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HOME COUNTRY MEASURES

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on issues in international investment agreements

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NOTE

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The following symbols have been used in the tables:

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

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

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

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

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

Reference to "dollars" ($) means United States dollars, unless otherwise indicated.

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

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Preface

The secretariat of the United Nations Conference on Trade and Development (UNCTAD), is implementing a work programme on international investment agreements. It seeks to help developing countries to participate as effectively as possible in international investment rule-making at the bilateral, regional, plurilateral and multilateral levels. The programme embraces capacity-bulding seminars, regional symposia, training courses, dialogues between negotiators and groups of civil society and the preparation of a Series of issues papers.

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

The Series is produced by a team led by Karl P. Sauvant and Pedro Roffe. The principal officer responsible for its production is Anna Joubin-Bret, who oversees the development of the papers at various stages. The members of the team include Patricia Mira Pontón, Aimé Murigande and Jörg Weber. The series' principal advisers are Arghyrios A. Fatouros, Sanjaya Lall, Peter T. Muchlinski and Patrick Robinson. The present paper is based on a manuscript prepared by John Kline. Reprinted in the Appendix is the "Agreed Outcome" from an UNCTAD Expert Meeting on Home Country Measures held in Geneva from 8 to10 November 2000, as it is immediately relevant to the topic of this paper. The final version reflects comments received from Susan Borkowski, Werner Corrales, William Dymond, Corinne Dreyfus, Felipe Jaramillo, Joachim Karl, Mark Koulen, Mansur Raza, Homai Saha, Chak Mun See and Marinus Sikkel. The paper was desktop-published by Teresita Sabico.

Rubens Ricupero
Secretary-General of UNCTAD

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UNCTAD has carried out a number of activities related to the work programme in cooperation with other intergovernmental organizations, including the Secretariat of the Andean Community, l'Agence pour la Francophonie, the Inter-Arab Investment Guarantee Corporation, the League of Arab States, the Organization of American States, la Secretaria de Integración Económica Centroamericana and the World Trade Organization. UNCTAD has also cooperated with non-governmental organizations, including the German Foundation for International Development, the Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico - la Universidad de Buenos Aires, the Consumer Unity and Trust Society - India, the Economic Research Forum - Cairo, the European Roundtable of Industrialists, the Friedrich Ebert Foundation, the International Confederation of Free Trade Unions, Oxfam, SOMO - Centre for Research on Multinational Corporations, the Third World Network, la Universidad del Pacifico, the University of the West Indies, and World Wildlife Fund International.

Funds for the work programme have so far been received from Australia, Brazil, Canada, France, Japan, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the European Commission. China, Egypt, Guatemala, India, Jamaica, Japan, Malaysia, Morocco, Peru, Sri Lanka and Venezuela have also contributed to the work programme by hosting regional symposia. All of these contributions are gratefully acknowledged.

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Executive summary

Most international negotiations on foreign direct investment (FDI) focus on issues involving the paired relationship between transnational corporations (TNCs) and host countries. TNCs desire access to foreign resources and markets to further their strategic global business objectives. Host countries desire FDI that promotes national economic and social objectives. Many host countries, including developing countries, adopt measures to attract FDI by, for example, improving their regulatory framework for FDI, enhancing educational programmes, or offering incentives. In reality, however, this paired relationship between TNCs and host countries is triangular. Home countries also influence FDI flows, including the relative prospects that their TNCs will select developing country investment sites. The question thus arises: to what extent do international investment agreements (IIAs) address home country measures (HCMs) that influence FDI flows to host countries?

A variety of HCMs affect TNC decisions regarding the selection of host country investment sites. In addition to possible restrictions on capital outflows, HCMs can encompass general policy pronouncements, information and technical assistance, transfer of technology, financial and fiscal incentives, investment insurance and market access regulations. A stock-taking analysis of HCMs in IIAs shows that developed countries have removed most national restrictions on outward FDI and embrace declaratory statements in inter-governmental agreements that endorse the promotion of FDI, particularly to developing countries. These policy declarations, however, are often not linked to specific obligations for the adoption of HCMs. Many FDI promotional declarations remain hortatory, particularly in the context of bilateral investment treaties (BITs). Similarly vague language is found in other international accords, although some regional agreements between developed and developing countries create a basis for complementary follow-up assistance programmes that offer practical support to both capital-importing countries and potential investing enterprises.

Promotional efforts often aim at correcting market imperfections that can disadvantage developing countries as TNCs consider prospective FDI sites. Developed countries can help provide information and facilitate contacts that match potential investors with FDI opportunities in host developing countries. Some national and regional programmes provide financial or fiscal incentives as well as investment insurance guarantees to help offset some of the risk associated with FDI, particularly in smaller developing countries where investors (particularly smaller ones) have less experience. HCMs may also prioritize assistance to promote FDI with particular technology transfer benefits or support FDI flows to the least developed countries, for example, through preferential market access.

Most of this assistance, however, remains at the discretion of the developed country and is commonly shaped to serve its own business interests along with general development objectives. This national benefit factor is particularly evident in the design of many financial and fiscal assistance programmes as well as market access HCMs (such as product certification or rules-of-origin regulations) that can discourage FDI flows by diminishing market access prospects for FDI projects with export potential. The limited input of developing countries into the design and execution of HCMs, as well as the often uncertain commitment to the duration of FDI promotional assistance, may diminish the beneficial impact promotional programmes can have on development, including on technology transfer objectives. Increased stability, predictability and transparency among these promotional efforts could serve the interests of both host and home countries, as well as TNCs.

The range of HCMs affecting outward FDI leads to interactions with a number of other concepts related to discussions of IIAs. The most significant interactions occur with issues involving incentives, taxation, transfer pricing, transfer of technology, most-favoured-nation (MFN) treatment and investment-related trade measures (IRTMs).

Most policy options to increase the beneficial impact of HCMs on FDI flows also relate to these areas. The practical effectiveness of these options are likely to increase proportionately to the strength of the policy commitments contained in IIA provisions, running along a continuum from hortatory declarations to binding obligations accompanied by detailed implementation plans and monitoring mechanisms. Similarly, the significance of IIA outcomes is likely to vary with the range and scope of HCM issues addressed by these policy provisions. For example, while encouraging a more direct link between developed country statements regarding FDI promotion and follow-up programmatic actions, increased collaboration on promotional initiatives could improve delivery mechanisms for financial incentives, establish development preferences for the administration of fiscal regulations and enhance technology transfer options for developing countries. A cross-cutting implementation issue that also merits consideration is the potential extraterritorial impact that HCMs might have in host developing countries, including the influence on a potential investor’s decision to engage in FDI as well as a TNC’s performance, once invested.

