, in a particular sector or a specific region. Thus, foreign investors could apply for these promotion measures only if they fall into the same category as their domestic counterparts.

Some host countries might wish to reserve certain investment promotion measures to investors of a particular foreign country. This might be the case, for instance, if the host country's development policy aims at fostering the economic (and political) ties with certain other countries. Such policies may violate the principle of most-favoured nation treatment, unless the granting of privileges is permitted under specific IIA provisions, such as a regional economic integration exception clause, i.e. a clause favouring regional economic integration (UNCTAD 2004b).

### **Home country measures**

Investment promotion activities may take the form of home country measures. Some IIAs include provisions encouraging or requiring home countries to take active steps in promoting outward direct investment in host countries by firms from such home countries. The value of such provisions lies in the enhancement of investment conditions, to the extent that investment costs can be mitigated through financial support, technical assistance investment, risk insurance and

other support measures provided by home countries (UNCTAD 2004a).

### **Host country operational measures**

Host country operational measures include all measures implemented by host countries concerning the operation of foreign affiliates inside their jurisdictions. They usually either take the form of restrictions or other requirements (UNCTAD 2004a). The fulfilment of such requirements may be a condition for the granting of investment promotion measures. IIAs deal with this issue primarily in the context of performance requirements. The objective behind such policies is to balance the objective of attracting foreign investment with some conditionality so that foreign investors contribute as much as possible to national development objectives.

### **Incentives**

Investment promotion measures often take the form of incentives. Incentives are measures adopted by the host or home country to encourage investors to operate in certain sectors or to implement certain projects that are more likely to have an impact on economic development (in the case of host country measures) or to increase productivity and profitability (from the point of view of the home country). In the context of host country measures, incentives may take the form of various economic benefits or advantages to specific investors to encourage them to invest in a certain sector, activity or region. In the context of home country measures, financial and fiscal incentives in the forms of grants, loans, equity participation, tax exemption and investment guarantees may

all be important measures to help domestic investors to invest abroad (UNCTAD 2004a).

Only a minority of IIAs expressly address the question of incentives. Most IIAs take up this issue only indirectly, namely through the provisions on non-discrimination, on fair and equitable treatment, and on performance requirements.

### **Investment-related trade measures**

Investment-related trade measures of the host country, such as export financing programmes or export processing zones, may constitute investment promotion measures for attracting export-oriented FDI (UNCTAD 2004a).

Also, some home country measures may fall into the category of trade measures that have an impact on foreign investment. These home country measures may be used to promote foreign investment to developing countries, such as the granting of special duty preferences to imports from developing countries, thereby enhancing the latter countries' attractiveness as a site for export-related foreign investment. Conversely, some home country measures may also comprise trade regulations, such as antidumping standards or rules-of-origin definitions that discourage foreign investment by threatening import penalties in order to offset the comparative production advantages offered by prospective investment sites in host developing countries (UNCTAD 2004a).

### **Social responsibility**

TNCs activities are meant to be guided by social responsibility principles and are therefore expected to conduct their economic affairs in good faith and in accordance with proper standards of economic activity, while also observing fundamental principles of good socio-political and ethical conduct. Requiring and upholding high standards of social responsibility may be at odds with investment promotion policies if countries seek to attract foreign investment by lowering such yardsticks. A growing number of IIAs therefore include provisions discouraging or prohibiting such investment promotion strategies, in particular with regard to environmental standards and core labour standards.

Another dimension of social responsibility in this context would be to condition the granting of investment promotion measures to the fulfilment by the foreign investor of certain socio-political goals. For instance, the host country could commit itself to grant specific investment incentives, provided that the foreign investor creates a certain minimum number of jobs or undertakes training activities for the workforce (UNCTAD 2004a).

### **State Contracts**

A host country may commit itself to grant certain investment promotion measures – such as fiscal or financial incentives – on the basis of an individual investment contract with the foreign investor. If the host country does not honour this commitment, it might be liable for a breach of the investment contract (UNCTAD 2004a). Such a breach of contract could likewise amount to a violation of the IIA. This



could be the case if the IIA includes a so-called "umbrella clause" according to which the host country has promised to respect any other commitment it has undertaken in connection with investments of investors of the other contracting party.

