UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

# Identifying core elements in investment agreements in the APEC region

## UNCTAD Series on International Investment Policies for Development

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# NOTE

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# PREFACE

The secretariat of UNCTAD is implementing a programme on international investment arrangements. The programme seeks to help developing countries participate as effectively as possible in international investment rulemaking. It 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. The programme is implemented by a team led by James Zhan.

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, Jörg Weber and Thomas Westcott. Members of the Review Committee are Mark Kantor, Mark Koulen, Peter Muchlinski, Antonio Parra, Patrick

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Supachai Panitchpakdi
Secretary-General of UNCTAD

October 2008

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# ABBREVIATIONS

| | |
|---|---|
| APEC | Asia–Pacific Economic Cooperation |
| ASEAN | Association of South-East Asian Nations |
| BIT | bilateral investment treaty |
| CEP | closer economic partnership agreement |
| EIA | economic integration agreement |
| EPA | economic partnership agreement |
| FDI | foreign direct investment |
| FIPA | foreign investment protection agreement |
| FTA | free trade agreement |
| GATS | General Agreement on Trade in Services |
| ICSID | International Centre for the Settlement of Investment Disputes |
| IIA | international investment agreement |
| IPPA | investment promotion and protection agreement |
| MFN | most favoured nation |
| NAFTA | North American Free Trade Agreement |
| NBIP | Non-Binding Investment Principles |
| PTIA | preferential trade and investment agreement |
| REIO | regional economic integration organization |
| RTA | regional trade agreement |
| TRIMs | Agreement on Trade-Related Investment Measures |
| UNCITRAL | United Nations Commission on International Trade Law |
| WTO | World Trade Organization |

# EXECUTIVE SUMMARY

This study responds to an Asia–Pacific Economic Cooperation (APEC) forum Investment Experts Group request to identify the core elements in investment agreements in the APEC region. This includes identifying the range of approaches taken in respect of these elements. The study sample, selected by APEC, includes 28 international investment agreements (IIAs) between and/or involving APEC member economies. These comprise 14 bilateral investment treaties (BITs) and 14 preferential trade and investment agreements (PTIAs).

The report also provides a means of considering how different IIAs address three possible objectives: investment liberalization, investment protection, and investment promotion. It explains how APEC economies address the legal issues of international investment, the nature and effect of the main provisions (the "core elements") that appear in IIAs, and how they interact together. It also identifies the purpose of these provisions and where APEC member countries take common and different approaches. Finally, it compares the approaches taken in "APEC IIAs" with three key "APEC investment instruments": the Non-Binding Investment Principles (NBIP), the Menu of Options, and the Transparency Standards on Investment (see annex 2).[1]

The key findings of the study are:

(a) There is a *considerable degree of conformity* concerning the core elements included in APEC IIAs. This trend is also evident in the global system of IIAs (UNCTAD 2007a and UNCTAD forthcoming). This high level of

consistency reflects, *inter alia*, considerable evolution over the last fifty years and in particular in the last ten years, and the influence of agreements such as the North American Free Trade Agreement (NAFTA). On a number of core issues, APEC IIAs reflect consensus with respect to the main content and overriding purpose. Provisions such as national and most favoured nation (MFN) treatment for established investments, fair and equitable treatment, guarantees of prompt, adequate and effective compensation for expropriation and of free transfers, and consent to investor–State and State–State dispute resolution all appear in the vast majority of agreements;

(b) Certain APEC economies adopt a very consistent approach to their IIAs. For example, Japan has six highly consistent IIAs in this study. The United States has NAFTA and very similar agreements based on revised NAFTA language in the form of its 2004 revised model BIT text. On the other hand, Australia has four different looking IIAs (three free trade agreements (FTAs) and an investment promotion and protection agreement (IPPA));

(c) However, on closer examination, APEC IIAs contain *significant differences in their wording and details*. There is considerable variation in the content and meaning of core elements, for example, provisions relating to investment-related capital transfers, key personnel, and mechanisms for settling disputes between investors and States. There are also some provisions that only appear in a minority of agreements and with considerable variation among agreements, for example, guarantees of national and MFN treatment with respect to the right to establish investment, and prohibitions on performance requirements;

(d) Some APEC members adopt different approaches to BITs and PTIAs (e.g. in the coverage of pre-establishment issues), whilst other countries are now concluding BITs that pursue the same objectives as their PTIAs;

(e) APEC IIAs are first and foremost *protective*. That is, the vast majority of commitments are intended to protect investment flows by limiting a host country's regulatory discretion;

(f) APEC IIAs are moderately *liberalizing*. Nonetheless, APEC probably contains proportionally more liberalizing IIAs than exist amongst all countries when considered together. This is driven by the strong liberalizing credentials of some APEC economies including the objectives of the recent BIT model texts of several economies. Nevertheless, the analysis conducted concludes that compared to what has been endorsed in APEC investment instruments, considerably more could be done;

(g) APEC IIAs are indirectly *promotional*. Most agreements do not contain provisions directly promoting international investment flows. Rather, promotion occurs indirectly as a consequence of creating a favourable investment climate through investment protection. Three APEC IIAs include a provision on investment cooperation within the investment agreement and three Japanese economic partnership agreements (EPAs) include cooperation obligations elsewhere in the EPA. Though 15 IIAs state that parties should promote investment flows, few go into any detail on how to achieve this;

(h) More recent APEC IIAs contain changes in the wording of substantive provisions such as the fair and equitable treatment standard and minimum standard of treatment, expropriation, and investor–State dispute settlement.

There is evidence that recent APEC IIAs are adopting minimum standard of treatment provisions that accord the same treatment as required under customary international law, though the same economies generally also have IIAs containing the fair and equitable treatment standard. At the moment this remains a localized trend amongst certain countries;

(i) APEC IIAs substantially follow the general structure and intent of the APEC investment instruments. On the other hand, all APEC IIAs include exceptions and omissions that mean investment liberalization and protection is more limited than the best practices set down in these APEC instruments. On closer comparison with the APEC investment instruments, four further observations can be made: (a) the Non-Binding Investment Principles do not encompass several general treatment standards that feature in almost all APEC investment treaties, for example, fair and equitable treatment; (b) the principles address investor behaviour, whereas to date the only obligation some APEC IIAs impose is a requirement to provide information about an investment; (c) IIAs covering pre-establishment could more actively use the Menu of Options suggestions for reform of prior authorization requirements, as APEC members are more likely to bind existing measures than reform prior authorization requirements as part of IIA negotiations; and(d) the APEC investment instrument, Investment Transparency Standards, sets down more comprehensive requirements than those included in APEC IIAs.

These findings underscore three challenges facing APEC – and indeed all – IIAs. The first is the need for policy coherence in the form of a consistent approach to domestic economic and development policy. The second is the need to balance the interests of investors with the broader public

interest. And the third challenge is how best to adequately address the development dimension of IIAs and development issues most relevant to developing countries in IIAs. The APEC investment instruments are useful policy tools for working to understand these three challenges in APEC IIAs and for encouraging approaches to negotiating investment treaties amongst APEC member economies – and within the broader IIA system - that seek to address these challenges.

## Note

1 In the following, the term "APEC IIAs" refers to the 28 individual investment treaties, whereas the term "APEC investment instruments" refers to the three instruments concluded by APEC.

# INTRODUCTION

The 28 international investment agreements (IIAs) that form the basis of this study represent a small but diverse sample of the different types of IIAs (see annex 1). They illustrate differing objectives and the complexity for policymakers and investors operating in a large treaty network. This study identifies common, core elements of APEC IIAs and the way these provisions assist in the liberalization, protection and promotion of investment. It also considers how the core elements compare with investment principles of existing APEC instruments, namely, the Non-Binding Investment Principles, the "Menu of Options",[1] and the Transparency Standards on Investment (see annex 2).

There are two main types of IIAs and both are commonly employed by APEC member economies: bilateral investment treaties (BITs, alternatively known as investment promotion and protection agreements or IPPAs), and preferential trade and investment agreements (PTIAs). PTIAs encompass the investment provisions in bilateral and plurilateral economic integration agreements (EIAs), such as regional trade agreements (RTAs), free trade agreements (FTAs), EPAs and closer economic partnership (CEP) agreements. Investment provisions are thus increasingly being formulated as part of agreements that cover a broader range of issues, including trade in goods and services. This has led to increased diversity of international investment treaty law and a new set of issues, particularly concerning the relationship between investment and services chapters in PTIAs. While BITs remain far more numerous than PTIAs, the latter occupy

a more important place in the international investment regime than they did a decade ago. Some countries increasingly prefer to address traditional investment protection as well as newer investment liberalization issues in the context of these broader agreements where investment provisions are only part of a larger framework for economic integration (UNCTAD, 2006).

Another trend observed in BITs is the distinction between two main models (UNCTAD, 2007b). The majority of APEC BITs examined follow the traditional "admission" model and only cover investments at the post-establishment stage. Admission is therefore subject to host country domestic laws. A smaller category of BITs, though proportionally more significant in this APEC study because of the membership of three key users of this model, have as their objective the liberalization as well as protection of investments.[2] This "right of establishment" model applies to the pre and post-establishment phases and also generally includes provisions on performance requirements and managerial personnel. The methodology of this study is to generally identify convergence and divergence between IIAs without distinguishing between whether the issue in question appears in a BIT or a PTIA. However, on occasion drawing distinction between BIT and PTIA practice is necessary.

### *Step one: Selecting APEC IIAs and identifying core elements*

The IIAs in this study include 14 BITs and 14 PTIAs identified as part of step one. All APEC economies are party to at least one IIA in the sample. The most represented are Japan (with 6 IIAs), Singapore (5), Thailand (5), Australia (4), Mexico (4), Canada (3), Chile (3) and the United States (3).

These agreements were selected as largely representative of approaches to IIA negotiations taken by member economies, though no more rigorous selection criteria were used in step one of the project to ensure all approaches were represented. Step one examined APEC IIAs and categorized treaty provisions on 17 issues. This classification formed the basis of the analysis in steps two and three that is the subject of this study.

***Step two: Analysing approaches to core elements***

APEC IIAs pursue three foreign investment objectives – liberalization, protection and promotion – in varying degrees and in differing combinations. The combinations into which APEC IIAs can be categorized include investment protection and promotion IIAs, investment liberalization and protection IIAs, and investment liberalization, protection and promotion IIAs. There are no APEC treaties in this study that are solely used for investment cooperation. One APEC IIA, the Framework Agreement on the Association of South-East Asian Nations (ASEAN) Investment Area, is a close match – at least in structure – to what could be described as an investment liberalization IIA (UNCTAD, 2006). A separate issue is how liberalizing this agreement has been in its effect.

The different purposes and objectives of IIAs add to the overall complexity of the IIA system. Though not addressed explicitly in what follows, this is an important and recurring theme in the study of investment rulemaking. Complexity for host governments, home governments and investors arises from the growing number of agreements, the co-existence of

different types of agreements, and various approaches to drafting provisions and the legal effect of these differences.

Identifying the core elements of IIAs promotes policy coherence and consistency by enhancing the understanding of convergence and divergence in approaches to negotiating. It also supports the objective of a consistent and predictable regulatory framework for investors and governments. And it provides negotiators with a deeper understanding of how APEC economies have approached the liberalization, protection and promotion of investment.

At the most general level, there is consistency in what countries see as the key elements of investment treaties. At a more detailed level, a range of approaches is adopted on virtually all provisions. There is a large degree of consensus amongst APEC members on the core elements of investment protection. National treatment, most-favoured-nation (MFN) treatment, fair and equitable treatment, protection in the event of expropriation, the free transfer of investments, and dispute settlement provisions are included in virtually all APEC IIAs. There is not yet consensus on the question of including investment liberalizing provisions and investment promoting provisions. The increasing number of FTAs and other economic cooperation agreements, and the increasing presence of a right of establishment in the BITs of some APEC members mean an increasing proportion of IIAs address investment liberalization. However, this has not reached the point of APEC-wide - even less, multilateral - consensus. Similarly, investment promotion is a direct objective in only about a third of APEC IIAs.

Some treaty provisions commonly included in IIAs are nevertheless beyond the scope of this study. For example, umbrella clauses are an important feature of many IIAs, but are less common amongst IIAs of APEC members and were not addressed in step one of this project. State–State dispute settlement mechanisms are commonly included, though hardly ever utilized, and were also omitted from step one. And thirdly, exceptions for regional economic integration organizations (REIOs), and labour and environment provisions have been dealt with in detail in other UNCTAD publications and will not be addressed in detail here (see UNCTAD, 2004a on REIO; UNCTAD, 2000 on employment; and UNCTAD 2001 on environment).

***Step three: Comparing core elements with APEC investment instruments***

The identified approaches to core elements are then compared to the investment objectives set out in three APEC investment instruments – the Non-Binding Investment Principles, the Menu of Options, and the Transparency Standards on Investment. Observational conclusions are made about the extent to which countries' practice in negotiation IIAs meet the objectives laid down in these investment instruments.

## Notes

[1] Officially titled "Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies".

[2] This model has been used by the United States since the 1980s, Canada after the mid-1990s, and by Japan since earlier this decade.

# I. IDENTIFYING CORE ELEMENTS

This chapter examines provisions of APEC IIAs in some detail and illustrates the approaches taken by APEC economies in formulating legal text. It also demonstrates the interrelationship between scope and definitional issues and substantive provisions. Scope issues are addressed first, and then substantive provisions are divided into three types: liberalizing, protecting and promoting provisions. Where a provision can, for example, liberalize and protect foreign investment, it has been categorized according to its dominant trait with discussion of its broader effect usually being included there, though sometimes also warranting a separate discussion under a different section.

## A. Scope issues

IIA scope – or coverage – issues are relevant to all substantive provisions and so are considered separately. This section only addresses some issues of scope central to step one of the study and will not cover other aspects such as the territorial and temporal application of the treaty. The coverage of an IIA is a key determinant in how liberalizing or protective the agreement will be, however the effect of scope provisions is dependent on the content of the substantive provisions. IIAs seeking to liberalize investment and according investors greater protection are characterized by a wide coverage. This typically includes (a) a broad definition of investment, coverage of mode three commercial presence for services, and coverage of portfolio investment; (b) a broad definition of investors with

coverage of permanent residents; and (c) limited exceptions to the operation of substantive provisions.

Analysis of APEC IIAs reveals that most include a broad definition of investment, and almost all cover services investment. About half explicitly provide some coverage of portfolio investment with only three IIAs explicitly excluding portfolio investment, and about half extend the IIA provisions to permanent residents. APEC economies draft exceptions to pre-establishment non-discrimination in different ways and this is also addressed briefly.

## *1. Investment*

Twenty-one APEC IIAs adopt a broad asset-based definition of investment with a list of examples setting out different categories of investments. This approach reflects the emphasis of most APEC IIAs on protecting a wide range of investment-related activities (beyond only foreign direct investment (FDI)), and, for many PTIAs and a number of more recent BITs, on liberalization. The most common formulation is illustrated by the China–Germany IPPA (2005, article 1)[1]:

> *"'investment' means every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party, and in particular, though not exclusively, includes:*
>
> *(a) movable and immovable property and other property rights such as mortgages and pledges;*

*(b) shares, debentures, stock and any other kind of interest in companies;*
*(c) claims to money or to any other performance having an economic value associated with an investment;*
*(d) intellectual property rights, in particular copyrights, patents and industrial designs, trade-marks, trade-names, technical processes, trade and business secrets, know-how and goodwill;*
*(e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources;*
*any change in the form in which assets are invested does not affect their character as investments.”*

Another approach to defining “investment” is to use an *enterprise-based definition* such as that used in article 1139 of NAFTA (1994). This differs from the broader asset-based definition by limiting investment mostly to those assets associated with an enterprise. Article G.40 of the Canada–Chile FTA (1997) adopts this approach:

“*investment means:*
*(a) an enterprise;*
*(b) an equity security of an enterprise;*
*(c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not*

*include a debt security, regardless of original maturity, of a state enterprise;*

*(d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a State enterprise;*

*(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;*

*(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);*

*(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and*

*(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under: (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;* [...]"