INTRODUCTION

An FDI transaction establishes a triangular relationship involving three main actors: the TNC investing funds; the capital-importing host country; and the capital-exporting home country. Most discussions of international investment issues focus on the TNC/host country dimension, especially on issues of why TNCs invest and how they behave in host countries as well as what host country factors attract FDI and how those countries should treat foreign investors. This paper examines a key aspect on the third point of the triangle B the laws, regulations and policies of home countries that relate to FDI and the extent to which such HCMs are, or can be, reflected in IIAs. A central concern is the impact HCMs exert on FDI flows and, in particular, how HCMs might increase such flows, including associated technology transfer, to developing countries.

When used in the context of international investment instruments, the term Ahome country measures@ refers to how such instruments might address a range of national laws, regulations and policies that affect outward FDI. Historically, the term has drawn limited attention because HCMs fell under the unilateral authority of developed country Governments that acted principally to promote the interests of their own TNCs. Nevertheless, these measures, which may restrict, permit or promote FDI, can influence both the quantity and quality of investment flows to developing countries. The resulting impact on development may be direct or indirect, deliberate or unintentional.

Although HCMs may restrict FDI, the principal policy debate revolves around actions capital-exporting developed countries might take to promote FDI, especially to developing countries. Many developed countries espouse policy positions that support FDI promotion, but the reality of follow-on programmatic activities often does not match the rhetoric of their declaratory statements. Development assistance programmes may contain a component of FDI promotion, including information dissemination, financial or tax incentives and investment insurance. Most HCMs operate unilaterally while others support initiatives stemming from bilateral, regional or multilateral agreements.

When formulated unilaterally by home country Governments, the principal focus of HCMs is a TNC's parent-affiliate link and how that relationship affects home country interests. Nevertheless, HCMs also acquire a development dimension from the nature of their actual or potential impact on FDI flows to developing countries. A first step to enhancing development benefits would be to enlarge the magnitude of FDI flows, removing impediments HCMs may impose that discourage FDI and augmenting promotional programmes that assist investors to identify and undertake projects in developing countries. Further benefits might be realized through a coordinated approach to the design, development and implementation of HCMs. Developed and developing countries could cooperate on how measures might best enhance FDI quality as well as quantity, including their impact on technology transfer. IIA negotiations might provide an opportunity to explore this type of cooperative relationship on HCMs as they relate to development objectives.

Section I

EXPLANATION OF THE ISSUE

The relative novelty of discussing HCMs in the context of IIAs requires some basic definition and identification of the types of measures that comprise this topic. Although national laws and policies are not covered, the increasing integration of national economies with global commerce expands the range of HCMs that influence FDI decisions, including potential investment flows to developing countries.

A. HCMs with impacts on FDI in developing host countries

This paper focuses on the main groups of HCMs that directly promote FDI to developing host countries. Before examining these measures, however, two issues should be noted that will not be centrally addressed by this analysis. The first relates to HCMs that govern whether, and under what circumstances, FDI may occur. National Governments may restrict capital outflows in their national interest, for example, to encourage domestic investment or respond to balance-of-payments concerns that might threaten national interests during times of foreign exchange shortfalls or other financial instability. However, most traditional home countries have engaged in a progressive liberalization of capital outflow restrictions, stimulated principally by the Organisation for Economic Co-operation and Development (OECD) Code of Liberalisation of Capital Movements, a binding agreement that covers outward and inward FDI. By the mid-1990s, OECD countries had removed most capital outflow restrictions, including those on capital outflow to developing countries. However, some restrictive measures remain for use in emergency situations, to prohibit FDI in certain countries and in regulatory regimes in newer capital-exporting countries not covered by the OECD agreements (UNCTAD, 1995).

A second, somewhat related issue not extensively addressed in this paper concerns how provisions in IIAs might deal with HCMs in a manner that recognizes the increasing number of TNCs now based in developing countries. Although HCMs are primarily associated with developed countries, the concept would also apply, at least in principle, to how IIAs address measures affecting capital exports from developing countries.[1] General principles in IIAs that might seek to proscribe HCM restrictions on FDI may require qualifications to reflect the particular needs of developing countries, for example, by permitting a gradual liberalization schedule comparable to the experience with the OECD's Liberalisation Code (ibid.). Similar issues may arise in drafting IIA provisions on other HCMs, where broad principles derived from historical experience in developed countries may entail differential application to developing country capital exporters.

B. Identification of major types of HCMs

Although no standardized classification of HCMs exists, six broad categories encompass the major types of HCMs that are used to promote or otherwise influence FDI flows:

- **Policy positions** that encourage FDI to developing countries are typically positive in tone but vague in specific commitments. Many home countries face competing policy objectives where support for national TNCs may conflict for example with domestic labour interests, and the concept of official neutrality on FDI flows contrasts with proclaimed support for increased FDI flows to assist developing countries. These competing or conflicting interests can lead home countries towards generalized statements on intentions or goals that maintain maximum flexibility on follow-up implementation, if any. In general, such policy pronouncements are hortatory and set forth positions that would benefit the home country as well as host developing countries. Nevertheless, these statements could be linked to more substantive policy or programmatic commitments to development assistance, including actions involving other types of HCMs.

- **Information provision and technical assistance** can help overcome market imperfections that sometimes disadvantage developing countries. Promoting FDI to many developing countries must begin with fundamental steps to gather, publish and disseminate basic information regarding the countries' legal frameworks, macroeconomic circumstances, sectoral conditions and other factors that form the broad political and socio-economic context within which foreign enterprises will look to invest. Developed countries can help collect and disseminate information on the investment climate and potential opportunities in developing countries, facilitating business contacts or even sponsoring "matching" programmes, particularly for small and medium-sized enterprises (SMEs). Although sometimes especially appropriate for a developing country's situation, these firms generally lack the global breadth, background and resources to conduct a wide search of unconventional FDI sites. Promotional HCMs may also offer technical assistance to developing countries that seek to enhance their investment climate, including support for regulatory reforms to improve transparency and administrative efficiency in areas of major concern to investors.