### **Taking of Property**

The termination or withdrawal of investment promotion measures might amount to an expropriation for which foreign investors could claim adequate compensation according to the applicable IIA (UNCTAD 2004a). This could be the case, for example, if the host country requires the foreign investor to return certain financial or fiscal aids to which the latter is entitled, and the investment has to be liquidated as a result. An expropriation could also be at stake if the host country had promised certain kinds of investment promotion to the foreign investor in an investment contract and thereafter does not honour its commitment.

### **Taxation**

Fiscal incentives are among the most commonly used types of investment promotion measures. Their underlying purpose is to reduce the effective tax rate applicable to foreign investment, thus increasing its rate of return. Fiscal incentives may be granted by the home country or the host country of the foreign investor. The applicability of IIAs with regard to fiscal investment promotion measures is relatively limited. Most IIAs include either a complete carve-out of taxation matters from the agreement, or they declare the most-favoured nation principle inapplicable with regard to fiscal advantages covered by double taxation treaties (DTTs) between the contracting

parties (UNCTAD 2004a). Such DTTs may be an important tool in its own right to promote cross-border investment flows.

### **Transfer of technology**

There is an interaction between the transfer of technology and investment promotion (UNCTAD 2004a). Contracting parties to an IIA may either agree to encourage the transfer of technology or to prohibit the imposition of a transfer of technology requirement on the foreign investor. Most association agreements concluded by the EU, for example, encourage cooperation on transfer of technology between the Union and the third party. However, recent FTAs concluded by Japan and the United States; for instance, often include provisions restricting the freedom of contracting parties to impose a transfer of technology requirement under the performance requirements clause.<sup>2</sup>

### **Transparency**

A key element of a favourable investment climate is transparency of the regulatory framework for foreign investment (UNCTAD 2004a). This includes transparency with regard to the investment promotion system of IIA contracting parties. Some IIAs include explicit transparency provisions.

**Notes**

- <sup>1</sup> UNCTAD's Series on issues in international investment agreements is available online at [www.unctad.org/ia](http://www.unctad.org/ia).
- <sup>2</sup> See for example Article 15.8 of the United States - Singapore FTA (2003). For transfer of technology cooperation provisions, see section II.F above.

#### **IV. OPTIONS FOR STRENGTHENING INVESTMENT PROMOTION IN IIAs**

This section outlines a number of options for giving investment promotion a more prominent role in IIAs in order to advance the development objectives of contracting parties. Traditionally, investment promotion provisions have their place in the preambles of IIAs. This reflects the fact that these provisions are normally of a very general nature, confirming the good intentions of the contracting parties to promote foreign investment through the conclusion of the IIA. However, the more investment promotion provisions have a specific content or even establish binding obligations of the contracting parties, the more it would be appropriate to give these provisions a separate place within the main body of the agreement.

IIA negotiators who consider including specific investment promotion provisions in the agreement are confronted with two main issues: First, there is the question of the scope, variety and number of investment promotion provisions that they might want to incorporate into the IIA; second, a decision has to be taken concerning the intensity of the commitment undertaken, including the issue of eventual implementation and follow-up mechanisms. As explained above, most of the investment promotion provisions currently found in IIAs are vaguely formulated, thereby creating the risk that they are interpreted in the sense of a political lip service. The more precise and binding the provisions are formulated, and the more directly they are linked to specific follow-up processes, the more the results are likely to have a visible effect. On the other hand, such an approach also implies that contracting parties have to give up their discretion in the

design and operation of their domestic investment promotion programmes to a certain extent.

#### **A. Benefits and costs of investment promotion provisions in IIAs**

As indicated above, including investment promotion provisions in IIAs could have several advantages, but may also imply some costs. Contracting parties therefore need to undertake a cost-benefit analysis on whether it would be useful to include investment promotion provisions in their agreement or not.

##### **1. Potential benefits of investment promotion provisions**

Giving more prominence to investment promotion in IIAs could have several positive effects. As explained above, investment promotion provisions usually establish a commitment of contracting parties to *actively do something* for the encouragement of foreign investment. Their promotional effect on foreign investment might therefore be felt more immediately than in the case of passive obligations concerning investment protection in relation to which contracting parties basically "only" pledge not to interfere with the foreign investment in certain proscribed manners. Investment promotion measures would be result-oriented and thus also more visible than passive provisions on investment protection. In that sense, investment promotion provisions could be an appropriate response to concerns that IIAs do not do enough to attract foreign investment.<sup>1</sup>

In a similar vein, investment promotion provisions might have a distinct added value. Investment promotion provisions are relatively rarely used in existing IIAs. Countries including such provisions in their investment agreements might therefore have a comparative advantage in the global competition to attract foreign investment. Whereas the granting of investment protection increasingly becomes common place, countries could distinguish themselves through additional active investment promotion measures on which they agree upon in their treaty.