Recently, six APEC IIAs (all involving one of the NAFTA economies) have included a definition of "investment"

that also clarifies what is *not* an investment. Several IIAs set out these clarifications through footnotes and several, including article G.40 of the agreement between Canada and Chile (1997), set out limitations in list form:

> "[…]
> *but investment does not mean,*
> *(i) claims to money that arise solely from*
> > *(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or*
> > *(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or*
>
> *(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h); or*
> *(k) with respect to "loans" and "debt securities" referred to in subparagraphs (c) and (d) as it applies to investors of the other Party, and investments of such investors, in financial institution in the Party's territory*
> > *(i) a loan or debt security issued by a financial institution that is not treated as regulatory capital by the Party in whose territory the financial institution is located,*
> > *(ii) a loan granted by or debt security owned by a financial institution, other*

> *than a loan to or debt security of a financial institution referred to in subparagraph (i), and (iii) a loan to, or debt security issued by, a Party or a state enterprise thereof.*"

Yet another recent approach adopted in the Canada–Peru (Foreign Investment Protection Agreement) FIPA (2007) is to resort to a closed list definition that sets out the exhaustive range of assets that may constitute an investment.

The scope of the agreement can be further narrowed through the exclusion of portfolio investment from the definition of "investment". Three APEC IIAs explicitly carve out portfolio investment. For instance, article 2 of the Framework Agreement on the ASEAN Investment Area (1998) provides that the agreement "*shall cover all direct investment other than* […] *portfolio investment* […]".

Another approach reflected in several APEC IIAs, including Article 1 of the Framework Agreement on the ASEAN Investment Area (1998) and article 901 of the Australia–Thailand FTA (2005), is to define "investment" as an investment made in accordance with the laws of the host country. Investments not made in accordance with the host country's approval requirements and conditions do not benefit from the agreement's provisions.

Finally, the scope of investment activities cannot only be affected by the definition of investment, but can also be shaped by the substantive provisions. For example, the Japan–Malaysia (2006) national treatment provision (article 75)

carves out the pre-establishment treatment of portfolio investments:

> " […] *2. This Article shall not apply to the establishment, acquisition and expansion of portfolio investments.*"

In summary, APEC IIAs most commonly adopt a broad asset-based definition of investment with others using an enterprise-based definition. In addition, some articulate what is not intended to be an investment.

### *2. Investor*

All APEC IIAs define the term "investor" as covering both natural and legal persons. Two issues are typically addressed: the types of entities that may qualify as "investors", and how to determine the nationality of the investor (an investor must have the nationality of the home country treaty party to have rights under the treaty).

The typical definition of a "national of a party" is a natural person recognized by that party's internal law as a national or a citizen. In a number of agreements between APEC members this definition is extended to include permanent residents. For example, Article 27 (3) of the New Zealand–Singapore CEP agreement (2001) defines an "investor" as including:

> "*a) a natural person who resides in the territory of the other Party or elsewhere and who under the law of that other Party:*

> *(i) is a national of that other Party; or*
> *(ii) has the right of permanent residence in that other Party, in the case of a Party which accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting investments, provided that that Party is not obligated to accord to such permanent residents more favourable treatment than would be accorded by the other Party to such permanent residents;* […]".

APEC IIAs also typically address the issue of natural persons having the nationality of both treaty parties. Some, such as the United States–Uruguay BIT (2006), consider a person with dual nationality as a national of the country of their dominant and effective nationality:

> "*Article 1 Definitions*
>
> […]*"investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship.*"

Other formulations have the effect of excluding nationals of both parties from coverage of the agreement. Though none of the APEC IIAs examined use this approach, it is followed in Canada's 2004 model BIT:

*"Article 1 Definitions*

*investor of a party means:*
*[...] (ii) a national or an enterprise of Canada, that seeks to make, is making or has made an investment;*
*in the case of ___:*
*____________________;*
*that seeks to make, is making or has made an investment and* ***that does not possess the citizenship of Canada****."* (emphasis added)

With respect to legal entities, there is considerable divergence on the formulation and preferred approach in APEC IIAs. Two criteria are used by APEC members (often in combination) to define the nationality of companies: the place of incorporation or organization, or the location of the company's headquarters (the place of the seat). A few examples illustrate different approaches adopted. The Japan–Republic of Korea agreement (2003) requires entities to be incorporated in the contracting Party in order to be an investor of that party:

"*Article 1*
*For the purposes of this Agreement,*
*(1) The term "investor" means with respect to a Contracting Party:*
[...]
*(b) a legal person or any other entity constituted or organized under the applicable laws and regulations of that Contracting Party, whether or not for profit, and whether private or government-owned or -controlled,*

> *and includes a company, corporation, trust, partnership, sole proprietorship, joint venture, association or organization.*"

The Russian Federation–Thailand BIT (signed 2002, article 1) requires an investing legal entity to meet three criteria in order to be covered by the BIT:

> "[…]
> *ii) legal persons, including companies, corporations, business associations and other organizations, which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party* [...]"

Overall, APEC IIAs tend to combine the requirement of incorporation with the requirement of also having the head office or the controlling interest in that country.

### *3. Link between investment and investor*

Another aspect addressed by some but not all APEC IIAs is the link of ownership between an asset and the investor that determines whether an asset is foreign investment rather than domestic investment. For example, article G.01 of the Canada–Chile FTA (1997) states that an "*investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party*". This protects investments of a national or company of a contracting party irrespective of how many corporate layers between the

investing entity and the investment exist (see UNCTAD, 2007b: 16–17).

### *4. Coverage of services*

Since the conclusion of the General Agreement on Trade on Services (GATS) of the World Trade Organization (WTO), there has been a trend in economic integration agreements to liberalize trade in services, including those delivered through mode three (commercial presence). This presents a policy question about liberalization of access for services investments with important implications for the scope and structure of the investment agreement. Half of the APEC IIAs in this study include services liberalization commitments. Some adopt a structure based on the positive list approach used in the GATS, whilst others use the negative list approach of NAFTA.[2] Under the GATS approach, the liberalization of services, including through commercial presence, is controlled by a services chapter and protection of investments in services is controlled by the investment chapter. Liberalization of access for services investments only occurs in those sectors listed in the annex. On the other hand, some agreements include mode three in the scope of the investment chapter, but apply a market access provision from the services chapter. The NAFTA, on the other hand, creates a general rule of liberalization of access for services investments in all services sectors subject to exceptions contained in the annex.

## B. Investment liberalization

Liberalization is typically associated with the reduction and elimination of barriers to the entry, establishment and

operation of investments. This can be brought about in a number of ways. First, and most significant, are those provisions that provide investors non-discriminatory access or a right of establishment. Second, provisions that remove informational barriers (i.e. provide transparency), allow the flow of senior personnel, or restrict performance requirements – to give some examples - may also contribute to liberalization. This second group of provisions is also key elements of investment protection and so will be addressed more substantively in section C.

IIAs may provide the right to establishment in a direct and unconditional way. This is uncommon in the APEC context; however one example is Article 7(1) of the Framework Agreement on the ASEAN Investment Area (1998):

> "[s]*ubject to the provisions of this Article, each Member State shall…open immediately all its industries for investments by ASEAN investors*."

A more common approach is to give a right of establishment on a non-discriminatory basis, through according national and/or MFN treatment. APEC IIAs that address a right of establishment in one way or another limit this right through the use of either a positive or negative list of sectoral exceptions and non-conforming measures.

### *1. Most favoured nation treatment*

MFN treatment (or non-discrimination between source economies) is consistently included in the APEC IIAs

reviewed, though two agreements do not incorporate this provision. Out of the 28 reviewed agreements, 14 grant MFN in the pre-establishment phase. These are addressed here, whilst post-establishment MFN treatment is discussed in section C. Provisions offering pre-establishment MFN are commonly recognized as liberalizing because they guarantee non-discrimination in the admission of investors and their investments.

At the most general level, there is convergence on key elements of the provision with numerous variations on precise formulation used by APEC economies. Jurisprudence in the last six or seven years has played a significant role in some recent treaty practice on MFN treatment (UNCTAD, 2007c).

IIAs in the sample almost universally require that a party give "treatment no less favourable than that it accords in like circumstances to investors of a third State and to their investments". Beyond this, a number of different approaches to wording and construction can be distinguished.

The most concise approach, used in article 90 of the Japan–Philippines EPA (signed in 2006), is to provide that:

> "*Each Party shall accord to investors of the other Party and to their investments treatment no less favorable than that it accords, in like circumstances, to investors of a non-Party and to their investments with respect to investment activities*."

Since the term "investment activities" is very broad, it seems to cover both the entry phase and the operational phase of an investment.

A second approach is to articulate the stages and phases of an investment to which MFN treatment is provided, including the pre-establishment phase, and to address the treatment of investors and investments in separate paragraphs. NAFTA (1994) article 1103 requires that:

> "*1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the* ***establishment****,* ***acquisition****, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the* ***establishment****,* ***acquisition****, expansion, management, conduct, operation, and sale or other disposition of investments.*" (emphasis added)

Since NAFTA, this formulation has been adopted in a number of IIAs, including Australia–United States, Canada–Chile, Canada–Peru, Iceland–Mexico and United States–Uruguay. Of the NAFTA parties, Mexico has also adopted

alternative MFN formulations in its IIAs with Japan and Australia.

## *2. National treatment*

According foreign investors and their investments no less favourable treatment than nationals is a key issue in investment rulemaking. Analysis of the standard can be divided into treatment during the pre-establishment phase (covered here) and treatment once investments are established in the host country (addressed under section C). The national treatment standard concerning establishment is common amongst APEC IIAs, with 14 PTIAs and 4 recent APEC BITs (i.e. Canada–Peru, Japan–Republic of Korea, Japan–Viet Nam, and United States–Uruguay) covering pre and post-establishment phases subject to exceptions. Eight APEC BITs only deal with post-establishment national treatment, and two contain no reference to this standard.

The degree to which the national treatment standard liberalizes investment flows is affected by several factors. Scope issues (definitions and exceptions) will determine whether an investment activity is captured by the treaty and the national treatment provision. And the extent of liberalization is also dependent on whether investors are unencumbered in their establishment of an investment. This is not strictly a question of *national* treatment, since there can be no direct comparison with how domestic investors are treated at the border. Rather, it is a question of treating foreign investors and their investments as if they are domestic entities.

An example of granting national treatment with respect to establishment, subject to annexed exceptions, is article 2.1 of the Japan–Republic of Korea IPPA (2003) which states:

> "*Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its own investors and their investments (hereinafter referred to as "national treatment") with respect to the* ***establishment****,* ***acquisition****, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments (hereinafter referred to as "investment and business activities").*" (emphasis added)

This general approach to national treatment is common amongst APEC members, with variations on the precise wording used. Another approach taken – for example, in article 75 of the Japan–Malaysia agreement (2006) – applies national treatment to establishment, but does not extend this treatment to the "*establishment, acquisition and expansion of* ***portfolio investments.***" (emphasis added)

It can be concluded from this practice that in APEC, national treatment provisions on the right of establishment are key investment liberalizing provisions. APEC IIAs show consistency in the approach to drafting national treatment provisions, although they vary in terms of extending it to the pre-establishment phase or limiting it to the post-establishment phase of an investment.

### *3. Scheduling exceptions*

Exceptions to certain substantive IIA provisions set out in a schedule to an annex are a common means of further determining the scope of APEC PTIAs and are mentioned a number of times throughout this study. Though traditionally not used in APEC BITs, more recent agreements covering pre-establishment, such as the Canada–Peru FIPA (2007) and United States–Uruguay BIT (2006), also use annexes to limit coverage. Whilst schedules are not a liberalizing feature of IIAs per se, there are a number of mechanisms within these provisions that produce a *more* liberalizing outcome and warrant brief mention.

APEC IIAs follow one of two main approaches to scheduling.[3] First, 16 agreements covering the pre-establishment phase adopt a negative list approach and set out those measures and sectors that are "carved out" from liberalization obligations. An example is article 4 of the Japan–Republic of Korea IPPA (2003), which allows parties to maintain non-conforming measures:

> "*1. Notwithstanding the provisions of Article 2 [NT, MFN],* […] *each Contracting Party may adopt or maintain any measure not conforming with the obligations imposed by Article 2* […] *in the sectors or with respect to the matters specified in Annex I to this Agreement.* […]"

Using a negative list usually implies a "standstill" commitment, where the parties are not allowed to introduce

new non-conforming measures beyond those included in the negative list. These non-conforming measures are typically set out in one annex, with a second annex for sectors where future flexibility is preserved. Some APEC IIAs, beginning with NAFTA (1994), go further than this and also include a so-called "ratchet" mechanism. This means any regulatory changes bringing about further liberalization are automatically incorporated into the country's treaty commitments (UNCTAD, 2006b). The negative list approach is commonly referred to as the NAFTA-inspired approach.

A second approach used in two PTIAs – Thailand's agreements with Australia (2005) and New Zealand (2005) – is to include GATS-style positive lists where treatment provisions apply only to those measures and sectors set out in the schedule.[4] The New Zealand–Thailand agreement (2005) states:

> "*Article 9.5 Scheduling of Commitments*
>
> *1. Each Party shall set out in a schedule the specific commitments in non-service sectors it undertakes under this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:*
>
> *(a) terms, limitations and conditions on market access;*
> *(b) conditions and qualifications on national treatment;*
> *(c) undertakings relating to additional commitments;*
> *(d) where appropriate, the time frame for implementation of such commitments; and*
> *(e) the date of entry into force of such commitments.*"

The Australia–Thailand FTA (2005) is unique amongst APEC IIAs for combining a positive and negative list approach. Pre-establishment national treatment is provided on a positive list basis, and post-establishment national treatment is offered on the basis of a negative list:

*"Article 904 Pre-establishment National Treatment*

***In the sectors inscribed in Annex 8**, and subject to any conditions and qualifications set out therein, each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to its own investors, with respect to the establishment and acquisition of investments in its territory.*" (emphasis added)

"*Article 907 Post-establishment National Treatment*

*1. Each Party shall accord to covered investments treatment no less favourable than it accords, in like circumstances, to investments in its territory of its own investors, **unless otherwise specified in its specific commitments as set out in Annex 8**.*

*2. Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to its own investors, **unless otherwise specified in its specific commitments as set out in Annex 8**.*" (emphasis added)

It is recognized that negative lists provide greater transparency for foreign investors of areas of differential treatment, but may be less appropriate for developing countries.

Another liberalizing innovation was included in the Chile-Republic of Korea agreement (2004) but does not appear in other APEC IIAs. Article 10.10 locks in future liberalization:

> "*Through future negotiations, to be scheduled every two years by the Commission after the date of entry into force of this Agreement, the Parties will engage in further liberalization with a view to reaching the reduction or elimination of the remaining restrictions scheduled in conformity with paragraphs 1 and 2 of Article 10.9 on a mutually advantageous basis and securing an overall balance of rights and obligations.*"

Another option aimed at preserving flexibility is to include a review of commitments clause or a modification of commitments provision. This could result in more or less liberalization. For example, the Lebanon–Malaysia agreement (2002) has maintained flexibility for policymakers through article 11 (amendment), which retains the ability to amend the treaty by mutual consent, although rights arising under the treaty prior to an amendment are preserved. A slightly different approach was taken in the Australia–Singapore FTA (2003) where article 7 allows for the modification or addition of reservations provided three months written notification is given and the "*overall balance of commitments undertaken by each Party*" is maintained.

The interaction between scheduled exceptions and the substantive provisions will determine the degree of liberalization and protection offered. On the whole, those APEC IIAs that cover admission and use scheduled exceptions appear to favour the negative list approach that provides for more straightforward liberalization. These agreements often employ standstill and ratchet mechanisms. Together these work to prevent parties turning away from their commitments and becoming more protectionist. However, this does not lead to a conclusion that APEC IIAs are generally liberalizing.