- **Technology transfer** can be facilitated by HCMs that encourage particular types of FDI or enhance host country conditions conducive to technology-related FDI. Some programmes tailor their support for FDI projects to encourage increased technology transfer or prioritize grants of assistance to promote specific technology-transfer objectives (for example, relating to environmental protection goals). Technology transfer can also be fostered by technical assistance that strengthens the receptive capacity of developing countries for FDI, in particular for technology-intensive sectors.

- **Financial and fiscal incentives** comprise a diverse array of HCMs that seek to promote FDI to developing countries. Development assistance institutions in some countries offer national enterprises direct financial support in the form of grants, loans or even equity participation for investment projects in eligible developing countries. Special support might be offered for FDI in designated industries, such as infrastructure projects, or for ventures undertaken by SMEs or with local business partners. Fiscal incentives (or disincentives) arise from HCMs relating to taxation, especially in the granting of tax exemptions, deferrals or credits for taxation of foreign source income, as well as general tax sparing provisions. Transfer pricing standards, monitoring, enforcement and information-sharing arrangements can also affect FDI prospects.

- **Investment insurance** represents a narrower but extensive, traditional category of HCMs aimed at promoting FDI. Most national and some regional or multilateral programmes offer coverage of political and other non-commercial risk not normally included under conventional, private insurance policies. These financial guarantee programmes promote FDI because the protected risk is generally higher in developing countries. Although the principal purpose of such HCMs is to protect their own national investors, the resulting off-set of risk helps encourage FDI. Some investment insurance agencies provide associated promotional support specifically designed to encourage investment in development-oriented projects.

- **Market access regulations** encompass trade-related measures dealing with matters such as product certification, country-of-origin definitions or preferential import regimes. These regulations can influence the comparative profitability of FDI in various developing countries, thereby affecting prospective investment decisions, particularly for export-related facilities. HCMs that inhibit domestic market access for exports from overseas facilities, or conversely grant favoured treatment to imports from selected countries, help shape the distribution pattern of global FDI flows. These regulations comprise one cluster of IRTMs (UNCTAD, 1999c) that affect TNC production strategies.

Although not a separate category of HCMs, **extraterritorial controls** constitute a related issue that cuts across the preceding categories. This particular method of implementing HCMs merits separate consideration because of its unusual and often controversial use. Applying national laws or regulations outside a home country's borders to TNC operations occurring within another sovereign political jurisdiction constitutes an extraterritorial extension of HCMs. Extraterritorial controls can include HCMs already discussed, such as taxation of foreign source income, as well as HCMs not previously identified, such as competition policy or trade controls. More broadly, the concept might also be used to extend HCMs in other areas, such as labour relations, the environment or corporate social responsibility standards. From the perspective of private foreign investors, potential conflicts over national jurisdictions can act as disincentives to investment because TNCs do not want to be caught in the middle between home and host country laws, where they are subject to the authority and potential sanctions of two (or more) sovereign Governments whose interests may conflict.

Note

1 For an analysis of FDI promotional policies and programmes in both developed and developing countries, see UNCTAD, 1995, chapter VII. That chapter contains more detail on examples of specific national programmes than can be included in this paper.

Section II

STOCKTAKING AND ANALYSIS

A. Policy positions to encourage FDI to developing countries

Policy positions to encourage FDI in developing countries are generally found as part of a development assistance programme. Although potential FDI recipients may offer suggestions regarding how such policies might aid their development, home countries generally control the formulation of programme goals and implementation procedures. Many initiatives are, therefore, weighted towards the type of FDI policy that promotes the home country's TNCs and, more specifically, the realization of export growth and employment benefits within the home country's own borders (boxes 1 and 2). (In parallel fashion, such initiatives may restrict FDI promotion to developing countries for projects that threaten adverse impacts on home country employment or other interests[1]). Most policy position statements contained in IIAs are general, hortatory calls for FDI promotion that neither substantively obligate nor constrain home country actions. Nevertheless, some IIAs, particularly regional instruments involving multiple developing country participants, incorporate specific policy positions regarding FDI promotion activities, providing a possible basis for assessing follow-up implementation activities.

Box 1. Examples of promotional HCMs in the United Kingdom

"The Commonwealth Development Corporation (CDC) is the UK Government's main instrument for directly mobilising private investment in developing countries. It is a public/private partnership with the UK government holding a substantial minority shareholding and a "golden share". It has existed since 1948 and now has an

/…

(Box 1, concluded)

investment portfolio in excess of $1.5 billion with around 80% in countries with a GNP per capita of less than $1,600. The CDC invests ethically in projects in developing countries with the objective of "maximising the creation and long term growth of viable businesses in developing countries". As well as the developmental impact of its investments, the CDC also has a strong demonstrative effect by showing that private investors can achieve returns from investing in poorer countries. The CDC investment strategy includes conditions to promote development, such as 70 % of all investment must be for the immediate or prospective benefit of poorer countries".

The country's "new Infrastructure Financing Facility for Africa was launched in September 2000. To date there has been very little long-term private investment in infrastructure in sub-Saharan Africa with foreign investors regarding it as too risky and local markets lacking the ability to provide long term investment. The Facility will offer to reduce the risk to investors and therefore aims to attract private investment in sectors such as electricity, gas pipelines, telecommunications, transport and water and sanitation".

...

The Overseas Investment Insurance Scheme "provides insurance for UK investors against the main political risks of expropriation, war, restrictions on remittances and breach of government undertakings. The scheme covers equity investments in, and loans advanced to, overseas enterprises. Loans need not be tied to the export of goods/ services from the UK or a third country, and they are not dependent on the country in question having a bilateral investment treaty with the UK. A recent example of support was for an $80 million investment in Mozambique. The support, in the form of a loan from a syndicate of banks, will help to finance the purchase of South African goods for a giant aluminum smelter plant under construction near the capital, Maputo."

Source: United Kingdom, 2000, pp. 3 and 4.

Box 2. Examples of Swiss HCMs promoting FDI and technology transfer

Services of the Swiss Organisation for Facilitating Investments

- Information
- General investment related advisory services
- Partner search (matchmaking)
- Business planning assistance
- Financial structuring of investment projects
- Search for funds

Funding facility for pre-investment studies

Purpose: facilitate investment of Swiss SMEs in developing countries by sharing the financial risk during the preparation/test phase through partial funding of the pre-investment studies/pilot projects.