In addition, measured against the thousands of existing IIAs and the high number of foreign investors around the world, violations of these agreements are relatively rare. This means that in most cases the investment protection granted in IIAs does not become *directly* relevant – except the important psychological effect that these treaties have in giving the foreign investor reassurance of being protected, and their preventive effect concerning potential treaty violations by the host country. By contrast, investment promotion may have a more visible impact from which foreign investor can benefit.

For instance, investment promotion provisions providing for the setting up of investment promotion agencies could open the door for establishing direct contacts between the host country and foreign investors. Another example would be the organization of workshops or fairs on investment opportunities with the participation of foreign investors. Such events could also present opportunities to establish linkages between foreign investors and local enterprises.

Another advantage may be that investment promotion provisions could be designed in such a way as to promote

particular kinds of foreign investment in which the host country has a special interest. Whereas investment protection applies across-the-board, investment promotion provisions would allow a more targeted approach. For instance, if contracting parties agree on financial or fiscal aids or to exchange information on investment opportunities, they could use this tool to attract those types of investments that they consider as particularly promising from a development perspective. More than investment protection, investment promotion provisions could therefore be used in the context of strategic investment policies of host countries in order to steer foreign investment in particular sectors, activities or regions where these countries see a comparable advantage for them and where they expect a promising potential for the future.

It follows from the above that investment promotion provisions could be particularly interesting for countries with a relatively low risk profile. The "safer" a host country appears from an investor's perspective, the less important investment protection in an IIA will be for deciding whether to invest in this country or not. As more and more countries improve their investment climate and move up the ladder towards higher levels of investment protection, the relative importance of investment promotion as compared to investment protection is likely to increase.

Likewise, the need for specific investment promotion measures in addition to investment protection will depend on the overall attractiveness of the host country for foreign investors. This attractiveness is not only determined by the existing legal environment, but by many other factors, such as market size, the availability of cheap and/or skilled labour

force, infrastructure, and the general political and economic climate. The more favourable these various factors are for foreign investors, the less additional promotion measures will be needed.

## **2. Potential costs of investment promotion provisions**

The widely held perception that IIAs are primarily concluded to protect foreign investors abroad might be difficult to change. Contracting parties may find investment promotion provisions to represent an additional layer of bureaucratic and logistical burdens imposed on them, and might therefore prefer to continue focusing on investment protection, relying on the assumption that improved investor protection is enough to promote FDI in IIAs.

Agreeing on investment promotion measures in IIAs may also result in financial commitments for the contracting parties. This is most obvious when it comes to the establishment by the IIA of new promotion activities. However, the financial burden might greatly differ, depending on what particular investment promotion activity has been chosen. Financial or fiscal incentives may be especially costly. Other measures, such as the organization of investment exhibitions, might be much cheaper, but still be a non-negligible load, especially for the least developed countries. On the other hand, home countries might be willing to carry parts of the costs, for instance through providing technical assistance.

In some cases, new investment promotion activities established in the IIA may cause "windfall gains" for foreign investors. This risk exists if these activities benefit those



investors who would have made an investment, regardless of whether they receive additional support or not.

Another consideration has to do with potential capacity constraints in developing countries. These countries might find it difficult to implement agreed investment promotion measures, such as improving transparency, setting up an investment promotion agency or co-organizing joint promotion activities. All this might require relatively extensive institutional and organizational arrangements. Limitations in developing countries may also become visible with respect to human resources. For instance, providing information on the domestic regulatory framework to interested foreign investors requires profound knowledge about the host country's laws and policies.

Likewise, a considerable degree of technical expertise is needed for the design of a coherent investment promotion strategy and the further development of an institutional framework. All this underlines the importance of additional capacity-building in this area. Otherwise, there is a risk that investment promotion provisions remain an empty shell, i.e. they express the good intentions of the contracting parties without ensuring their realisation.