### *4. Other issues*

*Transparency provisions* aim to remove informational barriers to entry by allowing participants in the investment process to access information in order to make informed decisions and meet obligations. This availability of information can liberalize, promote and protect investment, and so is relevant to several sections of this study.[5] The inclusion of transparency provisions in IIAs may impose obligations and rights on all three participants in the investment relationship – the home country, the host country and the foreign investor. In most APEC IIAs, obligations are only imposed on the home and host country, however, some APEC IIAs, for example article 1111 (2) of NAFTA (1994), allow parties "*to require an investor of another party or its investment in its territory, to provide routine information concerning that investment solely for informational or statistical purposes.*"

*Performance requirement provisions* in IIAs restrict the imposition and enforcement by a host government of certain

obligations on foreign investments or investors that are meant to shape the economic consequences of an investment. For example, to ensure that the investment contributes to employment in the host country or to the country's export earnings, an investment may be required to hire local staff or export a certain percentage of output. These requirements can be imposed as a condition for establishment of the investment, or could be used as a condition for receipt of some other benefit. These sorts of requirements can also distort trade and work against liberalization. To the extent that such requirements are prohibited and removed, performance requirements provisions are liberalizing, though often this is not the desired development objective of home countries.[6]

Provisions in IIAs concerning the *employment of senior personnel* seek to enhance the discretion of foreign investors to engage key managerial or professional staff of their choice. This offers investors additional flexibility where host countries sometimes require foreign investments to employ their own nationals to increase employment and facilitate the transfer of skills. This therefore has a liberalizing effect. Part of the competitive advantage of a foreign investment may be the managerial and technical knowledge of its foreign employees.[7]

Several points can be made in summing up the liberalizing effect of these agreements. First, the coverage of admission issues in half of these agreements and a corresponding general trend in those IIAs to favour negative lists demonstrates from an architectural standpoint a moderate level of commitment to the liberalization objective. However, second, there are very few examples of APEC IIAs being used as a vehicle for liberalizing investment policies and laws. One

partial exception is the Australia–United States FTA (2005) where Australia made legislative amendments to implement FTA commitments reducing barriers to United States investors.[8] As is discussed in chapter II below, APEC investment instruments, in particular the Menu of Options, encourage an approach to liberalization that is not taken up in the treaty practice of APEC economies.

## C. Investment protection

The protection of foreign investment remains the most significant objective of APEC IIAs. Protection provisions are commonly found in BITs, though the accepted practice is to also include these provisions in PTIAs, where the principal objective is closer economic integration.

### *1. Fair and equitable treatment*

"Fair and equitable treatment" provides a basic standard, detached from the host country's domestic law, against which the behaviour of the host country in relation to foreign investments can be assessed. It is a key standard of investment protection included in all but three of the APEC IIAs. However, "fair and equitable treatment" remained largely undefined until relatively recently. Over the last few years, investor claimants have increasingly relied on this provision in investment disputes and consequently the standard has received considerable attention.

Opinion is divided as to whether the obligation to grant "fair and equitable treatment" is synonymous with the minimum standard of treatment of foreign investment required

under customary international law, or whether it means something different – albeit with some overlap. Some commentators have argued that the plain meaning of this term, in particular treaties sets a higher standard than that required under customary international law. This has been recognized by some recent arbitration awards (e.g. *Saluka v. the Czech Republic*[9]). However, a number of Tribunals have also found no distinction on the facts between the standard of treatment required under customary international law and the fair and equitable treatment treaty standard.[10]

There is considerable divergence in approaches to drafting the standard in APEC IIAs. Some treaties make no link between the phrase "fair and equitable treatment" and treatment under international law, and some do. A survey of the APEC IIAs reveals five approaches to dealing with these provisions. Further categories not discussed here include where the fair and equitable treatment standard is combined with other legal principles such as obligations to provide full protection and security and non-discrimination.[11]

First, 14 APEC IIAs grant covered investments fair and equitable treatment without making any reference to international law.[12] For example, the BIT between India and Indonesia (2004) states:

> "*Article 3 Promotion and Protection of Investment*
>
> […]
> *2. Investments and returns of investors of each Contracting Party shall at all times be accorded*

> *fair and equitable treatment in the territory of the other Contracting Party.*"

The absence of a reference to customary international law leads some commentators to favour according provisions worded in this way an interpretation that results in a case-by-case assessment of whether the actions infringe an equity-based test.[13]

A variation on this approach is found in the Lebanon–Malaysia IPPA (2002). Here there is a reference only to "*equitable*" treatment in a promotion and protection provision (article 2), then the MFN provision (article 3) states that investments "*shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State.*"

A third approach appears in agreements such as the NAFTA (1994) and Japan's agreements with Mexico (2005) and the Philippines (signed 2006). This approach seeks to address the relationship between fair and equitable treatment and international law. It also expressly introduces the standard of full protection and security as part of the minimum standard of treatment. NAFTA (1994) article 1105 requires parties to accord investments of investors "*treatment in accordance with international law, including fair and equitable treatment* […]". In the NAFTA context, the parties have issued an interpretation clarifying that this does not require treatment beyond what is required under the customary international law minimum standard of treatment of aliens. This clarification is reflected in the language of the Chile–Peru ALC (signed 2006) and was

included as a footnote in the above-mentioned IIAs involving Japan:

> "*Note: This Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens* [...]"

A fourth approach has been adopted in the recent practice of several APEC economies. Canada, Mexico and the United States have sought to overcome confusion or uncertainty over the intended content of the standard through revised wording used in their new treaties. This takes as its starting point the series of NAFTA chapter 11 claims.[14] The key difference is that the third approach requires treatment in accordance with "international law", and the fourth approach says "customary international law". Five APEC IIAs[15] have incorporated this revised language clarifying the meaning of "fair and equitable treatment" and limiting its meaning to the minimum standard of treatment. This was the approach used in the Chile–Republic of Korea FTA (2004):

> *Article 10.5: Minimum Standard of Treatment*
>
> *1. Each Party shall accord to investments of investors of the other Party treatment in accordance with the*

*customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.*

*2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*
*[...]*

The fifth approach is to omit any reference to fair and equitable treatment or the minimum standard of treatment. This was the decision reached in the Australia-Singapore FTA (2003), the New Zealand-Singapore CEP (2001), and the New Zealand-Thailand CEP (2005).

Whilst the vast majority of all IIAs still include a treaty standard of fair and equitable treatment with no link or reference to any international law standard, an increasing number of countries are now reviewing their approach to formulating the fair and equitable standard. It can be expected that this will continue to be a key area of debate amongst APEC economies.

### *2. Non-discrimination*

Non-discrimination provisions guarantee investments national and/or MFN treatment. These provisions have been discussed generally and in terms of their application to the pre-establishment stage in the previous section on liberalization. As discussed above, the same guarantees may also protect

investments once they have crossed the border and indeed apply only in the post-establishment phase in a substantial number of the APEC agreements reviewed (12 agreements in the case of MFN, and 8 agreements in the case of national treatment). National treatment ensures that foreign investors are not treated less favourably than domestic investors in the host country, and MFN treatment offers protection against discrimination with respect to investments from different foreign countries. These guarantees apply to investments covered by an agreement once they have been admitted into a host country in accordance with that country's domestic laws and regulations. Post-establishment non-discrimination does not therefore normally require parties scheduling non-conforming measures since most discrimination takes place at the border.

### a. Most favoured nation treatment

One approach to post-establishment MFN treatment is illustrated by the Germany–Philippines agreement (2000):

> "*Article 3 Treatment*
> […]
> *(2) Each Contracting State shall in its territory accord the investors of the other Contracting State, as regards management, maintenance, use, enjoyment ot disposal of their investments, treatment not less favorable than that which it accords to investors of any third State.*[…]"

A second approach involves associating MFN treatment to other general standards of treatment. For example, Article 3

of the Malaysia–Viet Nam IPPA (1992) combines MFN with fair and equitable treatment:

> "*(1) Investment made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State.*"

A variation used in the Hong Kong, China–Thailand IPPA (2006) is to combine fair and equitable treatment and MFN treatment in a paragraph addressing investments, with a separate paragraph applying the two standards for investors, but limiting it to the post-establishment phase:

> "*Article 3 Treatment of Investments*
>
> *(1) Investments of investors of one Contracting Party in the area of the other Contracting Party, and also the returns therefrom, shall receive treatment which is fair and equitable and no less favourable than that accorded in respect of the investments and returns of the investors of the latter Contracting Party or any third party.*
>
> *(2) Each Contracting Party shall in its area accord to investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment which is fair and equitable and no less favourable than that which it*

*accords to its own investors or to investors of any third party.*"

Another approach is to apply the MFN standard in respect of specific treaty provisions. An example is once again article 3 of the Malaysia–Viet Nam IPPA (1992) which applies the MFN principle in the case of compensation for losses:

> "[…]*(2) Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, or owing to a state of national emergency, revolt, insurrection or riot in the territory of the other Contracting Party shall be accorded by the latter Contracting Party treatment as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to investors of any third State.*"

Finally, MFN treatment is not included in the Australia–Singapore FTA (2003). Rather than guaranteeing no less favourable treatment accorded to any third parties, the parties agreed to a "best endeavours" approach requiring that a party "*give positive consideration to a request by the other Party for the incorporation herein*" of treatment no less favourable than that provided to a third party or resulting from unilateral liberalization (article 15).

The most important development in the use of MFN treatment provisions derives from jurisprudence interpreting the effect of MFN provisions over the last few years (see UNCTAD, 2007b: 39). The *Maffezini* award's finding that the

more favourable dispute settlement provisions of another BIT could be invoked led to considerable discussion about the scope of MFN provisions and whether MFN treatment must be accorded for procedural provisions as well as substantive provisions.[16] A number of further major cases have since also dealt with the applicability of the MFN standard to dispute settlement before the International Centre for the Settlement of Investment Disputes (ICSID). While some have concurred with the *Maffezini* finding,[17] others have found that MFN treatment will only extend to dispute settlement provisions where there is a clear and unambiguous intention.[18]

In response to this uncertainty, some recent IIAs have been careful in explicitly drafting the intended scope of MFN treatment. Amongst APEC IIAs examined, the recent Canada–Peru agreement (2007) addresses the issue directly:

> "*Annex B.4 Most-Favoured-Nation Treatment*
>
> *For greater clarity, treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments" referred to in paragraphs 1 and 2 of Article 4 does not encompass dispute resolution mechanisms, such as those in Section C, that are provided for in international treaties or trade agreements.*"

By contrast, the footnote to the MFN provision (article 59) in the Japan–Mexico EPA (2005) ensures investors have the same access to domestic courts *and* international tribunals as third parties and domestic investors:

> "*Note 3: Each Party shall in its Area accord to investors of the other Party treatment no less favourable than the treatment which it accords, in like circumstances, to its own investors or investors of a non-Party with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defense of such investor's rights.*"

The MFN principle may promote coherence between different agreements and convergence in the treatment accorded to investors. However, this may also reduce the policy flexibility available to host governments and neutralize efforts of contracting parties to distinguish one agreement from another. Generally stated, broader MFN provisions will result in greater harmonization and reduced policy flexibility. It is common, however, to include exceptions in the treaty text exempting contracting parties from extending certain benefits, e.g. those negotiated under regional economic integration agreements or double taxation agreements. Also, an increasing number of countries are carefully framing treaty language on MFN in order to reduce the scope of interpretation of this provision.

## b. National treatment

Eight of the APEC IIAs reviewed only offer national treatment to investments after they are established in the host country. Amongst these eight, two approaches to drafting can be identified. The first applies the standard to "investments made in accordance with its laws". Those that use this approach sometimes cover national and MFN treatment together, and the protection is granted to both the investment

and the investor. An example is the Russia–Thailand BIT (signed in 2002):

"*Article 3 Treatment of Investments*

*1. Each Contracting Party shall accord in its territory to investments made in accordance with its laws by investors of the other Contracting Party treatment not less favourable than that it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable.*

*2. Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment not less favourable than that which it accords to its own investors or investors of any third State, whichever is more favourable.*"

Second, article 4 of the Australia–Mexico IPPA (signed in 2005) illustrates an alternative approach that talks of treatment by a contracting party "subject to its laws…" being accorded to investments made in its territory:

"*Each Contracting Party shall, **subject to its laws**, regulations and policies, grant to investments made in its territory by Investors of the other Contracting Party and to activities associated with investments, in like circumstances, treatment no less favourable than that which it accords to investments of its own Investors.*" (emphasis added)

This is a significantly weaker obligation because it makes national treatment contingent on domestic laws, regulations and policies.

Finally, several APEC IIAs have taken a hybrid approach to national treatment. The Australia–Thailand (2005) and New Zealand–Thailand (2005) agreements accord pre-establishment national treatment in a positive list and a separate provision sets out post-establishment national treatment for "covered investments" with a negative list of exceptions. The New Zealand–Thailand CEP (2005) states the following:

> "*Article 9.6 National Treatment in respect of the Establishment and Acquisition of Investments*
>
> *In the sectors inscribed in Annex 4 [schedule on investment], and/or subject to any conditions and qualifications set out therein, each Party shall accord to investors of the other Party, in relation to the establishment and acquisition of investments in its territory, treatment that is no less favourable than that which it accords in like circumstances to its own investors with respect to their investments.*
>
> *Article 9.7 National Treatment in respect of Covered Investments and Investors*
>
> *1. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the management, conduct,*

*operation, and sale or other disposition of investments, unless otherwise specified in Annex 4.*

*2. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, and sale or other disposition of investments, unless otherwise specified in Annex 4.*"

These three approaches to formulating post-establishment national treatment provisions suggest relative convergence amongst those APEC IIAs only protecting investments after they are established.

### *3. Expropriation*

Historically, protection against expropriation has been the most prominent issue in international investment law. There is a high level of convergence amongst APEC IIAs on the formulation of this provision. IIAs recognize the right of the host country to expropriate, but impose conditions that must be satisfied. What follows summarizes the two main issues that arise, namely the scope of the expropriation provision, and the conditions for a lawful expropriation. A more detailed coverage of the issue is found in other UNCTAD publications (for example, UNCTAD, 2006a and 2007b).

The scope of the expropriation provision refers to host country actions that may be deemed expropriatory. The most obvious and well understood is an act of direct expropriation or nationalization that transfers the ownership or possession of the

investment to the host country. However, other host country measures can devalue an investment whilst being intended to pursue legitimate regulatory objectives and not formerly transferring ownership to the host country. These measures may indirectly expropriate an investment. The scope of some IIA expropriation provisions seeks to expressly address the situations where investors would or would not receive compensation as a result of countries exercising their right to regulate in the public interest (i.e. whether the government regulatory action is legitimate or not).

The agreement between the Russian Federation and Thailand (signed in 2002) illustrates a formulation used to describe those acts of expropriation set out in 27 of the 28 APEC IIAs (with minor variations in wording):[19]

> "*Article 4 Expropriation*
>
> *1. Investments of investors of one Contracting Party made in the territory of the other Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as expropriation) except* […]"

Most APEC IIAs contain no clearer language to define the scope of the expropriation provision. The issue of indirect expropriation is addressed in virtually all APEC IIAs but in different ways. One way is the approach of the Chile–Republic of Korea FTA (2004), article 10.13 that specifically refers to acts that expropriate directly *or indirectly*:

> "*1. Neither Party may, directly or indirectly, nationalize or expropriate an investment of an investor of the other Party in its territory* […]"

Other APEC IIAs, including Article 4 of the Germany-Philippines BIT (2000), address measures *equivalent* to or *tantamount* to expropriation:

> "*(2) Investments by investors of either Contracting State shall not be expropriated, nationalized or subjected to any other direct or indirect measure the effects of which would be tantamount to expropriation or nationalization* […]"

A number of economies have expressed concern at the potentially wide reading that might be given to these formulations and the potential for every measure substantially impairing the value of an investment to be challenged as an indirect expropriation. However, in the wake of numerous investment disputes, some APEC economies have started including in IIAs more detailed clarifications to specifically address the situations where indirect expropriations might occur. For example, the Australia-United States FTA (2005) includes an annex on expropriation:

> "*Annex 11-B - Expropriation*
>
> *1. The Parties confirm their shared understanding that Article 11.7.1 [Expropriation] is intended to reflect customary*

*international law concerning the obligation of States with respect to expropriation.*

*2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.*

*3. Article 11.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.*

*4. The second situation addressed by Article 11.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.*
*(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:*
*(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*

> *(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and*
> *(iii) the character of the government action.*
> *(b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations.*"[20]

The second expropriation issue concerns the conditions imposed on a host country if it is to lawfully expropriate an investment. In all APEC IIAs, an expropriation by the contracting party is lawful, as illustrated in Article 10.10 of the Chile–Republic of Korea FTA (2004), where the expropriation is:

> "[…]
> *a) for a public purpose;*
> *(b) on a non-discriminatory basis;*
> *(c) in accordance with due process of law and Article 10.5(1) [minimum standard of treatment]; and*
> *(d) on payment of compensation in accordance with paragraphs 2 through 6.*"

Some APEC IIAs require only that payment of compensation is "*prompt, adequate and effective*", and in one case – the agreement between India and Indonesia (2004) – compensation must be "*fair and equitable*". However, most

APEC IIAs adopt the following approach (used in article 10.10 of the 2004 Chile–Republic of Korea FTA) and spell out in further detail the requirements for compensation, albeit using various formulations and with only some addressing the question of which currency compensation payments are to be made in:

> "[…]
> *2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.*
>
> *3. Compensation shall be paid without delay and be fully realizable.*
>
> *4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.*
>
> *5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that*

*date, shall be no less than that if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.*

*6. On payment, compensation shall be freely transferable as provided in Article 10.11 [Transfers].*

*7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the TRIPS Agreement.*"

In conclusion, the issue of expropriation is a core element of protective IIAs. Recent IIAs contain more detailed provisions that are intended to minimize disputes over whether regulatory actions have expropriated an investment and require payment of compensation. As shown above, some APEC economies are now including more detailed treaty text clarifying the scope of the expropriation provision and in particular what may amount to an indirect expropriation. This is likely to continue to be an area of importance amongst APEC economies. Two other options for reducing the potential for expropriation claims demonstrate how substantive provisions such as expropriation can interact with scope

provisions. First, one could narrow the definition of 'investment' to limit the type of assets to which the expropriation obligations apply. And a second option is to remove regulatory actions in certain policy areas from the scope of an IIA, either in a broad sense through the use of general exceptions, or in a narrower fashion, through drafting an exception to the expropriation provision.