Offer: (1) Credit up to 1 million Swiss francs;
(2) Interest rate: 3 year-SEBR plus 3 per cent;
(3) No collateral required;
(4) Credit can not be converted into a grant if study/pilot phase shows that the project is attractive to invest further.

Swiss Development Finance Corporation

Purpose: Swiss Development Finance Corporation is an equity investment company initiated by the State Secretariat for Economic Affairs and operated by Swiss Emerging Market Partners in Zurich. Its purpose is to provide financial support to investment projects in countries with economies under development or in transition. It is owned 49 per cent by the Swiss Confederation and 51per cent by private Swiss companies.

Offer: (1) Subordinated (mezzanine) debt with warrants;
(2) Direct equity investments;
(3) Short term senior bridge financing up to 6 months to strengthen the capacity of clients to borrow senior debt.

Source: SOFI, 2000.

When IIAs lack specific development assistance commitments, their policy position statements usually address the promotion of FDI, if at all, in only the most broad and general terms. The Pacific Basin Charter on International Investments,[2] under the heading "Basic Principles", suggests only that "Governments – especially those of economies in a creditor or favorable foreign exchange position – should stimulate and encourage the flow of private investments abroad". The Asia-Pacific Economic Cooperation (APEC) Non-Binding Investment Principles address HCMs indirectly in terms of removing restrictions rather than actively promoting FDI. Under the heading "Removal of Barriers to Capital Exports", "Member economies accept that regulatory and institutional barriers to the outflow of investment will be minimised". Similar general policy positions regarding FDI promotion to developing countries are found in most BITs whose provisions usually contain only hortatory calls for home countries to promote outward FDI flows. These policy positions stand in stark contrast to BIT provisions that contain more specific, binding obligations regarding the treatment of inward FDI by host countries (UNCTAD, 1998a, pp. 7, 50-51).

One of the more specific BIT policy position statements of a home country commitment to promoting FDI to a developing country is reflected in the BIT signed in 1980 between the Belgium-Luxembourg Economic Union and Cameroon. Article 2 (3) states: "Aware of the importance of investments in the promotion of its policy of cooperation for development, the Belgium-Luxembourg Economic Union shall strive to adopt measures capable of spurring its commercial operations to join in the development effort of the United Republic of Cameroon in accordance with its priorities" (UNCTAD, 1998a, p. 52). An even more substantive approach to structuring BIT policy provisions on FDI is outlined in the Caribbean Community (CARICOM) Guidelines for Use in the Negotiation of Bilateral Treaties which calls for more assured home country promotion of FDI. Under the heading "Type of Agreement Desired", the Guidelines suggest that:

"The preamble of the BIT should include:

(i) a provision which reflects the objective of increasing capital flows from the USA to the CARICOM States to build up their productive base and hence enhance their economic and social development;

(ii) a provision which reflects the undertaking of the USA to establish incentives and institutional arrangements to encourage the flow of investments from the USA to CARICOM States."

Although no negotiated BITs between the United States and CARICOM States incorporate these Guidelines provisions, the United States did unilaterally endorse a policy position linking FDI encouragement to development objectives in the "African Growth and Opportunity Act" passed in 2000. That legislation approved provisions offering enhanced trade preferences to countries in sub-Saharan Africa in the belief that such steps "will encourage both higher levels of trade and direct investment in support of the positive economic and political developments under way throughout the region" (United States, Congress, 2000, Section 102(9)). Some policy positions adopted in regional development agreements also provide a basis for more concrete follow-up actions on FDI promotion. The Fourth Convention between the African, Caribbean and Pacific countries (ACP) and the European Economic Community (EEC) (Lomé IV) sets forth "Principles governing the instruments of cooperation", including article 23 which promotes "helping the ACP States to gain access to the capital markets and encouraging direct private European investment to contribute towards the development of the ACP States". Some specific promotional activities to implement this policy position are examined in subsequent parts of this section.

Even more specific policy statements regarding home country commitments to promote FDI are found in regional agreements among developing countries. These IIAs offer a greater symmetry between home country responsibilities to promote outward FDI as well as host country obligations regarding FDI treatment. (This symmetry between promotion and treatment seldom occurs when regional agreements are negotiated between developed countries at substantially similar levels of economic development.) For example, the revised draft Model Agreements for Promotion and Protection of Investments developed by the Asian-African Legal Consultative Committee sought to encourage FDI among developing countries in the region. Article 2(i) states that: “Each Contracting Party shall take steps to promote investments in the territory of the other Contracting Party and encourage its nationals, companies and State entities to make such investments through offer of appropriate incentives, wherever possible, which may include such modalities as tax concessions and investment guarantees”.

The policy positions adopted in some regional agreements among developing countries explicitly call for preferential promotion of FDI. The Treaty Establishing the Caribbean Community differentiates between the more and less developed countries among its membership, establishing in chapter VII, article 59(1), a special regime for financial assistance “with a view to promoting the flow of investment capital to the Less Developed Countries”. The Agreement on Investment and Free Movement of Arab Capital Among Arab Countries endorses a policy in article 1(a) that: “Every Arab state exporting capital shall exert efforts to promote preferential investments in the other Arab states and provide whatever services and facilities required in this respect”. A follow-up mechanism to this commitment was the Convention Establishing the Inter-Arab Investment Guarantee Corporation to provide investment insurance as well as other promotional activities designed to stimulate FDI.

The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) contains policy position statements that provide a basis for follow-up programmatic actions. The preamble of this instrument states clearly that it is adopted "to enhance the flow to developing countries of capital and technology for productive purposes under conditions consistent with their development needs, policies and objectives, on the basis of fair and stable standards for the treatment of foreign investment". To promote these objectives, in addition to establishing an investment insurance programme, the MIGA Convention also provides in article 23 for "Investment Promotion" activities involving research, information dissemination and technical assistance. These activities shall under article 23(a)(ii) "seek to remove impediments, *in both developed and developing member countries*, to the flow of investment to developing member countries"(emphasis added).

Policy references to HCMs may also occur in IIAs in relation to specific sets of policy issues. For example, relevant policies in the area of restrictive business practices are addressed in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. Among the principles advanced to meet the Set's objectives is the "preferential or differential treatment for developing countries", which under paragraph 7 states that "particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries". This provision should encourage developed countries to consider possible investment or technology transfer impacts on developing countries, rather than only the effects on their own domestic economies, when contemplating whether, or how, to take action against anti-competitive TNC behaviour.