Including investment promotion provisions in IIAs may also raise concerns about a loss of discretion in the design and implementation of domestic investment promotion schemes. The more investment promotion becomes a binding obligation in IIAs, and the higher the degree of specificity of the particular activities agreed upon, the less room remains for contracting parties to act independently. On the other hand, the

added value of investment promotion provisions in IIAs to a large extent depends on the willingness of contracting parties to give up a certain level of autonomy in the conduct of their promotion programmes. Finding the right balance between these two conflicting objectives may be a major challenge (see section IV.B.2, 3 below).

Another consideration in this context is that contracting parties might shy away from undertaking commitments according to which they are supposed to take some positive action compared to passive obligations in the area of investment protection. This reluctance might be more pronounced in the case where the IIA establishes new investment promotion activities than if existing measures are only confirmed.

Also, there is the issue that IIA contracting parties might not be equally interested in incorporating investment promotion provisions in their agreement. As far as investment *protection* is concerned, it is essential for both the investor's home country and the host country, as it provides legal security (which is important from the home country's perspective), and has an indirect promotional effect (in which the host country is particularly interested). Equally important, the international legal protection that both parties seek to achieve *requires* an agreement between them. By contrast, when it comes to investment *promotion*, the home country and the host country might have diverging views about the need and appropriateness of such provisions in the IIA. Whereas the host country might strongly favour their inclusion into the agreement, the home country might already be satisfied with the protection part of the IIA. Also, for investment promotion

to become effective, it is not compulsory that an IIA be concluded between the contracting parties.

Finally, questions related to internal administrative competences and other formal aspects may play a role. For instance, promotion activities in the area of technical assistance and capacity building may be in the competence of special ministries and government agencies of the developed country treaty partner. These administrative departments might not wish that an IIA deals with issues falling within their domain. Also, those ministries in charge of investment protection might hesitate bringing into the realm of negotiations topics that do not belong to their core business. Experience shows that it is often difficult to change such long established administrative practices.

## **B. Policy options**

The overall objective of the various options presented below is to move away from an approach under which home and host countries retain full unilateral control over the design, formulation and implementation of their investment promotion activities, either because the IIAs do not contain any investment promotion provisions at all or because they are limited to hortatory language not going beyond a general political commitment to promote foreign investment. Rather, the goal would be to arrive at some commonly agreed solutions where contracting parties make more specific mutual commitments in the interest of economic development.

The following distinguishes between four broad categories of options for investment promotion provisions in

IAs. A differentiation can be made concerning the country undertaking the promotion measure, the nature of the measure, the legal character of the commitment, and any possible follow-up activities.

### **1. Country undertaking the investment promotion activity**

Contracting parties have three different options in this regard. They may agree upon investment promotion measures by the host country of the investor, by the home country or some cooperative efforts.

- *Host and home country promotional activities*

Practically all existing IAs dealing specifically with investment promotion focus on host country measures. This takes account of the fact that the host country is the main beneficiary of foreign investment. As outlined above, there is a great variety of host country promotional measures that contracting parties might wish to consider in the IIA.

One difficulty that might arise in this respect is the asymmetric situation in which host countries at different levels of economic development might find themselves. The need to improve general investment conditions, such as more transparency or better access to the capital market, might often be greater in developing countries than in developed countries. Consequently, the latter might not see a reason to undertake commitments in this respect.

One possibility to deal with this situation could be to condition investment promotion undertakings of one

contracting party to those of the other party. For instance, a developing country's commitment to improve transparency or to set up an investment promotion agency could be made contingent on the prior provision of technical assistance by the home country aimed at implementing these plans.

Investment promotion provisions on technical assistance and capacity-building could be designed in such a way as to increase the capabilities of host developing countries to implement investment promotion-related commitments. For instance, a developing country's commitment to improve transparency or to set up an investment promotion agency could be made contingent on the prior provision of technical assistance aimed at implementing these plans. Developed countries generally have a self-interest in providing this type of technical assistance so as to assure developing countries are able to implement and respect their international commitments.