### *4. Compensation for losses*

This element looks to provide investors with some level of protection in situations where their property is damaged as a result of war or civil strife. Protection owed under this provision is generally formulated as a relative standard, thereby leaving the host country with the choice of whether to compensate, but requiring that any action taken be on a non-discriminatory basis.

There is a considerable degree of convergence on the use and content of this element. Firstly, there is little variation in the range of situations for which compensation is available in APEC IIAs when compared to those situations envisaged amongst the wider system of IIAs. Secondly, there is some variation in the extent of protection provided.

Eighteen APEC IIAs provide investors with non-discriminatory treatment for compensation of losses. Most of these provide protection from a combination of some or all of the following types of man-made violence: "*war or other armed conflict*", "*civil strife*", "*revolution*", "*a state of national emergency*", "*revolt*", "*insurrection*", or a "*riot or other*

*similar situation*". Only one APEC IIA, the Canada–Peru FIPA (2007), also includes natural disasters:

> "*Article 12 Compensation for Losses*
>
> *1. Each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict, civil strife or a* ***natural disaster****.*" (emphasis added)

The agreement between Chile and the Republic of Korea (2004) also provides investors with the better of national or MFN treatment. The example adds the element of losses resulting from requisition or destruction of property, but narrows the scope of compensation here to such losses "*not caused in combat action or was not required by the necessity of the situation*". Article 10.6 of the Chile–Republic of Korea FTA (2004) states:

> "*Investors of a Party whose investments suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection, riot or other similar situations, and such losses as ones resulting from requisition or destruction of property, which was not caused in combat action or was not required by the necessity of the situation, in the territory of the other Party, shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other forms of settlement, no less favorable than that*

*which the latter Party accords to its own investors or to investors of any non-Party, whichever is more favourable to the investors concerned.*"

Six APEC IIAs only grant MFN treatment for compensation for losses. The FTA between New Zealand and Thailand (2005) illustrates this concept:

"*Article 9.12 Compensation for Losses*

*When a Party adopts any measures relating to losses in respect of covered investments in its territory by persons of any other country owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or other similar events, the* ***treatment*** *accorded to investors of the other Party as regards restitution, indemnification, compensation or other settlement* ***shall be no less favourable than that which the first Party accords to persons of any non-Party****.*" (emphasis added)

There is also a high degree of standardization in the means of compensating for losses with almost all APEC IIAs using the phrase "*restitution, indemnification, compensation or other settlement*".

Finally, three agreements include additional protection to the investor beyond the relative standards of national and MFN treatment.[21] These IIAs provide that, in certain situations, host countries owe an absolute obligation to compensate foreign investors. This obligation arises where the host country

plays an active role in the damage caused in war or a civil disturbance, as distinct from damages caused without direct action by the host country. Thus, where the forces or authorities of the host country requisition an investment, or cause destruction of an investment "*not required by the necessity of the situation*", there is an absolute obligation to compensate. The Hong Kong, China–Thailand IPPA (2006) illustrates this:

> "*Article 4 Compensation for Losses*
> *[…]*
> *(2) Without prejudice to paragraph (1) of this Article, investors of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the area of the other Contracting Party resulting from:*
> *(a) requisitioning of their property by its forces or authorities, or*
> *(b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,*
> *shall be accorded restitution or reasonable compensation. Resulting payments shall be made without delay and shall be freely transferable in freely convertible currencies.*"

In conclusion, most APEC IIAs provide *at least* MFN treatment for compensating losses incurred by foreign investors arising from war or civil strife. More than half of these IIAs also offer investors full non-discriminatory treatment, and several APEC IIAs go even further by imposing on host states an absolute obligation to compensate.

## *5. Transfer of funds*

The ability to transfer capital in relation to an investment and any returns from an investment is critical to its protection. This standard also promotes unrestricted capital flows and is therefore broadly liberalizing. At the same time, transfer of funds provisions can give rise to concerns on the part of developing economies. The adverse consequences of capital flight and sudden large inflows can be severe, at least in the short run. Nevertheless, all APEC IIAs include as a core element of investment protection a right to transfer funds relating to an investment.

Looking at the practice of APEC economies more closely, a typical approach is to require that all transfers relating to an investment must be freely permitted, and to include an illustrative, non-exclusive listing of transfers that must be permitted. The currency and exchange rate of transfers is also specified. This is illustrated in the Japan–Republic of Korea IPPA (2003):

> "*Article 12*
>
> *1. Each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor of the other Contracting Party may be freely transferred into and out of its territory without delay. Such transfer shall include, in particular, though not exclusively:*
> *(a) the initial capital and additional amounts to maintain or increase an investment;*

*(b) profits, interest, dividends, capital gains, royalties or fees;*
*(c) payments made under a contract including a loan agreement;*
*(d) proceeds of the total or partial sale or liquidation of investments;*
*(e) payments made in accordance with Articles 10 and 11;*
*(f) payments arising out of the settlement of a dispute under Article 15; and*
*(g) earnings and remuneration of personnel engaged from the other Contracting Party in connection with an investment.*

*2. Neither Contracting Party shall prevent transfers from being made without delay in freely convertible currencies at the market rate of exchange existing on the date of the transfer.* […]"

Some APEC IIAs only protect certain transfers and therefore include a closed list. The agreement between Malaysia and Viet Nam (1992) is an illustration of this approach. This formulation must also be distinguished on the basis that it allows the specified transfers only subject to domestic laws and regulations. A further distinctive feature is that transfers shall be effected in a freely usable currency. This example also includes MFN treatment of transfers:

"*Article 6 Repatriation of Investment*

*(1) Each Contracting Party shall, subject to its laws, regulations and administrative practices*

*allow without unreasonable delay the transfer in any freely usable currency:*
*(a) the net profits, dividends, royalties, technical assistance and technical fees, interest and other current income, accruing from any investment of the investors of the other Contracting Party;*
*(b) the proceeds from the total or partial liquidation of any investment made by investors of the other Contracting Party;*
*(c) funds in repayment of loans related to an investment; and*
*(d) the earnings of citizens and permanent residents of the other Contracting Party who are employed and allowed to work in connection with an investment in the territory of the other Contracting Party.*

*(2) The exchange rates applicable to such transfer in paragraph (1) of this Article shall be the rate of exchange prevailing at the time of remittance.*

*(3) The Contracting Parties undertake to accord to the transfers referred to in paragraph (1) of this Article a treatment as favourable as that accorded to transfers originating from investments made by investors of a third State.*"

Eighteen APEC IIAs allow in certain circumstances some limitation on the right to transfer funds. Most of these IIAs are less restrictive than the above-mentioned Malaysia–Viet Nam IIA (1992). Most allow for the host country to

restrict transfers during times of balance of payments difficulties or difficulties in macroeconomic management consistent with the IMF Articles of Agreement. An example is the Japan–Mexico EPA (2005):

"*Article 72 Temporary Safeguard Measures*

*1. A Party may adopt or maintain measures not conforming with its obligations under Article 58 [National treatment] relating to crossborder capital transactions and Article 63 [Transfers]:*
*(a) in the event of serious balance-of-payments and external financial difficulties or imminent threat thereof; or*
*(b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.*"

Even those agreements that allow for unfettered transfers commonly include some provisos. The following formulation is almost universally used:

"*3. Notwithstanding paragraphs 1 and 2 above, a Party may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:*
*(a) bankruptcy, insolvency or the protection of the rights of creditors;*
*(b) issuing, trading or dealing in securities;*
*(c) criminal or penal offenses;*

> *(d) reports of transfers of currency or other monetary instruments; or*
> *(e) ensuring compliance with orders or judgments in adjudicatory proceedings*" (article 63, transfers, Japan–Mexico EPA, 2005).

Another way of differentiating country practice is on the basis of whether the agreement protects transfers coming into the host country as well as the more commonly protected outflows. The Japan–Republic of Korea example (2003) set out above explicitly covers transfers into as well as out of the host country. Protection of "transfers in" often corresponds to those agreements that cover the pre-establishment phase of investments (as in the case of Japan and the Republic of Korea). Thus, the transfer of funds provision can operate with establishment provisions to facilitate a more open investment regime. There is a corresponding investment protection issue because it also covers existing investments that wish to import further capital for the operation of the investment.

### *6. Performance requirements*

Performance requirements can be used to impose certain obligations on foreign investments or investors. Many APEC economies use performance requirements of some description as part of their economic policy. Fifteen APEC IIAs do not deal with performance requirements. However, regardless of whether IIAs include performance requirements provisions, such measures may be contrary to, inter alia, the national treatment provision in APEC IIAs and the WTO Agreement on Trade-Related Investment Measures (TRIMs). Where the IIA uses schedules, a host country must reserve in

an annex the right to impose a performance-related measure that violates the national treatment provision.

Of the remaining 13 APEC IIAs that restrict the use of performance requirements, most are PTIAs of five economies: Canada, Chile, Japan, the Republic of Korea, and the United States. Recent BITs with provisions on performance requirements include those between the United States and Uruguay (2006), Canada and Peru (2007), Japan and the Republic of Korea (2003), and Japan and Viet Nam (2004). Two main types of provision can be discerned amongst those IIAs that seek to limit the use of performance requirements: a TRIMs-consistent approach only covering trade in goods, and the NAFTA approach which broadens the coverage of prohibitions by also restricting the use of performance measures other than TRIMs and extending it to services sectors.

The first approach is to incorporate the TRIMs Agreement into the IIA text. This method was used in the Japan-Malaysia EPA (2006):

> "*Article 79 Prohibition of Performance Requirements*
>
> *1. For the purposes of this Chapter, the Annex to the Agreement on Trade-Related Investment Measures in Annex 1A to the WTO Agreement, as may be amended, is incorporated into and forms part of this Agreement, mutatis mutandis.*

> *2. The Countries shall enter into further consultations, at the earliest possible time. The aim of such consultations is to review issues pertaining to prohibition of performance requirements within five years from the date of entry into force of this Agreement.*
>
> *3. The aim of consultations referred to in paragraph 2 of this Article may include the review of reservations relating to prohibition of performance requirements.*"

In this treaty, parties agreed to a further review of the performance requirements provision, suggesting they might include more detailed obligations at some future point. This formulation also means the incorporated TRIMs obligations are enforceable through any dispute resolution mechanism in the EPA.

The second formulation used in APEC IIAs includes prohibitions on performance requirements beyond those addressed by the TRIMs Agreement. 11 APEC IIAs include a list of prohibited performance requirements along the lines of that used in NAFTA (1994) Article 1106 which is a "WTO TRIMS-plus" agreement. The Canada-Peru FIPA (2007) illustrates this approach:

> "*Article 7 Performance Requirements*
>
> *1. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment,*

*acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non-Party in its territory:*
*(a) to export a given level or percentage of goods;*
*(b) to achieve a given level or percentage of domestic content;*
*(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;*
*(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;*
*(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;*
*(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or*
*(g) to supply exclusively from the territory of the Party the goods it produces or the services it provides to a specific regional market or to the world market.*

*2. A measure that requires an investment to use a technology to meet generally applicable health, safety*

*or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 3 and 4 apply to the measure.*

*3. Neither Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:*
*(a) to achieve a given level or percentage of domestic content;*
*(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;*
*(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or*
*(d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.*[…]"

The provisions in APEC IIAs also set out in some detail measures that could be considered performance requirements but that are permissible as part of a host country's incentive policies. This recognizes the role performance requirements play in policy making in some host countries. For example, Article 10.7 of the Chile–Republic of Korea FTA (2004) sets out that:

> "[…]
> *4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, in compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory. In the event of any inconsistency between this paragraph and the TRIMS Agreement, the latter shall prevail to the extent of the inconsistency.*
> [...]"

Another feature that appears in seven APEC IIAs (including NAFTA) is an obligation to refrain from imposing the banned performance requirements not only on each other's investments and investors, but also on investments and investors of any third country. These third country investors then indirectly benefit from this prohibition without the need for their home countries to engage in negotiations or for them to rely on an MFN provision. The purpose of this non-discrimination principle is to provide a less restricted and more level playing field for investors. It could also have the effect of progressively establishing this more expansive standard as an international norm, thereby further limiting host country policy flexibility.

In summary, the intermittent use of restrictions on performance requirements suggests it is not yet a core element amongst APEC economies. This is consistent with the situation

in the broader IIA community outside WTO. However, this provision has become more common in recent years, using the WTO TRIMs Agreement as its basis. The main difference in drafting amongst APEC economies that include performance requirements provisions is that some take a "TRIMs only" approach and some a "TRIMs plus" approach. Restricting performance requirements can offer additional certainty for investors regarding their autonomy over investment decisions. It also prevents distortions. On the other hand, APEC economies recognize the role performance requirements can play in economic policymaking and these provisions seek to strike a balance between competing objectives.

### 7. *Employment of senior personnel*

A provision concerning the employment of senior personnel is included in 10 APEC IIAs. As mentioned above, this provision aims to provide foreign investors increased discretion to employ key managerial or professional staff of their choice. Though more commonly associated with BITs and investment protection, in APEC treaty practice seven of the agreements with a senior personnel provision are PTIAs. Some economic integration agreements, for example the Australia–Thailand FTA (2005), include a chapter on the movement of natural persons that also applies to the trade in services and the investment chapters. Such agreements therefore contain no reference to this issue amongst investment provisions.

There is a settled view on the legal text for this provision amongst those APEC IIAs that include it. The Canada–Chile FTA (1997) is an example:

"*Article G-07. Senior Management and Boards of Directors*

> *1. Neither Party may require that an enterprise of that Party that is an investment of an investor of the other Party appoint to senior management positions individuals of any particular nationality.*"

Notwithstanding, host countries can preserve existing nationality restrictions on senior personnel in IIAs that include schedules by reserving against these measures. For example, Australia takes the following reservation in its FTA with the United States (2005) in relation to its partially Government owned telecommunications company:

| | |
|---|---|
| "*Sector:* | *Telecommunications* |
| *Obligations concerned: [...]* | *Senior Management and Boards of Directors (Article11.10)* |
| *Level of Government:* | *Central* |
| *Source of Measure:* | *Telstra Corporation Act 1991* |
| *Description: [...]* | *The Chairperson and a majority of directors of Telstra must be Australian citizens, and Telstra is required to maintain its head office, main base of operations, and place of incorporation in Australia.*" |

Another category comprising four of these 10 APEC agreements also includes a clause that preserves the right of a

party to require that a majority of the board of directors of an investment hold a particular nationality or have residency status in the territory of the party. This can only be imposed provided it does not materially impair the ability of the investor to exercise control over its investment. An example is article 11.10 (Senior Management and Boards of Directors) in the Australia–United States FTA (2005):

> "[…]
> *2. A Party may require that a majority or less of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.*"

Australia's non-conforming measure relating to the Telstra Corporation (see above) also reserves the right to require a majority of Board Members to be Australian citizens. Whilst article 11.10(2) preserves the right to require that a majority of the board of directors be of a particular nationality, by taking out a reservation there can be no challenge under an IIA's dispute resolution provisions as to whether this requirement "materially impair(s)" the investor's ability to exercise control.