The General Agreement on Trade in Services (GATS) incorporates a more general policy position which, if implemented, could both promote service-related FDI to developing countries while reducing HCMs that may restrict the access of developing country service providers to developed country markets. Article IV specifically states:

> “The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:
>
> (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis;
> (b) the improvement of their access to distribution channels and information networks; and
> (c) the liberalization of market access in sectors and modes of supply of export interest to them.”

This policy provision could lead to home country activities to promote service-related FDI into developing countries to strengthen their capacity as well as alter HCMs that may restrict the access of developing country service providers to developed country markets. On the other hand, a narrower interpretation could view such a response as going beyond actions envisaged by the GATS provisions, because its specific commitments do not directly address FDI-related aspects of trade in services. Although the “shall” wording of the provision indicates a level of commitment beyond hortatory formulations, practical implementation has fallen short of developing country expectations (Shahin, 1999).

One example of possible follow-up to the GATS policy language emerged in the Cotonou Agreement signed by the ACP countries and the European Union, on 23 June 2000, following the expiration of Lomé IV. In a chapter on “Trade in Services”, the provisions of Article 41 acknowledge both the requirement for addressing developing country interests in liberalization agreements and “the need for special and differential treatment for ACP suppliers of services”. While noting the application of most favoured nation treatment under the GATS, the article stated the European Union’s intention to "give sympathetic consideration to the ACP States' priorities for improvement in the EC schedule, with a view to meeting their specific interests". In this context, the article specified particular areas in which:

> "The Community shall support the ACP States efforts to strengthen their capacity in the supply of services. Particular attention shall be paid to services related to labour, business, distribution finance tourism, culture and construction and related engineering services with a view to enhancing their competitiveness and thereby increasing the value and the volume of their trade in goods and services" (Cotonou Agreement, 2000, p. 31).

This more specific list of sectoral objectives provides more specific goals than the GATS provisions against which to evaluate actual implementation steps.

Thus, statements of policy positions related to HCMs are found in documents that range across the spectrum from unilateral declarations to international agreements. The vast majority of these statements, however, are confined to hortatory declarations that impose few specific obligations on home countries, or leave implementation steps to be negotiated or developed later. Approaches involving collaborative discussions among countries in a region, or in an international institution, may bolster the ability of developing countries to attain commitments regarding HCMs that reflect more appropriate developmental benefits than unilaterally-designed actions, or even BIT provisions in which the influence of single developing host countries may be more constricted. Nevertheless, practical outcomes will be magnified if a document's general statement of policy principles is followed by provisions containing a more detailed list of items or specific implementation process that will translate policy into practice.

B. Information provision and technical assistance

Programmes to gather and disseminate information on FDI opportunities in developing countries and to provide technical assistance to facilitate such investments comprise an important category of HCMs that can promote FDI. These initiatives help overcome market imperfections or structural deficiencies that often work to the disadvantage of developing countries, especially when an economy's relatively small size, geographic distance or limited prior experience with foreign investors serve to exclude it from customary lists of prospective FDI sites.

Investment climate information constitutes an essential element of an FDI decision-making process. Although prospective host countries can and do compile many of the necessary data, their efforts could be aided, particularly in the information-dissemination stage, by home country Governments and relevant international institutions. For example, the Convention establishing MIGA specifies in article 23 on Investment Promotion that the Agency undertake research, information dissemination and technical assistance activities to promote FDI in developing countries as an appropriate complement to the institution's investment insurance function. MIGA seeks to coordinate these activities with agencies that perform a similar promotional role, including the International Finance Corporation.

When developing countries negotiate agreements among themselves, their mutual interest in an exchange of investment climate information is sometimes reflected in provisions calling for the "Promotion of Investment and Exchange of Information". For example, article 17-14 of the Treaty on Free Trade between the Republic of Colombia, the Republic of Venezuela and the United Mexican States provides: "With a view to increasing reciprocal investments, the Parties shall design and implement mechanisms for the dissemination, promotion, and exchange of information relating to investment opportunities". The Asia Investment Facility, a part of the Asia-Invest Programme of the European Union, was "designed to identify, evaluate and promote focused investment opportunities". Among its various activities, this facility will conduct:

> "*Research, by country and by industrial* sector, into investment opportunities for European Union companies in Asia (principally in the less developed countries), and the subsequent dissemination of information through workshops and publications. In particular, individual Asian countries will be targeted and an assessment will be made of investment opportunities in specific industries, the legislative framework, financing opportunities and specific major projects" (UNCTAD and EC, 1996, p. 68).

Although the facility will also disseminate information in Asia on investment opportunities in European Union countries, this function would not require the same research and information preparation for developed countries on which data is already easily available.

Since 1996, the Asia Europe Meeting (ASEM) brings together the 15 member States of the EU, the European Commission and 10 Asian partners. ASEM economic ministers endorsed in 1999 a list of "Most Effective Measures to Attract Direct Foreign Investment" as a non-binding benchmark – they relate to investment policy measures that impact directly on the investment climate. Partners report annually on the implementation of these measures. In order to foster transparency of investment regimes, ASEM also set up the "Virtual Information Exchange" website giving access to ASEM partners' national investment websites that contain regulatory and promotional information. The listed national contact points allow direct communication with national authorities (Asia-Invest Secretariat, 2001).

The Cotonou Agreement includes a commitment in article 75 on "Investment promotion" to "disseminate information on investment opportunities and business operating conditions in the ACP States"(Cotonou Agreement, 2000, p. 49). In an annex on "Institutional Support", assistance is also pledged to strengthen efforts by the Centre for the Development of Enterprise to promote private sector development activities, including its initiatives to "provide information to European companies and private sector organisations on business opportunities and modalities in ACP countries" (ibid., Annex, III, p. 25). The Agreement also calls for periodically analysing and providing the business community with information on broad issues affecting ACP-European Union economic relationships as well as specific sectoral problems relating to the production or products at the regional or sub-regional level.

The Framework Agreement on the Association of Southeast Asian Nations (ASEAN) Investment Area includes a commitment in article 6 that member countries undertake a joint Promotion and Awareness Programme to encourage FDI flows. This approach emphasizes the shared nature of the endeavour, with home and host country agencies cooperating in joint FDI promotion activities, including seminars, workshops and training programmes. Investment promotion agencies in member countries are called upon to hold regular consultations on FDI promotion and exchange lists of industries in which good investment opportunities exist (UNCTAD, 2000b, p. 142).