Moreover, home country promotional measures could be seen as a "*quid-pro-quo*" for the investment protection granted by the host countries. There have been complaints that – de facto – North-South IIAs would establish obligations unilaterally on the developing country treaty partner, since the vast majority of the investments is made by investors from developed countries. It might therefore contribute to a more balanced agreement if the investment protection-related obligations of the host country find a counterweight in the investment promotion-related commitments of the home country.

On the other hand, political considerations in capital-exporting countries would also have to be taken into account.

Against relatively high unemployment rates in a number of developed countries, concerns have been expressed that outward foreign investment contributes to "job exports". Such perceptions might be strong enough in individual countries to caution against the idea of including investment promotion measures of home countries of foreign investors into the IIAs.<sup>2</sup>

- *Cooperative efforts*

As shown above in Section II, various options exist for agreeing upon joint investment promotion activities in the IIA.

An additional option would be to condition the granting of investment promotion measures by the home country to the requirement that those investments conform to the laws and regulations of the host country. Some IIAs, such as the BIT between Australia and Indonesia (1993), already state in a general manner that the investment must be made "*in conformity with the laws, regulations and investment policies applicable from time to time*" (UNCTAD 1998). This general requirement could be made relevant for investment promotion purposes. Accordingly, contracting parties would ensure that only foreign investment desirable for development purposes *as stipulated in the host country's laws and regulations* will benefit from investment promotion granted by the home country. Thus, foreign investors applying for investment promotion by their home country would need to prove that the investment is in line with the host country's development objectives before they could receive any financial or other aid.

Likewise, home country programmes offering incentives might link such assistance to performance standards related to the anticipated developmental effects in host

countries. For example, projects receiving preferential treatment because of their proposed technology transfer benefits could be expected to actualize such plans, or forfeit the promotional benefit. Joint follow-up and monitoring activities, for instance through joint meetings, might incorporate an integral role for the host developing country in assessing the foreign investor's performance relative to these development objectives.

In sum, IIAs could seek to better coordinate investment promotion measures by home countries of foreign investors with host country development policies. Accordingly, the home country would no longer decide exclusively along its own criteria whether the investment is "worth" being promoted, but on the basis of a joint evaluation.

## **2. Nature of the investment promotion measure**

One can make two broad distinctions concerning the nature of investment promotion provisions. First, they may relate to already existing promotion activities or cover new measures. Second, the investment promotion schemes may cover the general policy framework for foreign investment or include specific promotion measures for individual companies.

As regards the first set of alternatives, the benefits of investment promotion provisions might be particularly strong if contracting parties agreed upon some *new* promotion measures in the IIA that did not yet exist. For instance, if foreign investors had complaints about a lack of clarity of the legal framework in the host country, a transparency provision in the IIA might help to improve the situation. Likewise, an

agreement in the IIA to set up investment promotion agencies may be a genuine contribution to improving the investment climate. On the other hand, it might also be more difficult to come to an agreement concerning the setting up of new investment promotion activities than in the case that existing measures are only confirmed.

This, however, does not mean that investment promotion provisions, which only confirm already existing promotion activities of the contracting parties would be futile. As said before, their inclusion in the IIA would give more legal assurance to foreign investors about their availability and contribute to making the legal framework more predictable. Also, contracting parties could use the IIA as a "publicity window" in order to make their existing investment promotion schemes more transparent and visible.

When it comes to the second set of alternatives – promotion measures concerning the general policy framework or individual promotion measures to enterprises – much depends on the particular situation of the contracting parties. The more deficiencies the general policy framework in the host country has, the more there is a need that promotion measures focus on this area. This includes technical assistance activities by the home country. Vice versa, individual promotion activities of the host country, such as financial or fiscal incentives, might be adequate in the context of strategic investment policies. Such incentives may, however, not make up for deficiencies in the overall framework for foreign investment.

### **3. Legal character of investment promotion provisions**



Any of the above-mentioned options could be agreed upon as a voluntary commitment of the contracting parties or become a legally binding obligation. The breadth of such an approach would depend on the number and variety of investment promotion measures addressed and the strength of the provisions could vary with their specificity as well as the nature of associated follow-up and monitoring mechanisms. Several options exist.

At the bottom of the range would be a “best efforts clause” according to which contracting parties would endeavour undertaking investment promotion activities. Such a clause could be formulated in a general manner or specify individual promotion measures, for instance, a pledge to exchange information on investment opportunities or to provide technical assistance.