Another limitation is that the right to employ senior personnel of any nationality is dependent on it being able to lawfully enter the host country. Only one APEC IIA, the Canada–Peru FIPA (2007, Article 6), links the senior personnel

provision with the issue of entry and sojourn of these personnel:

> "[…]
> *3. Subject to its laws, regulations and policies relating to the entry of aliens, each Party shall grant temporary entry to nationals of the other Party, employed by an investor of the other Party, who seek to render services to an investment of that investor in the territory of the Party, in a capacity that is managerial or executive or requires specialized knowledge.*"

Another agreement, the Australia–Mexico IPPA (signed 2005), does not include a provision concerning the employment of foreign senior personnel, but contains an obligation on a party "*within the framework of its laws*" to "*give a sympathetic consideration to applications for the permits necessary for the engagement of key managerial and technical personnel in connection with investments in its territory of the Investor's choice from abroad*" (article 5).

A similar approach, though more general in the language it uses and without reference to senior personnel, is taken in Article 8 of the Japan–Viet Nam IPPA (2004). This requires "*sympathetic consideration to applications for the entry, sojourn and residence of a natural person having the nationality of the other Contracting Party who wish to enter the territory of the former Contracting Party and remain therein for the purpose of investment activities*".

It can be concluded that in the APEC context a provision on the employment of foreign personnel is more commonly associated with PTIAs, though in the broader IIA system it is more typically found in BITs. Regulating the hiring of senior personnel is not yet an established core element of APEC IIAs, but is linked to other provisions regulating the movement of natural persons.

### *8. Investor–State dispute settlement*

Investor–State dispute settlement increases the level of certainty regarding the host country's business environment and depoliticizes disputes by ensuring they are decided on legal grounds. Other studies provide detailed analysis of all the features of investor–State dispute settlement (UNCTAD 2004b (volume 1, chapter 12), 2005, 2006a, and 2007b). Dispute settlement provisions are included in IIAs by APEC members and serve to protect foreign investment. A mechanism for investors to take up claims directly against the host country is included in all but one of the reviewed IIAs (the Australia–United-States FTA, 2005). In the Japan–Philippines EPA (signed 2006), the Contracting Parties agreed to further negotiations on a mechanism for resolving investor–State disputes. In the meantime, a disputing party may at its discretion grant or deny its consent in each individual dispute.[22] There are recent developments and significant innovations in the investor-State arbitration provisions of several APEC economies. These recent trends are important elements of treaty negotiations involving these APEC economies. What follows is a summary of key features of investor-State arbitration with an emphasis on these recent developments in APEC IIAs.

Practice on investor–State dispute settlement provisions varies significantly. Some APEC economies follow the NAFTA model and deal with the issue in a set of lengthy and detailed provisions that offer guidance to the disputing parties on procedural issues and aim to strengthen the rules-based nature of these mechanisms. Other agreements, particularly most BITs, only mention the main features and include general guidance on procedures. They place greater reliance on existing arbitration rules, often those offered by ICSID or the United Nations Commission on International Trade Law (UNCITRAL). As mentioned, more recent practice amongst a number of APEC members, led by the NAFTA experience of Canada and the United States, has been to reform investor–State dispute settlement procedures to provide greater transparency in arbitral proceedings, allow more involvement of interested third parties and facilitate the consolidation of claims.

A key feature of investor-State provisions is the scope of claims that can be taken to international arbitration. This varies from any dispute between an investor and the host country, to disputes involving a provision of the treaty or an obligation of contracting parties. A number of APEC IIAs offer more limited access to arbitration and require that an investor "has incurred loss or damage by reason of, or arising out of, an alleged breach of any right" (article 15, Japan–Republic of Korea BIT, 2003). The scope of these provisions is also a question of legal standing. Some IIAs allow a foreign subsidiary, locally incorporated, to access the provisions as a foreign investor.

Another key element relates to the prerequisites for accessing arbitration. First, consultations between parties to the dispute are almost always required, though there is divergence amongst APEC IIAs on whether consultations must take place for three, five or six months. Second, consent to arbitration is often provided through the inclusion of a "compulsory jurisdiction" provision. This ensures State parties to a dispute comply with the ICSID convention's consent requirements. Here again there is considerable divergence in how the legal text is drafted. Thirdly, almost all APEC IIAs do not require exhaustion of local remedies prior to submitting a dispute to international arbitration. This reflects the fact that most APEC members consider arbitration an alternative means of resolving a dispute rather than a subsidiary mechanism to domestic court proceedings.

Reforms have also been introduced to promote greater procedural predictability and control of the parties over arbitration. First, parties to some treaties are now obliged to be involved in the arbitration process to interpret aspects of their treaties. For example, article 41 of the Canada–Peru FIPA (2007) requires the parties, sitting as the "Commission" that oversees the operation of the treaty, to interpret the annexes:

> "*1. Where a disputing Party asserts as a defence that the measure alleged to be a*
> *breach is within the scope of a reservation or exception set out in Annex I, Annex II or Annex III, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of*

*delivery of the request, shall submit in writing its interpretation to the Tribunal.*"

Second, there have been efforts by some APEC economies to promote judicial economy, for example by seeking to avoid frivolous claims and by allowing for the consolidation of claims. Article 28 (Conduct of the Arbitration) paragraph 6 of the United States-Uruguay BIT (2006), states that in deciding as a preliminary question any objection by the respondent that a claim submitted cannot be the subject of an award:

"[…] *the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.*"

And in the same treaty a process for the consolidation of claims is provided for under article 33 "(w)here two or more claims have been submitted separately to arbitration […] and the claims have a question of law or fact in common and arise out of the same events or circumstances".

There have also been attempts to create greater transparency. For example, the Canada–Peru FIPA (2007) includes the following provision:

"*Article 38*
*Public Access to Hearings and Documents*

*1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.*

*2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.*

*3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.*

*4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.*"

Finally, a desire to ensure greater consistency among arbitral awards has prompted ongoing discussion about subjecting arbitrations to appeal, though nothing concrete has been proposed.

Considered together, these key features and recent developments underscore that treaty practice on investor-State dispute settlement provisions is varied and is evolving. Reforms seek to increase predictability in the arbitration process and, more generally, strengthen the rule of law.

## D. Investment promotion

Most IIAs only promote foreign investment indirectly through the granting of investment protection (UNCTAD, 2008). The same can be said of APEC IIAs. Twelve IIAs concluded by APEC economies include language on investment promotion with several further PTIAs involving Japan containing references to investment promotion in a separate chapter.[23] These agreements have language that encourages the promotion and facilitation of investment in general terms, and a small subset of three IIAs include provisions with greater detail on investment cooperation between the parties. A third class of investment-promoting IIAs include those with transparency provisions.

IIAs with investment promotion objectives are often concluded by a developing economy with an industrialized economy. Investment promotion may therefore offer some quid pro quo for the less developed party in return for the protections it offers as host country to investors and their investments from the industrialized economy. In fact, this only eventuates if the developed country commits itself to investment promotion activities. The promotion objective is also central to some IIAs between developing economies, in particular where investment provisions are part of a push towards closer regional integration. The ASEAN Framework Agreement on Investment is one such example.

## *1. Investment promotion and facilitation*

The first class of IIAs containing a reference to investment promotion offer a somewhat vague and general commitment to "encourage" or "promote" investment, or "create favourable conditions" for investors. Such language is often included in the preamble to the treaty:

> "*Recognizing the need to promote and protect foreign investments with the aim to foster their economic prosperity*". (Australia-Mexico, signed 2005)

Another example is Article 2 (Promotion and Protection of Investments) of the Malaysia–Viet Nam IPPA (1992):

"(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest in its territory and subject to its rights to exercise powers conferred by its laws, regulations and administrative practices, shall admit such investments. […]"

Article 3 (Promotion and Protection of Investment) of the India–Indonesia IPPA (2004) requires that parties "encourage and create favourable conditions for investors" and Article 3 of the Australia-Mexico IPPA (signed 2005) asks that parties "to the extent possible, promote investments in its territory by Investors of the other Contracting Party".

## *2. Cooperation on investment*

Several IIAs go further and impose more specific obligations on parties.[24] For example, an IIA may require

parties to exchange information on investment opportunities in their respective economies. This may be contained in a stand-alone provision or incorporated in a transparency provision. The Japan–Malaysia EPA (2006) includes a separate provision on cooperation. Article 92 states:

> "*1. Both Countries shall cooperate in promoting and facilitating investments between the Countries through ways such as:*
> *(a) discussing effective ways on investment promotion activities and capacity building;*
> *(b) facilitating the provision and exchange of investment information including information on their laws, regulations and policies to increase awareness on investment opportunities; and*
> *(c) encouraging and supporting investment promotion activities of each Country or their business sectors.*
>
> *2. The implementation of this Article shall be subject to the availability of funds and the applicable laws and regulations of each Country.*"

The New Zealand–Thailand CEP (2005) includes a similar but more broadly phrased requirement in article 9.4 for parties to "strengthen and develop cooperation efforts in investment" through "research and development", "information exchange", "capacity-building" and so forth. However, this agreement also identifies key sectors where cooperation should be developed, namely in "biotechnology, software, electronic manufacturing and agro-processing".

The distinction between those provisions that purport to promote and facilitate and those that provide for cooperation is sometimes illusory. In practice, the wording of some cooperation provisions does not provide for substantively more than an obligation to "encourage and promote" investments.

One APEC IIA stands out as going much further to promote investment flows. Article 6 of the Framework Agreement on the ASEAN Investment Area (1998) includes programmes and action plans for the promotion of investment, including a review obligation:

> "*1. Member States shall, for the implementation of the obligations under this Agreement, undertake the joint development and implementation of the following programmes:*
> *a. co-operation and facilitation programme as specified in Schedule I;*
> *b. promotion and awareness programme as specified in Schedule II; ...*
>
> *2. Member States shall submit Action Plans for the implementation of the programmes in paragraph 1 to the AIA Council established under Article 16 of this Agreement.*
>
> *3. The Action Plans shall be reviewed every 2 years to ensure that the objectives of this Agreement are achieved.*"

One could ask whether APEC economies' IIAs could include more detailed provisions on investment promotion. They could cover such diverse issues as transparency and exchange of investment-related information, fostering linkages

between foreign investors and domestic companies, capacity-building and technical assistance, granting of investment insurance, encouragement of transfer of technology, easing informal investment obstacles, joint investment promotion activities, access to capital, and the setting up of an institutional mechanism to coordinate investment promotion activities (UNCTAD, 2008).

### *3. Transparency*

The overriding aim of transparency is to enhance the predictability and stability of the investment relationship and to provide a check against circumvention and evasion of obligations by resort to covert or indirect means. Thus, transparency can serve to promote and protect investment through the dissemination of information on support measures available from home countries, investment conditions and opportunities in host countries and through the creation of a climate of good governance. Transparency is also important for assessing the treatment and protection of investment and for monitoring disciplines, restrictions, reserved areas, and exceptions that are provided for in IIAs. Equally, the extension of transparency obligations to corporate disclosure can help protect the interests of host countries and home countries, as well as other stakeholders (UNCTAD, 2004b, volume 1, chapter 10).

Nine APEC IIAs contain transparency requirements amongst investment provisions and at least 11 of the PTIAs include transparency provisions in separate chapters. Some convergence is evident in the way APEC members address transparency issues. The content of transparency obligations

varies depending on the items of information to be made public (e.g. policies, laws, regulations, administrative decisions, as well as corporate business information). There are also different modalities employed to implement transparency, which may involve, for example, the exchange of information or the publication of relevant government measures.

One type of transparency provision used in APEC IIAs requires the prompt publication or availability of laws and regulations "respecting any matter covered by this agreement" or "that pertain to or affect covered investments". For example, the Japan–Viet Nam IPPA (2004) states:

> "*Article 7*
>
> *1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect investment activities.* […]"

Since the regulatory framework of both the host and home countries affects foreign investment, transparency obligations formulated in these terms could cover laws and regulations of both countries. Although this reading appears logical, there is a tendency to interpret these types of provisions as only covering host countries (UNCTAD. 2004b, vol. 1, chapter 10). This approach also represents a broader obligation because in addition to "laws and regulations on investment", it requires the public availability of

"administrative rulings and judicial decisions of general application" and a party's international obligations that might "pertain to or affect" business activity.

On the other hand, some provisions, such as article 6 of the Australia–Mexico IPPA (signed in 2005), present a narrower requirement and are drafted to more clearly target host countries:

> "*Each Contracting Party shall, with a view to promoting the understanding of its laws and regulations on investment that pertain to or affect investments in its territory by Investors of the other Contracting Party, take reasonable measures as may be available to make such laws and regulations public.*"

A second type of clause used by several APEC economies requires the parties to respond to inquiries about the other contracting party's laws and regulations that pertain to or affect investment and business activities. This gives scope for investors to request that their home state make inquiries on their behalf:

> "[…] *2. Each Contracting Party shall, upon request by the other Contracting Party, promptly respond to specific questions and provide that other Contracting Party with information on matters set out in paragraph 1 of this Article.* […]" (article 7, Japan–Republic of Korea IPPA, 2003).

The greatest degree of transparency can be seen in IIAs that include a requirement to, where possible, publish in

advance proposed laws, regulations etc., provide interested parties with a reasonable opportunity to comment on proposed measures, and notify the other party of any proposed or actual measures that might affect operation of the agreement or the other party's interests (Australia–United States FTA, 2005, articles 20.2 and 20.3).

To summarize, transparency provisions are usually framed in general terms and in APEC IIAs most commonly impose obligations on both home and host countries. They can play an important role in fostering the strengthening of institutions and providing regulatory openness. Home country transparency requirements have the added advantage of aiding investment promotion objectives in host countries. For example, information about outward investment regulations and programmes offered by investment exporting (i.e. home) countries might assist host countries identify suitable investors. In addition, transparency of those home country regulations that may act as barriers to investment flows can be raised in investment treaty negotiations with a view to removing these impediments to investment.

## Notes

[1] Treaty dates refer to the year of entry into force unless otherwise specified.

[2] Scheduling exceptions are dealt with in further detail in section B 3.

[3] Ten agreements do not use schedules and provide only post-establishment national treatment.

[4] The recent Japan–Thailand EPA, not part of the current APEC sample, has also followed the positive list approach for both services and investment.

[5] Transparency issues are dealt with in further detail in section D 3.

[6] Performance requirements provisions are dealt with in further detail in section C 6.

[7] Employment of senior personnel provisions are dealt with in section C 7.

[8] See the Australia–United States FTA, annex 1, http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html.

[9] *Saluka Investments B. V. v. The Czech Republic*, Partial Award, 16 March 2006, UNCITRAL (Netherlands–Czech Republic BIT).

[10] See for example *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 (United States/Ecuador BIT), *CMS Gas Transmission Company v. Argentina*, Award, 12 May 2005, ICSID Case No. ARB/01/8 (US/Argentina BIT), *Azurix Corp v. Argentina*, Award, 14 July 2006, ICSID Case No. ARB/01/12 (US/Argentina BIT), and see T. Westcott, "Recent Practice on Fair and Equitable Treatment". *Journal of World Investment and Trade*. Vol. 8, No. 3, 2007: 409–430.

[11] Note that the UNCTAD 2007 BIT survey identifies seven distinct categories used amongst all BITs (UNCTAD, 2007b).

[12] They are the following IIAs: Hong Kong, China–Thailand, Japan–Republic of Korea, Japan–Malaysia, Japan–Singapore, Japan–Viet Nam, Australia–Thailand, Peru–Singapore, Australia–Mexico, Chile–Peru, Russian Federation–Thailand, Malaysia–Viet Nam, Lebanon–Malaysia, India–Indonesia and Germany–Philippines.

[13] R. Dolzer and M. Stevens (1995) *Bilateral Investment Treaties.* Brill, Leiden: 60.