Business contacts and facilitation functions are closely related to the dissemination of investment climate information. Seminars, workshops and investment missions all provide valuable occasions for personal exchanges when prospective investors can meet and speak with Government officials and potential local business partners in developing countries. The active participation of home countries plays an especially valuable role in linking prospective investors with opportunities in developing host countries. The European Union's Asia-Invest Programme embraces an unusually broad array of mechanisms for this purpose, including:

- The Asia-Invest Antennae B promotion points hosted by private sector groups in European Union countries that disseminate information to business organizations and enterprises;

- The Asia-Invest Membership Scheme B a distribution channel for newsletter and bulletins;
- The Asia Invest Inforoute B information exchange and databases access service;
- The Annual Asia-Invest Conference B sessions to discuss recent country developments, obtain feedback and suggestions and provide opportunities for business people to meet (UNCTAD and EC, 1996, pp. 68-69).

The European Union engaged in similar promotional activities with the ACP countries within the framework of the Lomé IV Convention. Among the actions specified in article 259 were:

“a) support efforts aimed at promoting European private investment in the ACP States by organizing discussions between any interested ACP State and potential investors on the legal and financial framework that ACP States might offer to investors;

b) encourage the flow of information in investment opportunities by organizing investment promotion meetings, providing periodic information on existing financial or other specialized institutions, their facilities and conditions and encouraging the establishment of focal points for such meetings.”

The new Cotonou Agreement reaffirms the usefulness of business facilitation measures. The document pledges under article 75 to “encourage the EU private sector to invest and to provide specific assistance to its counterparts in the ACP countries under mutual business cooperation and partnerships”. Included among the Agreement’s list of investment promotion measures are plans to “sponsor sectoral investment fora to promote partnerships and external investment” and to “promote national, regional and ACP-EU private sector business dialogue, cooperation and partnerships, in particular through an ACP-EU private sector business forum... to facilitate dialogue within the ACP/EU private sector and between the ACP/EU private sector and the bodies established under the Agreement" (Cotonou Agreement, 2000, p. 49). The Agreement's support for the Centre for the Development of Enterprise calls for the Centre to "provide assistance for investment promotion activities, such as investment promotion organisations, organisation of investment conferences, training programmes, strategy workshops and follow-up investment promotion missions" (ibid., Annex III, p. 24).

The Tokyo International Conferences on African Development, held in 1993 and 1998, also spurred new efforts aimed at information dissemination and business contact facilitation. The Africa-Asia Business Forum and the Africa-Asia Investment Information Center, organized in 1999, promotes the matching of Asian FDI with African investment opportunities. For example, working in conjunction with UNCTAD to promote business networking, a meeting in March 1999 facilitated over 120 one-on-one discussions that resulted in 16 business agreements between Asian and African firms (UNCTAD, 1999a, p. 33).

Technical assistance to promote FDI in developing countries covers a wide range of applications, including assistance to host Governments to improve regulatory regimes and enhance institutional capabilities to attract, receive and utilize FDI. Technical assistance may also be provided to investing enterprises, particularly SMEs, as well as to local joint venture partners. To develop and strengthen SMEs, the Agreement Establishing an Association between the European Communities and their Member States, of the One Part, and the Republic of Estonia, of the Other Part, under article 74 (2), commits the Governments to "encourage the exchange of information and know-how" by improving legal, administrative, technical, tax and financial conditions for SMEs and cross-border cooperation while providing specialized services such as management training, accounting, marketing and quality control. Similar commitments appear in article 75 (2) (3) of the European Union's Association Agreement with Latvia, which incorporates additional provisions dealing with links via European business cooperation networks and a commitment to supply technical assistance, especially for institutional back-up for SMEs, "regarding financial, training, advisory, technological and marketing services".

Article 74 in the chapter on "Investment and Private Sector Development Support" of the Cotonou Agreement specifies that "Cooperation shall, through financial and technical assistance, support the policies and strategies for investment and private sector development as set out in this Agreement". The "Investment Promotion" article (Cotonou Agreement, 2000, p. 49) calls specifically to "support capacity building for domestic investment promotion agencies and institutions involved in promoting and facilitating foreign investment". Provisions in Title III on "Technical Cooperation" call for technical cooperation that will "favour the transfer of know-how and increase national and regional capabilities". Assistance should strengthen ACP consulting firms and organizations, encourage exchange arrangements involving both ACP and European Union consultants and "support intra-ACP technical assistance in order to promote the exchange between the ACP States of technical assistance, management and professional expertise" (ibid., 2000, p. 51).

In article 21 on "Investment and private sector development", the Cotonou Agreement calls for cooperation to "promote business development through the provision of finance, guarantee facilities and technical support". Among other objectives, this assistance contemplates "encouraging inter-firm linkages, networks and cooperation including those involving the transfer of technology and know-how at national, regional and ACP-EU levels, and partnerships with private foreign investors". Similarly, article 23 on "Economic sector development" pledges cooperation to support policy and institution reforms and investments to provide access to the "development of scientific, technological and research infrastructure and services; including the enhancement, transfer and absorption of new technologies" (ibid., p. 21).

C. Technology transfer

Technology transfer represents a conceptual step beyond the sharing of know-how entailed in most technical assistance programmes, implying a more substantial application to business operations. Measures to transfer technology may still be aimed initially at developing or strengthening a host Government's receptive capabilities to attract and utilize newer commercial technologies, including through regulatory reforms that establish the framework for transferring competitive privately-held technology. The impact of HCMs on the transfer of technology ranges from prohibition to promotion. Some HCMs restrict technology transfer for national security or economic competitiveness reasons. On the other hand, HCMs can also promote the transfer of technology to developing countries in a manner that advances developmental objectives.