Another, more binding option would be to establish an obligation – “*The contracting parties shall...*” –, but to draft it in such an open manner that contracting parties would retain ample discretion. For example, the contracting parties could commit themselves to increase transparency. Despite its legally binding character, this option would leave contracting parties sufficient room of manoeuvre on how they would want to fulfil their commitment. In a similar vein, the IIA could state that contracting parties shall take those investment promotion measures, which they consider appropriate. Adding a time limit until when the promotion measures would have to become effective could further reinforce this approach.

One further step could be that contracting parties establish a right of foreign investors to receive certain forms of

investment promotion measures, such as fiscal or financial incentives. In all likelihood, contracting parties would refrain from granting foreign investors an absolute right, but make the receipt of the advantage subject to their domestic laws. Foreign investors could therefore claim these investment promotion measures under the IIA, provided that they fulfil the requirements for their granting as laid down in the laws and regulations of the contracting party concerned. Thus, while each contracting party would retain sovereignty in designing and implementing its national investment promotion programmes, it would nevertheless provide foreign investors with legal assurance in the IIA that the applicable rules will be respected. This right could be further reinforced if contracting parties agree that the dispute settlement mechanism of the IIA applies to investment promotion-related quarrels.

The strongest form of a commitment of contracting parties would be the establishment of an absolute right to investment promotion. In this case, the IIA would specify what kind of promotion activity the investor could claim and under what conditions. These rights could relate, for instance, to the granting of incentives by home countries or host countries, the provision of information about investment conditions in the host country, or the establishment of time limits within which the administration of the host country has to decide upon applications made in connection with the investment. Rights could also be established exclusively between the contracting parties. An illustration would be an obligation of the home country to provide some form of technical assistance or to give financial support to the host country, for example in connection with the organisation of investment fairs or as regards capacity building.

A key issue for negotiators is the degree of legal commitment investment promotion provisions should have and where to draw the borderline between giving legal assurance about the availability of investment promotion measures, on the one hand, and reserving sufficient regulatory discretion of the contracting parties, on the other hand. Negotiators need to find a compromise between drafting investment promotion provisions in such a vague manner that their impact on attracting foreign investment becomes irrelevant, and establishing such strong provisions that they lose any flexibility in operating their national investment promotion schemes.

Maintaining a certain degree of discretion in investment promotion is crucial because the environment in which such schemes are designed and function is subject to change. This situation is strikingly different to investment protection where the contracting parties undertake long-term commitments that are supposed to survive changing circumstances. Guarantees of non-discrimination, or in the case of expropriation are universal treaty standards that are usually given irrespective of the particular situation of the contracting parties. In contrast, investment promotion depends much more on the specific needs of individual countries, their state of economic and legal maturity, and their own development strategies. The latter might change when new governments come into power with other priorities. All this calls for a cautious approach towards binding investment promotion-related commitments.

The issue of whether to include binding obligations or not also depends on what particular promotion activity is at

stake. In some areas, binding commitments may be more "risky" for contracting parties than in others. For instance, it could be advantageous if contracting parties undertake an obligation to provide transparency concerning the legal and administrative framework for foreign investment. Likewise, home countries might consider the provision of technical assistance as a long-term commitment, and not hesitate to confirm this in a legally binding manner. The opposite situation may exist with regard to investment promotion measures in the framework of strategic investment policies in relation to which there may be need for adaptation and modification over time.

With regard to the other end of the spectrum, it needs to be emphasized that voluntary commitments on investment promotion – albeit not as strong as binding obligations – may nevertheless have significant effects. More important than the legal nature of a commitment may be the question of whether an individual investment promotion provision actually contributes to improving the investment climate and encouraging more foreign investment. If a voluntary commitment directed at such improvements is properly implemented, its effect might be as strong as a legally binding obligation. This makes follow-up and monitoring mechanisms concerning the promotion-related commitments of the contracting parties particularly important.

#### **4. Follow-up activities**

As stated before, a lack of appropriate implementation and follow-up mechanisms is probably the most important shortage in existing investment promotion provisions, and it is

in this context where there is a particular need for improvement.