[14] See especially, *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits, April 10 2001, ICSID Reports 102.

[15] These are Australia-United States, Canada-Peru, Chile-Republic of Korea, Iceland-Mexico, and United States-Uruguay.

[16] *Maffezini v. Kingdom of Spain*, ICSID Case No. Apr/97/7, Decision on jurisdiction of 25 January 2000 and Award of Tribunal of 13 November 2000.

[17] *Siemens v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision

on Jurisdiction, 16 May 2006; *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006.

[18] *Salini Construtorri S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005; *Berschader & Berschader v. The Russian Federation* (Arbitration Institute of the Stockholm Chamber of Commerce); *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006.

[19] In the sample for this study, only the New Zealand–Singapore Closer Economic Partnership agreement does not contain protection against expropriation.

[20] Other APEC IIAs with the same or a similar annex are the United States–Uruguay BIT (2006) and the Canada–Peru FIPA (2007).

[21] The Hong Kong, China–Thailand IPPA (2006), Australia–United States FTA (2005), and United States–Uruguay BIT (2006).

[22] "*Article 107 Further Negotiation: 1. The Parties shall enter into negotiations after the date of entry into force of this Agreement to establish a mechanism for the settlement of an investment dispute between a Party and an investor of the other Party.*

*2. In the absence of the mechanism for the settlement of an investment dispute between a Party and an investor of the other Party, the resort to international conciliation or arbitration tribunal is subject to mutual consent of the parties to the dispute. This means that the disputing Party may, at its option or discretion, grant or deny its consent in respect of each particular investment dispute and that, in the absence of the express written consent of the disputing Party, an international conciliation or arbitration tribunal shall have no jurisdiction over the investment dispute involved.*"

[23] One of the 12, the Russian Federation–Thailand BIT (signed in 2002), only refers to investment promotion in the preamble and does not include a specific investment promotion provision.

[24] These three are: Japan–Malaysia EPA (2006), New Zealand–Thailand CEP (2005), and the Framework Agreement on the ASEAN Investment Area (1998).

# II. APEC INVESTMENT INSTRUMENTS

This section discusses the extent to which the principles and practices in APEC investment instruments are reflected in the approach to treaty making taken by individual member economies. Considered together, the APEC investment instruments set out principles and practices that are consistently reflected in the IIAs concluded by APEC members. However, looking at each of the three instruments individually reveals divergence in several areas.

## A. Non-Binding Investment Principles

The Non-Binding Investment Principles (NBIP) were adopted in Bogor in 1994 as a means of facilitating investment flows within the region. The instrument sets out 12 investment principles that are broadly similar to the core elements of IIAs identified in this study. The principles relate to: transparency, non-discrimination between source economies, national treatment, investment incentives, performance requirements, expropriation and compensation, repatriation and convertibility of funds, settlement of disputes, the entry and sojourn of personnel, the avoidance of double taxation, investor behaviour, and the removal of barriers to capital exports.

A number of areas of difference or gaps between these principles and investment treaty practice can be identified.

### *1. Transparency*

First, the NBIP transparency provision requires member economies to make publicly available "all laws, regulations,

administrative guidelines and policies **pertaining to investment in their economies**" (emphasis added). As illustrated in the previous section with the example of article 6 (Transparency of Laws) of the Australia–Mexico IPPA (signed in 2005), this limits the obligation of transparency by imposing the requirement exclusively on the host country.

However, a number of other APEC IIAs do not limit the transparency obligation to host countries. For example, article 19 of the Canada-Peru FIPA (2007) provides:

> "*1. Each Party shall, to the extent possible, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them*. […]"

This ensures host countries might benefit from greater awareness and knowledge of home country measures that can affect outward FDI. This serves as a means of investment promotion.

## *2. National treatment*

Second, the principles recommend member economies accord foreign investors national treatment at the establishment phase, but subject to domestic laws. Whilst the non-binding nature of the principles leave flexibility for member economies to impose restrictions on the entry of foreign investment, it

nevertheless starts from the idea that treatment no less favourable than that accorded to domestic investors be provided during the establishment of an investment. As was seen in section II, above, 10 APEC BITs in this study do not offer national treatment at the pre-establishment phase, though several recent BITs have adopted the NBIP approach.

### *3. Fair and equitable treatment / full protection and security/protection from strife*

A third difference is that APEC investment treaty practice commonly grants investors additional protection in line with the general treatment standards of fair and equitable treatment, full protection and security, and compensation for losses arising from war or civil disturbances. These standards are not incorporated in the NBIP. IIA treaty practice by most APEC economies therefore commonly extends the objective of investment protection beyond what has been envisaged by this APEC investment instrument.

### *4. Performance requirements*

Fourth, the NBIP set out that APEC members aspire to “minimize the use of performance requirements […]”. More than half the APEC IIAs in this study do not seek to curtail the use of performance requirements, though all APEC economies are now subject to the WTO TRIMs Agreement. There is therefore a substantial gap between this principle and treaty practice amongst member economies, although in practice WTO membership may substitute for explicit coverage of performance requirements in APEC IIAs.

### *5. Transfer of funds*

Fifth, the NBIP encourage member economies to allow the free and prompt repatriation and convertibility of funds related to foreign investments. This objective is embraced by APEC IIAs with most guaranteeing free transfers without restricting the type of investment-related transactions. Two APEC IIAs articulate a more limited approach with a closed list of transactions that are guaranteed under the IIA and with the qualification that transactions are subject to the Parties' domestic laws and regulations.

### *6. Key personnel*

Sixth, the NBIP spell out that member economies will permit the temporary entry of key foreign technical and managerial personnel engaged in activities connected with foreign investment subject to their domestic laws. It is important here to distinguish between provisions permitting temporary entry for natural persons and provisions looking to regulate the nationality of senior management or board members. Of the 10 APEC IIAs addressing investment personnel issues, all but three focus on nationality restrictions on management. As mentioned in section II B 5, only one APEC IIA links temporary entry with the regulation of senior personnel nationality, and several economic integration agreements deal with temporary entry in separate chapters. There is therefore considerable scope for further addressing these issues in APEC IIAs.

### *7. Investor behaviour*

Finally, the NBIP place emphasis on the role investor behaviour (and investor obligations) play in facilitating investment flows and acknowledge that foreign investment is facilitated when foreign investors abide by the host economy's laws and regulations. With the exception that some APEC IIAs require investors to provide information about their investments for informational and statistical purposes, the issue of investor obligations is otherwise not addressed in APEC IIAs. IIAs to date have focused on creating obligations for host countries and corresponding rights for investors. The question of how to balance the rights and interests of foreign investors and those of host countries is at the core of current debate about the future development of international investment rules (UNCTAD, 2007a; UNCTAD, forthcoming).

## B. Menu of Options

The Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies (or "Menu of Options") offers a comprehensive list of policies for liberalization and business facilitation introduced in the late 1990s and subject to regular review. An important distinction between this investment instrument and APEC IIAs is that the Menu of Options is cast more broadly than just encouraging foreign direct investment. Its objective is to improve all investment in economies. Items are therefore presented as regulatory reform options at the domestic level. A direct assessment of performance by APEC economies against some of these reform options is not possible from examining IIA treaty practice. However, in many instances domestic reform

items in the Menu of Options have equivalent international law commitments reflected in IIA treaty practice. These can be broadly indicative of State practice. For example, the approach taken by APEC economies to defining "investment" in IIAs may give some indication as to how economies have addressed the Menu of Options recommendation to "(b)roaden definitions of investment […] in existing legislation".

Most topics in the Menu of Options (items 1–9) are reflected in core elements of APEC IIAs, but a number of policy areas (items 10–15) are not specifically included in APEC IIAs.[1] These include items relating to intellectual property, the avoidance of double taxation, competition policy, and elements of the sections on business facilitation, technology transfer, and venture capital. It is increasingly common for these issues to be covered in other chapters of economic integration agreements.

Items 1.01–1.03 cover what are termed "general issues" including the definition of investment, permitting and promoting investment and locking in current treatment. These are addressed by APEC IIAs. IIAs in the study adopt a definition of "investment" that item 1.01 would consider broad and IIAs cover the classes of transactions included in this item. On the other hand, not all IIAs offer investors a standstill on restrictions (item 1.03). As pointed out above, 12 of the 14 BITs surveyed do not use schedules of commitments to identify restrictions on investors. Commitments on current treatment are, however, a common feature of APEC economic integration agreements.

Perhaps the most notable gap between the Menu of Options and APEC IIAs is in the area of prior authorization requirements (items 1.04-1.07 and items 1.08-1.09). The Menu of Options recommends eliminating or phasing out prior authorization requirements as a critical step towards investment liberalization, but there is little evidence of APEC economies using IIAs to liberalize existing establishment requirements. First, it should be noted that only two BITs address prior authorization. Second, a partial exception where an APEC IIA has relaxed establishment requirements is the Australia–United States FTA (2005) and Australia's decision to raise its screening thresholds in certain sectors for United States investors.

Another recent study found that high-income APEC economies including Japan, the Republic of Korea, and Singapore have achieved greater openness in their services sectors (including investment in services through commercial presence) through EIAs than lower income economies.[2] This suggests an opportunity for greater ambition in addressing items 1.04–1.07 of the Menu of Options in line with a country's development stage.

Item 2, which deals with the transparency of investment regimes, is addressed in section II C on the Investment Transparency Standards, below.

Item 3 concerns policy options to introduce further non-discrimination of foreign investment. Items 3.01–3.08 recommend progressively improving the level of MFN and national treatment offered to foreign investors. This study shows general consensus in favour of including treaty

provisions committing APEC economies to non-discriminatory treatment. As with item 1, general practice amongst APEC members is to bind existing exceptions to non-discrimination rather than use IIAs to drive further domestic reforms. Identifying the sectoral coverage of these non-discrimination commitments and exceptions to such treatment requires analysis of domestic measures scheduled in treaty annexes. This could be the subject of further study.

APEC IIAs fully meet the objectives of item 4 in relation to expropriation and compensation. Indeed the practice of APEC economies is to address the issue in greater detail by also seeking to protect foreign investors against indirect expropriation.

All APEC IIAs also meet the level of treatment set out in item 5. APEC treaty practice offers investors and their investment non-discriminatory protection from strife and similar events. Some offer both MFN and national treatment, others offer MFN treatment, and several offer absolute protection (i.e. a right to be compensated) in certain events of war or other civil disturbances.

Item 6 relates to the transfer of capital related to investments and commends member economies to remove or reduce restriction on free transfers. All APEC IIAs reflect a commitment to this objective. 10 agreements fully meet the objectives of this item and allow unfettered transfers. Most other IIAs include limited exceptions (for example, an exception to free transfers in the case of balance of payment crises), consistent with item 6.03.

Items 7.01–7.03 deal with restrictions on performance requirements. As has been observed previously, this is an area of investment regulation that is not addressed as comprehensively amongst APEC IIAs and requires further attention in future IIA negotiations. Still, some economies have consistently exceeded what this item recommends and included restrictions on performance requirements for investment in services as well as in goods sectors.

Items 8.01 and 8.02 address the temporary entry and stay of personnel for investment purposes. This is equivalent to the objectives set out in the NBIP, and as mentioned above, is an issue addressed in the investment provisions of only three of the APEC IIAs with several EIAs dealing with temporary entry in separate chapters. However, 8.03 and 8.04 in the Menu of Options link the issue of temporary entry of personnel with that of domestic regulation of nationality of senior management. As articulated previously, these two issues are not usually addressed together in APEC IIAs.

Item 9 supports the use of effective dispute settlement mechanisms (including investor-State dispute settlement) and endorses membership of international arbitration bodies. These regulatory options are well supported by APEC treaty practice.

## C. Transparency Standards on Investment

Transparency principles were set out in the Statement to Implement APEC Transparency Standards ("Leaders' Statement") delivered at Los Cabos, Mexico, in October 2002. In October 2003, the APEC Investment Experts Group developed a set of transparency standards on investment for

incorporation into the Leaders' Statement. These standards flowed from APEC Leaders' 2002 principles on transparency and built on the Menu of Options.

APEC investment transparency standards cover the publication, awareness and availability of investment laws and measures. This level of transparency obligation is what most commonly appears in APEC IIAs. The APEC transparency standards also require that members ensure "that appropriate domestic procedures are in place to enable prompt review and **correction of final administrative actions** […]" (emphasis added) relating to investment matters. This expansion of the concept of transparency to include elements of due process is infrequently included in APEC IIAs, however one example is Article 11(5) of the United States–Uruguay BIT (2006). This states:

> "[…]
> (b) *Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:*
> *(i) a reasonable opportunity to support or defend their respective positions; and*
> *(ii) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.*"

The APEC transparency standards also seek to maintain consistency in the use of screening guidelines, procedures for registration and government licensing, prior authorization

requirements and investment promotion programmes (paragraphs 5–8). These issues are not covered in IIAs.

Finally, paragraph 9 of the standards highlights the link between transparency and investment disputes and encourages the inclusion of transparency provisions in investor–State dispute settlement mechanisms. There has been considerable attention given to transparency in dispute settlement proceedings in the IIAs of several APEC members, notably Canada and the United States. For example, article 29 of the United States–Uruguay BIT (2006) requires the respondent to transmit certain documents to the home country and to make them available to the public. These documents include the notice of arbitration, the memorials, the transcripts of hearings and the arbitral awards. In addition to keeping the public informed, some APEC IIAs now also allow *amicus curiae* briefs to be submitted by parties not involved directly in the dispute. Indeed this development goes beyond what is included in the transparency standards.

The implications of convergence and divergence in APEC IIA treaty practice demonstrated in Section I of this study are drawn together in Section II. Four key conclusions for APEC economies can be drawn from a comparison of APEC IIAs with those principles and policy recommendations set out in APEC investment instruments. First, the biggest gap between APEC principles and APEC IIA practice is in the limited use of IIAs to drive domestic investment policy reform in the ways endorsed by the Menu of Options items, namely through reducing prior authorization requirements (item 1) and reducing exceptions to non-discriminatory treatment of foreign investors (item 3). A second main gap between principles and

IIA practice is in the limited way APEC IIAs (considered as a whole) address the use of performance requirements. Third, this analysis demonstrates the comprehensive treatment given by APEC IIAs to APEC principles relating to expropriation and compensation (item 4), non-discriminatory protection in the event of war or civil disturbance (item 5), transfers of funds related to foreign investment (item 6), and in relation to dispute settlement mechanisms (item 9). Finally, additional protections not included in APEC investment instruments such as the fair and equitable treatment standard and minimum standard of treatment are commonly included in APEC investment treaties.

## Notes

[1] The complete text of the Menu of Options is reproduced in annex 2.

[2] Fink C and Molineuvo M (2007).

# CONCLUSIONS

The core elements of APEC IIAs described in this study interact to determine the obligations of the treaty parties and how the treaties will liberalize, protect and promote investment. Three types of interaction can be identified: (a) the interaction of definitions with the substantive provisions; (b) the interactions of exceptions (general exceptions and scheduled exceptions) with the substantive provisions, and (c) the interaction of the substantive provisions with the dispute resolution provisions.

There is general agreement on which are the core elements and provisions of IIAs involving APEC economies. This conformity is also evident in the global system of IIAs (UNCTAD 2007b and UNCTAD forthcoming). On a number of core issues, APEC IIAs reflect consensus with respect to the substantive issues covered by the agreements and their overriding purpose. Provisions such as national and MFN treatment for established investments, fair and equitable treatment, guarantees of prompt, adequate and effective compensation for expropriation and of free transfers, and consent to investor–State and State–State dispute resolution all appear in the vast majority of agreements.

On closer examination, APEC IIAs are quite different in their wording and meaning. There are also some provisions that only appear in a minority of agreements and with considerable variation among agreements. For example, this is the case with regard to guarantees of national and MFN treatment with respect to the right to establish investment, and

prohibitions on performance requirements. These differences are partly attributable to different approaches taken by individual countries in response to uncertainties about the interpretation of these provisions. This requires further targeted capacity building amongst APEC economies.

There has also been a recent trend in a small but growing number of APEC IIAs to include significant revisions to the wording of various substantive treaty obligations. Prominent amongst these are more detailed treaty language on the meaning of fair and equitable treatment and the concept of indirect expropriation. And there have been revisions to procedural provisions with some recent IIAs including significant innovations to the investor-State dispute resolution procedures. The main purpose of these innovations is to increase transparency, to promote judicial economy, and to foster sound and consistent results. At the same time, all these changes increase the complexity of the IIA dispute settlement system.