One of the most extensive treatments of this subject comes in the draft International Code of Conduct on the Transfer of Technology. Among its principles, this document asserts that "States should co-operate in the international transfer of technology in order to promote economic growth throughout the world, especially that of the developing countries... It is understood that special treatment in transfer of technology should be accorded to developing countries". Chapter 6 of the draft Code then elaborates on "Special treatment for developing countries", addressing specifically three areas in which Governments of developed countries should take action. With the objective of promoting transfer of technology, developed country Governments should:

> "6.1 ...facilitate and encourage the initiation and strengthening of the scientific and technological capabilities of developing countries;

> 6.2 ...assisting in the promotion of transfer of technology to developing countries B particularly to the least developed countries B . . . as a part of programmes for development assistance and co-operation; and
> 6.3 ...take measures in accordance with national policies, laws and regulations to encourage and to endeavour to give incentive to enterprises and institutions in their countries, either individually or in collaboration with enterprises and institutions in developing counties, particularly those in the least developed countries."

The 20 specific measures called for under these three categories incorporate a range of programmatic support actions, including:

- "facilitate access by developing countries to available information regarding the availabilities, description, location and, as far as possible, approximate cost of technologies...;
- facilitating access, as far as possible, to available scientific and industrial research data;
- co-operate in the development of scientific and technological resources in developing countries, including the creation and growth of innovative capacities;
- co-operate in the establishment or strengthening of technology transfer centres;
- provide training for research, engineering, design and other personnel from developing countries engaged in the development of national technologies or in the adaptation and use of technologies transferred;
- provide assistance and co-operation in the development and administration of laws and regulations with a view to facilitating the transfer of technology;
- grant credits on terms more favourable than the usual commercial terms for financing the acquisition of capital and intermediate goods in the context of approved development projects involving transfer of technology transaction.

- assist in the development of technological capabilities of the enterprises in developing countries, including special training as required by the recipients."

Results from the Uruguay Round negotiations include an example of how international agreements can be linked to these types of HCMs in ways that facilitate technology transfer through FDI-related mechanisms. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) recognizes in article 66(1) "the special needs and requirements of least-developed country Members". Relevant provisions include a statement in Article 66(2) that "Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base". Subsequently, Article 67 of the Agreement continues: "In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members".

The European Union provides technical support in both China and the ASEAN region to improve intellectual property protection under the TRIPS Agreement, both to advance the interests of its investing firms and to promote technology transfer to developing countries. A similar motivation underlies the European Union's technical support to developing countries in following up the Uruguay Round Agreement on Technical Barriers to Trade. The European Union offers technical assistance to improve testing and certification capabilities in developing countries, espousing a belief that effective implementation of this agreement's standards should "increase the willingness of firms to engage in FDI" (UNCTAD and EC, 1996, p. 66).

The Energy Charter Treaty approaches the issue of HCMs and technology transfer without a special concern for developmental objectives. Under article 8, "the Contracting

Parties agree to promote access to and transfer of energy technology on a commercial and non-discriminatory basis"; accordingly, the signatory countries "shall eliminate existing and create no new obstacles to the transfer of technology in the field of Energy Materials and Products and related equipment and services, subject to non-proliferation and other International Obligations". Article IV of the GATS focuses on "Increasing Participation of Developing Countries". The provision under paragraph 1(a)(b) calls for "the strengthening of their domestic services capacity and its efficiency and competitiveness" and "improvement of their access to distribution channels and information networks, with special priority given to the least-developed countries". Follow-up implementation of this provision is left vague, however, calling only for unspecified technical assistance at the multilateral level, provided by the secretariat, without reference to any promotional HCMs on the part of the developed countries. The United Nations Framework Convention on Climate Change and its Kyoto Protocol also has special provisions for financial assistance and technology transfer, particularly through the Global Environment Facility created under the Convention's article 4.3, to enable developing countries to meet their commitments (UNCTAD, 2000b, pp. 145-147; see also UNCTAD, forthcoming c, for a discussion of transfer of technology provisions in the context of environmental agreements).

One of the most favourable provisions for the promotion of technology transfer to developing countries arises in the Lomé IV Convention. Article 85 states:

> "With a view to assisting the ACP States to develop their technological base and indigenous capacity for scientific and technological development and facilitating the acquisition, transfer and adaptation of technology on terms that will seek to bring about the greatest possible benefits and minimize costs, the Community, through the instruments of development finance co-operation, is prepared, inter alia, to contribute to: (a) the establishment and strengthening of industry-related scientific and technical

infrastructure in the ACP States; . . . (e) the identification, evaluation and acquisition of industrial technology including the negotiation on favourable terms and conditions of foreign technology, patents and other industrial property, in particular through financing or through other suitable arrangements with firms and institutions within the Community. ”

The Cotonou Agreement reaffirmed the importance of technology transfer objectives, calling for cooperation in the “development of scientific, technological and research infrastructure and services; including the enhancement, transfer and absorption of new technologies”. Promotion of business development will include “encouraging inter-firm linkages, networks and cooperation including those involving the transfer of technology and know-how at national, regional and ACP-EU levels, and partnerships with private foreign investors” (Cotonou Agreement, 2000, pp. 20-21). In its work, the Centre for the Development of Enterprise is also charged with providing “support for initiatives that contribute to develop and transfer technologies and know-how and best practices on all aspects of business management” (ibid., Annex III, p. 24).

D. Financial and fiscal incentives

Financial incentives for outward FDI exist in various national programmes, where their formulation and operation suggest how such HCMs might be addressed in IIAs to support investment in developing countries. For example, Germany sponsors programmes that provide financial assistance for FDI in developing countries through both equity capital participation in FDI projects, through the German Finance Company for Investment in Developing Countries, and loans for German investors, from the Kreditanstalt für Wiederaufbau (UNCTAD and EC, 1996, p. 55). The Export-Import Bank of Japan employs an unusually broad array of financial incentives for FDI. In addition to making loans directly to Japanese enterprises for FDI or for operating overseas projects, the Bank can also provide loans to foreign Governments or banks to fund equity investments and loans to joint ventures with Japanese enterprises (UNCTAD, 1995, p. 317). Other Japanese programmes (the ASEAN Investment Co., the ASEAN Finance Corporation and the ASEAN Japan Development Co.) focus on regional FDI promotion, particularly for developing countries in Asia (UNCTAD and EC, 1996, p 55). Japan has financed the construction of an export processing zone in Nakhodka, eastern Russia, for use by Japanese TNCs, providing assistance that links aid, trade and FDI.

As far back as its 1972 document containing the "Guidelines for International Investment", the International Chamber of Commerce (ICC) offered support for these types of financial HCMs. In proposals directed to "The Investor's Country's Government", the ICC endorsed special aid for economic and social infrastructure projects in developing countries that will facilitate private investment significant to the host country's economic development and foreign aid to support institutions providing managerial training that would foster more local participation in enterprises established in developing countries.