Contracting parties could establish a control mechanism in the IIA allowing to monitor as to what extent the investment promotion activities agreed upon have actually been put in place and to what degree they are efficient. This would be especially important in the case that an IIA includes only relatively general commitments without specifying a timetable for their implementation or without giving any other details on how the commitment (e.g. an encouragement of technology transfer) should be honoured. In these cases, there is a considerable risk that the investment promotion provisions reflect only political lip service not followed by some concrete actions of the contracting parties.

Accordingly, the IIA could provide for the establishment of an institutional framework to accompany the proper implementation of the investment promotion measures. A follow-up procedure, for instance in the form of regular annual meetings between the contracting parties, could provide a useful means to assess what has been achieved and what still needs to be done. It could also be an instrument allowing developing countries to seek the assistance of their developed country treaty partners in fulfilling their investment promotion-related commitments.

The monitoring system could cover the full range of investment promotion activities. It could address promotion measures aimed at technical assistance and capacity-building, as well as improving the general policy framework for foreign

investment, or support actions in respect of individual investors, such as incentives.

Another possible function of a follow-up mechanism could be to render those investment promotion activities more specific on which contracting parties had agreed upon in the IIA only in a general manner. The purpose would therefore be to make the investment promotion provisions more operational and to create a benchmark against which future success in implementing the promotion measure could be measured. For instance, if the contracting parties had agreed initially in the IIA to exchange information on investment opportunities, a follow-up activity could be that the governments involved identify concrete steps on how this information should be provided. Similar considerations would apply, for example, with regard to a general commitment to provide technical assistance.

Follow-up procedures could also be used to modify existing investment promotion activities, or terminate those that have proved to be ineffective. Also, if host countries are concerned that foreign investors benefiting from investment promotion measures cause social or environmental harm, or are otherwise detrimental to economic development, the former could raise these issues with their home country counterparts.

#### Notes

<sup>1</sup> See footnote 2 above.

<sup>2</sup> For more details, see (UNCTAD 2004c, Box V.14, P. 215).



## CONCLUSION

Investment promotion provisions have been much less discussed and analysed than protection clauses in IIAs. Despite the fact that these agreements expressly aim at promoting and encouraging the establishment of foreign investors, their main content is to provide legal protection to foreign investors. Accordingly, only a minority of IIAs include explicit provisions on investment promotion. This situation may severely limit the expected promotional effect of IIAs, since most of these treaties do not give foreign investors any assurance of what kind of investment promotion activities and measures they can expect when making an investment in the host country.

For many developing countries, especially least developed countries, granting high standards of investment protection in IIAs might not in itself be sufficient to attract foreign investment in the quantity and quality needed to achieve their development objectives (UNCTAD 1998). There is therefore a need to explore ways and means on how one could strengthen the promotion component of IIAs.

As this paper has tried to show, there are many options for enhancing investment promotion in international investment rulemaking, including through measures by the host country, the home country and joint activities. Contracting parties also have different possibilities at hand concerning the nature of the investment promotion measure they want to agree upon in the IIA, the legal character of the investment promotion provisions, and possible follow-up/monitoring procedures.



Investment promotion agencies (IPAs) in particular could raise the awareness of the contracting parties on the need of investment promotion provisions in IIAs. IPAs could also be involved in identifying countries with which IIAs are desirable in light of medium and long-term national investment promotion strategies. Likewise, IPAs might wish to use IIAs more actively as a promotional tool.

More recourse to investment promotion provisions in IIAs may increase the likelihood of host countries receiving foreign investment, but they may likewise reduce the contracting parties' discretion in the design and operation of their domestic investment promotion schemes. To what extent flexibility is reduced depends on the concreteness and legal strictness in which such commitments are made. The more specific the investment promotion measures agreed upon in the IIA, and the stronger the legal commitment, the higher might be the likelihood that the desired promotion effect actually occurs. There is thus a trade-off between strengthening the promotional character of IIAs, on the one hand, and retaining sovereignty over national investment promotion systems, on the other hand.

Strengthening the promotional aspect of IIAs could also contribute to concluding more balanced treaties. The current strong emphasis on investment protection tends to favour the capital-exporting party to an investment agreement, because – de facto – it benefits more from the treaty rights than it is bound by the obligations. Giving more prominence to investment promotion could establish a counterweight, since one would expect that investment promotion becomes also a task of the home country of the foreign investor. Taking equal

account of investment promotion and protection in IIAs could therefore contribute to a more stable and harmonious relationship between the contracting parties.



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