In an overall increasingly complex IIA system, three challenges relating to the content of APEC IIAs are evident (UNCTAD, forthcoming). These challenges are addressed, in part, by the APEC investment instruments. First is the challenge of promoting policy coherence. Coherence requires that a country's IIAs are consistent with domestic economic and development policy, and with other IIAs signed by that country. Policy coherence is central to the objectives of the NBIP and Menu of Options. Both investment instruments promote the need for a clear and coherent national development approach that promotes economic growth. The NBIP "(e)mphasiz(es) the importance of promoting domestic

environments that are conducive to attracting foreign investment". The Menu of Options provides APEC member economies with a non-exhaustive and non-prescriptive range of policy choices, but offers consistent guidance aimed at improving coherence and further liberalizing the treatment of investment. Despite the existence of the APEC investment instruments, it appears that APEC IIAs have not yet achieved a substantially higher degree of consistency.

Second, there is a challenge relating to how best to reflect in IIAs a balancing of investors' interests with the public interest. Long-term sustainability of the system requires maintaining this balance. In addition to principles of investment protection, the NBIP underscores the principle that "foreign investors abide by the host economy's laws, regulations, administrative guidelines and policies, just as domestic investors should." APEC IIAs go some way to balancing public and private interests through the use of exceptions and through the inclusion in some APEC IIAs of revised language on issues such as fair and equitable treatment and expropriation.

Third, there is the challenge of how to incorporate development issues most relevant to developing countries into IIAs. This is made more difficult by the fact that the development interests of different countries cannot be uniformly addressed in all IIAs. Different kinds of IIAs suit the development goals of different countries. Two aspects are evident in APEC IIAs. First, flexibility in the approach to certain core elements of APEC IIAs is required, for example in the way investment is defined, the use of positive lists to identify sectors to which commitments apply, the use of limited

and temporary derogations from an investor's right to freely transfer investment-related capital, and in the use of performance requirements provisions. By definition this introduces a tension with the challenge of coherence outlined above. Second, using IIAs to more actively and directly promote development may be appropriate for some APEC member economies. This could be achieved by including in future APEC IIAs more specific investment promotion provisions, or by canvassing alternative means of resolving disputes between investors and the States. APEC investment instruments are crafted with the flexibility to allow APEC member economies to address the development dimension in the most beneficial way.

The APEC investment instruments are useful policy tools for working to understand these three challenges in APEC IIAs and for encouraging approaches to negotiating investment treaties amongst APEC member economies – and within the broader IIA system – that seek to address these challenges.

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# ANNEX 1
# List of covered treaties

1. Acuerdo de Libre Comercio entre el Gobierno de la República del Perú y el Gobierno de la República de Chile, que modifica y sustituye el ACE N°38, sus anexos, apéndices, protocolos y demás instrumentos que hayan sido suscritos a su amparo. (Chile-Peru ALC) (signed 2006)*
2. Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (Canada–Peru FIPA) (2007)
3. Agreement between Japan and the Republic of Singapore for a New Age Economic Partnership (Japan-Singapore EPA) (2002)
4. Agreement between Japan and the Republic of the Philippines for an Economic Partnership (Japan–Philippines EPA) (signed 2006)
5. Agreement between Japan and the Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment (Japan–Viet Nam IPPA) (2004)
6. Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (Japan–Mexico EPA) (2005)
7. Agreement between New Zealand and Singapore on a Closer Economic Partnership (New Zealand–Singapore CEP) (2001)
8. Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (Germany–Philippines BIT) (2000)
9. Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (Australia–Mexico IPPA) (signed 2005)

10. Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership (Japan–Malaysia EPA) (2006)
11. Agreement between the Government of Japan and the Government of the Republic of Korea for the Liberalization, Promotion and Protection of Investment (Japan–Republic of Korea IPPA) (2003)
12. Agreement between the Government of the Hong Kong (China) Special Administrative Region of the People's Republic of China and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments (Hong Kong, China–Thailand IPPA) (2006)
13. Agreement between the Government of the Kingdom of Thailand and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments (Russian Federation–Thailand BIT) (signed 2002)
14. Agreement between the Government of the Lebanese Republic and the Government of Malaysia for the Promotion and Protection of Investments (Lebanon–Malaysia IPPA) (2002)
15. Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments (India–Indonesia IPPA) (2004)
16. Agreement between the Government of the Republic of Singapore and the Government of the Republic of Peru on the Promotion and Protection of Investments (Peru–Singapore IPPA) (signed 2003)
17. Agreement between the Government of the Socialist Republic of Viet Nam and the Government of Malaysia for the Promotion and Protection of Investments (Malaysia–Viet Nam IPPA) (1992)
18. Agreement between the Government of the United Mexican States and the Government of the Republic of Iceland on the

Promotion and Reciprocal Protection of Investments (Iceland–Mexico BIT) (2006)
19. Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments (China–Germany BIT) (2005)
20. Australia–Thailand Free Trade Agreement (2005)
21. Australia–United States Free Trade Agreement (2005)
22. Canada–Chile Free Trade Agreement (1997)
23. Framework Agreement on the ASEAN Investment Area (and the 1987 ASEAN Agreement on the Promotion and Protection of Investments as affirmed) (1998)
24. Free Trade Agreement between the Republic of Korea and the Republic of Chile (Chile–Republic of Korea FTA) (2004)
25. North American Free Trade Agreement (1994)
26. Singapore–Australia Free Trade Agreement (2003)
27. Thailand–New Zealand Closer Economic Partnership Agreement (New Zealand–Thailand CEP) (2005)
28. Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States–Uruguay BIT) (2006).

**Note**

* Date indicates year treaty entered into force unless otherwise indicated.

# ANNEX 2
# APEC Investment Instruments

## 1. APEC Non-Binding Investment Principles

**Jakarta, November 1994**

In the spirit of APEC's underlying approach of open regionalism,

Recognizing the importance of investment to economic development, the stimulation of growth, the creation of jobs and the flow of technology in the Asia–Pacific region,

Emphasizing the importance of promoting domestic environments that are conducive to attracting foreign investment, such as stable growth with low inflation, adequate infrastructure, adequately developed human resources, and protection of intellectual property rights,

Reflecting that most APEC economies are both sources and recipients of foreign investment,

Aiming to increase investment including investment in small and medium enterprises, and to develop supporting industries,

Acknowledging the diversity in the level and pace of development of member economies as may be reflected in their investment regimes, and committed to ongoing efforts towards the improvement and further liberalization of their investment regimes,

Without prejudice to applicable bilateral and multilateral treaties and other international instruments,

Recognizing the importance of fully implementing the Uruguay Round TRIMs Agreement,

APEC members aspire to the following non-binding principles:

## Transparency

- Member economies will make all laws, regulations, administrative guidelines and policies pertaining to investment in their economies publicly available in a prompt, transparent and readily accessible manner.

*Non-discrimination between source economies*

- Member economies will extend to investors from any economy treatment in relation to the establishment, expansion and operation of their investments that is no less favourable than that accorded to investors from any other economy in like situations, without prejudice to relevant international obligations and principles.

*National treatment*

- With exceptions as provided for in domestic laws, regulations and policies, member economies will accord to foreign investors in relation to the establishment, expansion, operation and protection of their investments, treatment no less favourable than that accorded in like situations to domestic investors.

*Investment incentives*

- Member economies will not relax health, safety, and environmental regulations as an incentive to encourage foreign investment.

*Performance requirements*

- Member economies will minimize the use of performance requirements that distort or limit expansion of trade and investment.

*Expropriation and compensation*

- Member economies will not expropriate foreign investments or take measures that have a similar effect, except for a public purpose and on a non-discriminatory basis, in accordance with the laws of each economy and principles of international law and against the prompt payment of adequate and effective compensation.

*Repatriation and convertibility*

- Member economies will further liberalize towards the goal of the free and prompt transfer of

funds related to foreign investment, such as profits, dividends, royalties, loan payments and
liquidations, in freely convertible currency.

*Settlement of disputes*

- Member economies accept that disputes arising in connection with a foreign investment will be settled promptly through consultations and negotiations between the parties to the dispute or, failing this, through procedures for arbitration in accordance with members' international commitments or through other arbitration procedures acceptable to both parties.

*Entry and sojourn of personnel*

- Member economies will permit the temporary entry and sojourn of key foreign technical and managerial personnel for the purpose of engaging in activities connected with foreign investment, subject to relevant laws and regulations.

*Avoidance of double taxation*

- Member economies will endeavour to avoid double taxation related to foreign investment.

*Investor behaviour*

- Acceptance of foreign investment is facilitated when foreign investors abide by the host economy's laws, regulations, administrative guidelines and policies, just as domestic investors should.

*Removal of Barriers to Capital Exports*

- Member economies accept that regulatory and institutional barriers to the outflow of investment will be minimized.

## 2. Options for investment liberalization and business facilitation to strengthen the APEC economies 1997

APEC leaders and ministers at Bogor, Osaka, Subic, and Vancouver have committed their economies to create free and open investment by 2010 and 2020. They endorse Individual Action Plans (IAPs) as a core instrument in this process. They have called for transparency in, and the annual improvement of IAPs. ABAC has also called on APEC economies to make progress in the investment area.

In response to both Government and business, the Investment Experts Group, at St. Johns, Canada, undertook to compile a "Menu of Options" for helping economies to identify policy measures that member economies may include unilaterally in their IAPs for implementation of this objective. There was a consensus that the project should focus on concrete measures, rather than on continued philosophical debate. APEC ministers endorsed the "menu" initiative at Vancouver.

With these instructions in mind, the following document is a non-exhaustive "master menu" of investment-liberalizing and business-facilitating measures from which economies may voluntarily select any of a number of options to make progress toward creating a free and open investment regime. It is intended as a reference tool that economies may refer to when updating their IAPs.

The APEC approach to liberalization and facilitation of trade and investment, as reiterated by APEC Leaders at Vancouver, recognizes the diversity that exists among APEC economies. This "menu of options" is consistent with this recognition of diversity, providing members with a broad range of choices suitable for different circumstances. The items are not prescriptive and, where

chosen, may be modified to suit particular circumstances. The menu is not designed to set out the steps in the liberalization process and will evolve over time.

The IEG intends to update this menu on a regular basis, starting in 1999, so as to capture the benefit of APEC economies' increasing experience and changing views.

| Item No. | Description |
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| **GENERAL** | |
| 1.01 | Broaden definitions of investment and foreign investment in existing legislation, regulations and administrative procedures to permit the widest variety of forms of investment and allow for newly emerging forms to be covered, without a need for future changes in domestic legislation/ regulations.<br><br>-- The definition might include – illustratively - not just new ("green field") investments, but also acquisition of shares of domestic enterprises, management contracts, long-term leases, all forms of business organization (e.g. wholly owned, subsidiaries, partnerships, branches, joint ventures, smart partnerships, strategic alliances, venture capital), certain kinds of debt instruments, intellectual property, etc. |
| 1.02 | Permit and promote all forms of investment through means other than, or additional to, broadening the definitions of investment and foreign investment in existing legislation, regulations and administrative procedures. |
| 1.03 | Commit to locking in current treatment for investors in specific sectors (i.e. standstill on restrictions). |
| **On prior authorization requirements:** | |
| 1.04 | Eliminate or phase out prior authorization requirements. If appropriate, replace them with post-establishment notification. |

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| 1.05 | Make approval within any existing prior-authorization mechanism automatic except in limited specified situations. |
| 1.06 | Raise the threshold (value of an investment) above which prior authorization is required. If appropriate, announce progressive raising of the threshold, according to a schedule with a certain date to eliminate most or all prior authorization requirements. |
| 1.07 | Limit the requirement for prior authorization to selected sectors. If appropriate, replace it with post-establishment notification. |
| **Involving other economies:** | |
| 1.08 | Sign or establish (or, as appropriate, sign or establish additional) bilateral, regional, and/or multilateral agreements or arrangements for the protection of investment that provide commitments to the current level of protection and openness for investors/ investment. |
| 1.09 | Sign or establish (or, as appropriate, sign or establish additional) bilateral, regional and/or multilateral agreements or arrangements for the protection of investment with enhanced protection and openness for investors/ investments (e.g. fewer restricted sectors of an economy, fewer restrictions within sectors, stronger mechanisms for resolving disputes). |
| **TRANSPARENCY** | |
| 2.01 | Make available to investors timely updates of changes to investment regimes, including via the APEC Secretariat (who will use it for the APEC investment guidebook). |
| 2.02 | Publish and/or make widely available through other means, on a timely basis, information on an economy's investment code, investment laws and regulations, and procurement procedures, with an eye to ensuring transparency in the administration of investment laws, regulations and procedures at federal/central, provincial/state and local authority levels. |
| 2.03 | If screening is used, publish and/or make widely available through other means the guidelines for evaluating and scoring projects for their approval. |
| 2.04 | Conduct briefings (in appropriate forums) on the current investment |

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| | policies and future directions to be undertaken by the government. |
| 2.05 | Give advance notice of proposed regulations and laws, and provide an opportunity for public comment. |
| 2.06 | Clarify procedures and practices regarding application, registration, government licensing and procurement by:<br><br>-- Publishing (and widely disseminating) clear and simple instructions, and an explanation of the process (the steps) involved in applying/bidding/registering;<br>-- Publishing (and widely disseminating) definitions of criteria for assessment of investment proposals;<br>-- Publishing (and widely disseminating) contact points for inquiries on standards, technical regulations, and conformity requirements;<br>-- Conduct periodic reviews of prior authorization requirement procedures to ensure they are simplified and transparent;<br>-- Make available to investors all rules and information relating to investment promotion schemes. |
| **NON-DISCRIMINATION**<br>**Related to MFN** | |
| 3.01 | Commit to MFN treatment economy-wide, except in a few limited cases as may be specified by individual member economies, immediately or over a publicly announced period of time. |
| 3.02 | For economies that have already committed to MFN treatment, review where MFN exceptions to it taken in the past can be eliminated or reduced (in other words, review whether the “few limited cases” of exceptions to MFN can be narrowed even further). |
| **Related to National Treatment or both MFN and National Treatment**<br>***Sectors*** | |
| 3.03 | Extend national treatment now (or starting on a particular date) in one or more sectors. |
| 3.04 | Extend national treatment economy-wide except in a few limited cases now, or starting on a certain date; or |
| 3.05 | Progressively extend national treatment to one more sectors. |
| 3.06 | Open additional sectors to participation by foreign investors, or |

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| | permit foreign investment economy-wide with only limited exceptions. In other words, reduce the size of the list of sectors that are closed or partially restricted to foreign investment. |
| 3.07 | Eliminate or phase out sectoral restrictions on a foreign investment. |
| 3.08 | Review existing agreements, treaties, and laws to see if any exceptions to national treatment can be eliminated. |
| ***Ownership*** | |
| 3.09 | Allow all investors to choose their form of establishment within legislative and legal frameworks. |
| 3.10 | Update regulations to eliminate joint venture requirements for establishment. |
| 3.11 | Permit greater foreign equity ownership in sectors partially opened to foreign investment, or permit greater foreign equity ownership economy-wide.<br><br>-- Prepare a schedule now for future increases in foreign equity ownership.<br>-- Accelerate implementation of dates for liberalizing sectors where possible. |
| 3.12 | Eliminate or phase out conditions for foreign ownership in relation with export ratios or domestic sales. |
| 3.13 | Reduce areas with joint-venture criteria under investment promotion schemes to allow greater foreign participation. |
| 3.14 | Implement (and announce) a policy of not requiring the divestiture or dilution of the ownership of investments on the basis of nationality. Eliminate or phase out requirements to transfer ownership to local firms over a period of time. |
| 3.15 | Eliminate or phase out restrictions for foreign investors on the establishment of local branches. |
| 3.16 | Eliminate or phase out restrictions for foreign investors to diversity operations. |
| 3.17 | Eliminate or phase out restrictions on foreigners with respect to operational permits and licenses. |

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| 3.18 | Where a time period for foreign investors to find local partners is specified, extend the period of time. |
| ***Finance and Capitalization*** | |
| 3.19 | Update regulations to reduce or eliminate restrictions on foreign borrowing by corporations. |
| 3.20 | Liberalize foreigners' access to domestic financial instruments (e.g. money market instruments, corporate bond markets). |
| 3.21 | With respect to the entry of foreign investment, eliminate or phase out requirements to deposit certain guarantees for foreign investors. |
| 3.22 | Reduce, reduce progressively, or eliminate minimum capitalization requirements in sectors where such capitalization requirements are not needed for prudential reasons. |
| 3.23 | Eliminate or phase out subsequent additional investment or reinvestment requirements for foreign investors. |
| 3.24 | Open existing investment incentive programs to participation by foreign investors, so they are equally available to domestic as well as foreign investors. |
| ***Other Measures*** | |
| 3.25 | Eliminate or ease discriminatory restrictions on imports needed to support foreign investment. |
| 3.26 | Change policies, guidance, regulations, or laws to eliminate pricing by state-designated monopolies that is discriminatory on the basis of nationality. |
| 3.27 | Change policies, guidance, regulations or laws to eliminate discriminatory access to local raw materials and inputs. |
| **EXPROPRIATION AND COMPENSATION** | |
| 4.01 | Consistent with international law standards/principles, limit permissible expropriation to cases involving a public purpose where expropriation is undertaken in a non-discriminatory manner, under due process of law, and accompanied by payment of prompt, adequate and effective compensation.<br><br>-- Take steps to amend expropriation laws and regulations based on |

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| | the above-mentioned standards/principles of international law with respect to expropriation. |
| 4.02 | Included in bilateral, regional or multilateral investment treaties, agreements, and/or arrangements a commitment on compensation in cases of expropriation. |
| 4.03 | To improve transparency, define, publish and disseminate to investors the relevant investment treaties and arrangements. |
| **PROTECTION FROM STRIFE AND SIMILAR EVENTS** | |
| 5.01 | Decide - and, as possible, commit in investment agreements/arrangements between governments and private investors and in bilateral/multilateral government-to-government treaties, agreements, and/or arrangements - that the government will accord treatment that is non-discriminatory on the basis of nationality to investments with respect to losses that investments may suffer in the government's territory that are due to war, other armed conflict, revolution, national emergency, insurrection, civil disturbance, or other similar events. |
| **TRANSFERS OF CAPITAL RELATED TO INVESTMENTS** | |
| 6.01 | Remove or reduce restrictions on the transfer of funds related to foreign investment, such as profits, dividends, royalties, loan payments, interest, infusions of additional financial resources after the initial investment has been made, and proceeds from liquidations - all in a freely convertible or a freely usable currency.<br><br>-- Eliminate or phase out restrictions that impede recovery of profit, such as ceilings on royalties, technical assistance fees or special taxes, restrictions on access to foreign exchange, and control over the allocation of foreign currencies. |
| 6.02 | Make a binding commitment, in treaties, agreements or arrangements, to eliminate or progressively reduce restrictions on the transfers of funds related to foreign investment, such as profits, dividends, royalties, loan payments, interest, infusions of additional financial resources after the initial investment has been made, and proceeds from liquidation - all in freely convertible or freely usable currencies. |

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| 6.03 | Guarantee the right to transfer capital related to an investment in and out of an economy, without delay and at market rates of exchange, with only limited exceptions. |
| **PERFORMANCE REQUIREMENTS** | |
| 7.01 | Publish and implement a phase-out plan for WTO TRIMs-inconsistent programs identified on TRIMs illustrative list. |
| 7.02 | Reach consistency with WTO TRIMs' illustrative list by 2000. Take steps to accelerate implementation of phase-out plans where possible. |
| 7.03 | Eliminate, phase out, or relax unilaterally and/or through government-to-government agreements and treaties, on an economy-wide or sectoral basis, requirements such as:<br>-- local hiring requirements,<br>-- local training requirements,<br>-- requirements to manufacture locally,<br>-- local sales requirements,<br>-- required technology transfer,<br>-- required local research and development,<br>-- export requirements (e.g. those expressed as requirements to generate foreign exchange or achieve a particular export target). |
| **ENTRY AND STAY OF PERSONNEL** | |
| 8.01 | Consistent with an economy's visa laws regarding the entry and stay of personnel, allow the temporary entry and stay of personnel needed to establish, develop, administer or advise on the operation of an investment of theirs (i.e. investor and key managerial or technical personnel and advisers). |
| 8.02 | Offer visas for investors that facilitate entry and reentry (or identify other ways, consistent with domestic laws and policy, to facilitate investors' ability to enter and reenter for investment purposes). |
| 8.03 | Take steps to permit investors/project sponsors to hire the top managerial advisory talent of their choice, regardless of nationality. |
| 8.04 | Take steps to permit investors/project sponsors to hire the top technical and/or advisory talent of their choice, regardless of nationality. |

| SETTLEMENT OF DISPUTES | |
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| 9.01 | Develop effective mechanisms for resolving disputes and mechanisms for enforcing the solutions found to those disputes. |
| 9.02 | Take steps to become a member of the International Convention on the Settlement of Investment Disputes (ICSID) and/or other widely recognized international arbitration bodies. |
| | *Note: We defer to the APEC Dispute Mediation Experts Group for specific menu options for IAPs related to improvements in dispute mediation.* |
| **INTELLECTUAL PROPERTY** | |
| 10.01 | Develop adequate protection for intellectual property. |
| 10.02 | Provide protection for intellectual property that at least meets the standards established in the WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS). |
| 10.03 | Provide adequate and effective enforcement measures, including as appropriate, administrative, civil, and criminal, against infringement of intellectual property rights.<br><br>-- Increase cooperation among agencies responsible for the administration and enforcement of intellectual property matters and between IPR agencies and those responsible for regulatory issues.<br>-- Provide and streamline, as appropriate, judicial and administrative procedures to ensure timely processing of enforcement actions.<br>-- Increase public education about the importance of intellectual property and its role in the economy as well as the need for effective and efficient enforcement of intellectual property rights.<br>-- Enhance cooperative relationship between different law enforcement agencies.<br>-- Ensure close and efficient cooperation between enforcement agencies and the right holders. |
| 10.04 | Develop and implement programs that require official agencies in member economies to respect intellectual rights in their operations, such as by using only legitimate software in an authorized manner. |

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| | -- To the extent possible, provide an adequate budget for purchase of legitimate software. |
| 10.05 | Develop/further improve intellectual property regimes:<br><br>-- Where possible, give effect to international norms for intellectual property protections.<br>-- To the extent possible, cooperate with other nations in international for a. |
| *Note: We defer to the APEC Intellectual Property Rights( IPR) Group for specific menu options for IAPs related to IPR improvements.* | |
| **AVOIDANCE OF DOUBLE TAXATION** | |
| 11.01 | Sign, where appropriate, bilateral avoidance of double taxation agreements that are in conformity with international norms. Expand coverage of such agreements as appropriate. |
| **COMPETITION POLICY AND REGULATORY REFORM** | |
| 12.01 | Ensure consistency between investment policies and competition and regulatory reform policy. |
| *Note: We defer to the APEC Competition Policy Group for specific menu options for IAPs related to improving competition.* | |
| **BUSINESS FACILITATING MEASURES TO IMPROVE THE DOMESTIC BUSINESS ENVIRONMENT** | |
| 13.01 | Reduce discriminatory use of bureaucratic discretion, by means such as:<br><br>-- preparing and distributing written in-house guidelines for administrative practices related to the handling of applications, registrations, licensing, etc.<br>-- establishing in-house decision appeal mechanisms, as well as appeal mechanisms available to the public. |
| 13.02 | Streamline application, registration, government licensing and government procurement procedures by:<br>-- simplifying forms;<br>-- simplifying the submission (e.g. permitting electronic submission, or centralizing approval offices in a “one-stop shop”); |

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| | -- shortening processing time of such applications/registrations, and<br>-- reducing unnecessary steps. |
| 13.03 | Take positive steps to assist investors by measures such as:<br><br>-- establishing an office to serve as a clearinghouse (one-stop agency/unit) for interested investors to learn market opportunities and potential investment partners;<br>-- providing a network of all the government agencies that the investors or businesspersons have contact with in doing investments;<br>-- establishing/designating one government agency to handle investors' complaints (e.g. investment ombudsman). |
| 13.04 | Examine the role and effects of investment incentives at all levels of Government: federal/central, state/provincial and local. |
| 13.05 | Offer incentives which are voluntary, non-discriminatory, and limited in duration, such as:<br>-- tax breaks,<br>-- loans guarantees,<br>-- grants, subsidies and industrial development bonds,<br>-- employment training programs,<br>-- programs aimed at helping companies achieve greater efficiency,<br>-- WTO-consistent export promotion programs,<br>-- small business development,<br>-- high technology development programs,<br>-- measures to support development of new industries,<br>-- industrial linkage programs,<br>-- mobilization of domestic resources. |
| 13.06 | Introduce measures to assist companies seeking to achieve greater efficiency such as:<br>-- zero inventory<br>-- just in time program<br>-- other related programs |
| 13.07 | Establish legal and taxation systems in areas such as stock exchanges, corporate division and mergers and acquisitions to enable flexible corporate reorganization. |
| 13.08 | Introduce accounting and financial reporting systems that follow |

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| | internationally accepted accounting standards. |
| 13.09 | Develop and streamline bankruptcy law systems that facilitate corporate reorganization. |
| 13.10 | Establish a financial system that enables a variety of financing and capital raising methods. |
| 13.11 | Strengthen and promote improved standards of corporate governance. |
| 13.12 | Develop a labor market that facilitates domestic labor mobility, taking into account national labor market conditions and policies. |
| 13.13 | Improve standards of professional services, such as legal and accounting services. |
| **TECHNOLOGY TRANSFER** | |
| 14.01 | Improve the transparency of related laws and regulations. |
| 14.02 | Reduce the restrictions on the transfer of technology consistent with the protection of essential security interests (for example by modifying as appropriate existing laws and regulations) to facilitate the flow of technology for the economic development of member economies. |
| 14.03 | Develop legislation, regulations and measures for the adequate and effective protection of technology and related interests arising from technology transfer. |
| **VENTURE CAPITAL AND START-UP COMPANIES** | |
| 15.01 | Introduce measures to assist businesses in different stages including start-up companies seeking equity funding, such as:<br>-- establishment of a legal and taxation system to assist the development of the venture capital industry and investment banking; and<br>-- establishment of sound and transparent initial public offering (IPO) markets for small and medium enterprises (SMEs). |

## 3. Transparency Standards on Investment

**Los Cabos, Mexico, October 2002**

1. Each Economy will, in the manner provided for in paragraph 1 of the Leaders' Statement, ensure that its investment laws, regulations, and progressively procedures and administrative rulings of general application ("investment measures") are promptly published or otherwise made available in such a manner as to enable interested persons and other economies to become acquainted with them.

2. In accordance with paragraph 2 of the Leaders' Statement, each Economy will, to the extent possible, publish in advance any investment measures proposed for adoption and provide a reasonable opportunity for public comment.

3. In accordance with paragraph 3 of the Leaders' Statement, upon request from an interested person or another Economy, each Economy will:

   (a) endeavor to promptly provide information and respond to questions pertaining to any actual or proposed investment measures referred to in paragraph 1 above; and

   (b) provide contact points for the office or official responsible for the subject matter of the questions and assist, as necessary, in facilitating communications with the requesting economy.

4. Where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding investment matters covered by these standards, that:

(a) provide for tribunals or panels that are impartial and independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the investment matter;

(b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;

(c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record complied by the administrative authority; and

(d) ensure subject to appeal or further review under domestic law, that such decisions will be implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.

5. If screening of investments is used based on guidelines for evaluating projects for approval and for scoring such projects if scoring is used, in accordance with paragraph 1 of the Leaders' Statement each Economy will publish and/or make publicly available through other means those guidelines.

6. Each Economy will maintain clear procedures regarding application, registration, and government licensing of investments by:

   (a) publishing and/or making available clear and simple instructions, and an explanation of the process (the steps) involved in applying/government licensing/registering; and

   (b) publishing and/or making available definitions of criteria for assessment of investment proposals.

7. Where prior authorization requirement procedures exist, each Economy will conduct reviews at the appropriate time to ensure that such procedures are simple and transparent.

8. Each Economy will make available to investors all rules and other appropriate information relating to investment promotion programs.

9. When negotiating regional trade agreements and free trade agreements that contain provisions with an investor/state dispute settlement mechanism, each Economy should consider whether or not to include transparency provisions.

10. Each Economy will participate fully in APEC-wide efforts to update the APEC Investment Guidebook.

# SELECTED UNCTAD PUBLICATIONS ON TRANSNATIONAL CORPORATIONS AND FOREIGN DIRECT INVESTMENT

(For more information, please visit www.unctad.org/en/pub)

## A. SERIAL PUBLICATIONS

### *World Investment Reports*

(For more information visit www.unctad.org/wir)

***World Investment Report 2008. Transnational Corporations and the Infrastructure Challenge.*** Sales No. E.08.II.D.23. $80. http://www.unctad.org/en/docs//wir2008_en.pdf.

***World Investment Report 2007. Transnational Corporations and the Infrastructure Challenge. An Overview.*** 42 p. http://www.unctad.org/en/docs/wir2008overview_en.pdf.

***World Investment Report 2007. Transnational Corporations, Extractive Industries and Development.*** Sales No. E.07.II.D.9. $75. http://www.unctad.org/en/docs//wir2007_en.pdf.

***World Investment Report 2007. Transnational Corporations, Extractive Industries and Development*. *An Overview*.** 50 p. http://www.unctad.org/en/docs/wir2007overview_en.pdf.

***World Investment Report 2006. FDI from Developing and Transition Economies: Implications for Development.*** Sales No. E.06.II.D.11. $75. http://www.unctad.org/ en/docs//wir2006_en.pdf.

***World Investment Report 2006. FDI from Developing and Transition Economies: Implications for Development*. *An Overview*.** 50 p. http://www.unctad.org/ en/docs/wir2006overview_en.pdf.

***World Investment Report 2005. Transnational Corporations and the Internationalization of R&D.*** Sales No. E.05.II.D.10. $75. http://www.unctad.org/ en/docs//wir2005_en.pdf.

***World Investment Report 2005. Transnational Corporations and the Internationalization of R&D. An Overview***. 50 p. http://www.unctad.org/en/docs/wir2005overview_en.pdf.

***World Investment Report 2004. The Shift Towards Services.*** Sales No. E.04.II.D.36. $75. http://www.unctad.org/en/docs//wir2004_en.pdf.

***World Investment Report 2004. The Shift Towards Services. An Overview***. 62 p. http://www.unctad.org/en/docs/wir2004overview_en.pdf.

***World Investment Report 2003. FDI Policies for Development: National and International Perspectives.*** Sales No. E.03.II.D.8. $49. http://www.unctad.org/en/docs//wir2003_en.pdf.

***World Investment Report 2003. FDI Polices for Development: National and International Perspectives. An Overview***. 66 p. http://www.unctad.org/en/docs/wir2003overview_en.pdf.

***World Investment Report 2002: Transnational Corporations and Export Competitiveness***. 352 p. Sales No. E.02.II.D.4. $49. http://www.unctad.org/en/docs//wir2002_en.pdf.

***World Investment Report 2002: Transnational Corporations and Export Competitiveness. An Overview***. 66 p. http://www.unctad.org/en/docs/wir2002overview_en.pdf.

***World Investment Report 2001: Promoting Linkages***. 356 p. Sales No. E.01.II.D.12 $49. http://www.unctad.org/wir/contents/wir01content.en.htm.

***World Investment Report 2001: Promoting Linkages. An Overview***. 67 p. http://www.unctad.org/wir/contents/wir01content.en.htm.

***Ten Years of World Investment Reports: The Challenges Ahead***. *Proceedings of an UNCTAD special event on future challenges in the area of FDI*. UNCTAD/ITE/Misc.45. http://www.unctad.org/wir.

***World Investment Report 2000: Cross-border Mergers and Acquisitions and Development***. 368 p. Sales No. E.99.II.D.20. $49. http://www.unctad.org/wir/contents/wir00content.en.htm.

***World Investment Report 2000: Cross-border Mergers and Acquisitions and Development*. *An Overview*.** 75 p. http://www.unctad.org/wir/contents/wir00content.en.htm.

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