An example of a multi-variate approach is the European Community Investment Partners Scheme whose "objective is to encourage FDI by small and medium-sized European Union firms in countries throughout Asia, Latin America, the Mediterranean and South Africa" (UNCTAD and EC, 1996, pp. 70). Operating from 1988 to 1999, this programme included large enterprises "if their projects are particularly interesting for the development of the host country". The programme used financial institutions and investment-promotion bodies in participating countries to support five facilities:

"1. identification of potential partners, similar to the pre-competitive actions under the Asia-Invest programme;

2. feasibility-study loans;
3. capital investment in companies or share-secured loans;
4. management assistance and training loans;
5. grants for privatization" (ibid.).

The privatization grants of this programme could also be used to support "build-operate-transfer, or build-operate-own, schemes in private infrastructure, utilities or environmental services".

Asia-Invest is another European Union programme that provides a range of financing initiatives, including the Business Priming Fund to assist SMEs with market entry and business cooperation (Asia-Invest Secretariat, 2001).

The Lomé IV Convention also provided for financial support mechanisms through the European Investment Bank and/or the Commission of the European Community. As outlined in Section 4, "Investment Support", this assistance was designed particularly to encourage SMEs and joint ventures, offering direct loans and other financing, including equity participation. Among other purposes, the programme offered often-critical support for the early stages of a prospective investment project and could, through article 268(9), "finance specific studies, research or investment for the preparation and identification of projects; provide assistance, including training, management and investment-related services. . . and, where appropriate, contribute to the start-up costs, including investment guarantee and insurance premiums, necessary to ensure that the investment decision is taken".

The scope of the European Investment Bank's operations was progressively extended several times to cover more developing countries and economies in transition. Bank funding often favours joint venture FDI; projects with significant technology transfer from the European Union; environmental improvements; and investments furthering regional integration. The Bank may finance up to one-half of projects in infrastructure, manufacturing, agro-industry, mining, energy and tourism, with special emphasis given to projects bringing environmental improvements (UNCTAD and EC, 1996, p. 72). At the level of international institutions, the International Finance Corporation also provides loan financing and equity participation FDI in order to foster developmental objectives (UNCTAD, 1999b, p. 51).

The Cotonou Agreement continued the Lomé IV Convention's recognition of the role that financing measures play in translating policy positions into practical actions. Article 76 on "Investment finance and support" states: "Cooperation shall provide long-term financial resources, including risk capital, to assist in promoting growth in the private sector and help to mobilise domestic and foreign capital for this purpose". Particular activities singled out for financial implementation support include some types of the measures already discussed:

"a. grants for financial and technical assistance to support policy reforms, human resource development, institutional capacity-building or other forms of institutional support related to a specific investment. . .; investment facilitation and promotion. . .;

b. advisory and consultative services to assist in creating a responsive investment climate and information base to guide and encourage the flow of capital" (Cotonou Agreement, 2000, pp. 49-50).

In addition, the Agreement provides for "risk-capital for equity or quasi-equity investments, guarantees in support of domestic and foreign private investment and loans or lines of credit", as well as "loans from the Bank's own resources" (ibid., p. 50). The Investment Facility is authorized to use its resources for "guarantees and other credit enhancements which may be used to cover political and other investment-related risks, both for foreign and local investors or lenders". This support is also intended "to have a catalytic effect by encouraging the mobilisation of long-term local resources and attracting foreign private investors and lenders to projects in the ACP States" (ibid., Annex II, pp. 7-10). Funds to support these undertakings are committed in the Agreement's Financial Protocol, pledging financial assistance over five years amounting to EURO 15,200 million (ibid., Annex I, p. 3).

Fiscal incentives revolve primarily around tax HCMs and the application of transfer pricing policies. Regional investment agreements among developing countries often contain provisions on tax incentives that guarantee tax-free asset transfers or provide reduced tax levels for qualifying preferred investors (UNCTAD, 2000d, p. 43). In its formulation of a draft provision on the "promotion and encouragement of investments", the Asian-African Legal Consultative Committee suggested under article 2(1) the use of "appropriate incentives, wherever possible, which may include such modalities as tax concessions and investment guarantees".

Tax provisions in home countries can also act as disincentives to FDI in developing countries. Home countries may use a residence basis to claim tax revenue from foreign source income, setting up the potential for double taxation of such income. Although the relevant HCM may grant credits for taxes paid abroad to relieve the double tax burden, the credit system may actually offset the impact of FDI incentives provided in many developing countries through lower tax rates, which would reduce the creditable tax burden. Essentially, the home country tax authority would appropriate the tax benefit granted the investor by the host country's lowered tax rate, thereby nullifying the FDI incentive effect of such a development policy. This problem can be alleviated if the home country adopts a tax-sparing policy that grants the investor a tax credit for the amount of taxes that would have been paid the host country, absent the use of the tax incentive. Many developed countries, with the notable exception of the United States, have been willing to accept tax-sparing provisions in double taxation treaties signed with developing countries. This approach, in effect, grants the host country some influence over the effective application of tax HCMs in its treaty partner (ibid., p. 57). The ICC essentially endorsed tax-sparing provisions in its 1972 Guidelines for International Investment, proposing under paragraph 2(e) of chapter IV that home country Governments "should refrain from frustrating the effects of development reliefs granted by host countries in respect of new investment by affording appropriate matching reliefs".

Similar difficulties can arise from the application of transfer pricing policies in tax HCMs. A home country's tax authority may re-allocate a TNC's pricing standards in ways that increase tax liability in the home country. The OECD's Model Tax Convention, essentially taking the opposite tack represented by tax-sparing policies, recommends that the host country adjust downward the tax charged a TNC's foreign affiliate in order to avoid double taxation (UNCTAD, 1999e, p. 19). Such a response, of course, would decrease the tax revenue obtained by a host country Government. When transfer pricing policies reflected in HCMs differ from the policies adopted in host developing countries, HCMs may thereby serve as a disincentive or obstacle to FDI flows to those developing countries.

E. Investment insurance

Investment insurance provided by agencies of home country Governments represents one of the earliest and most direct examples of how HCMs can promote FDI to developing countries. Of course, this insurance is also intended to benefit the home country's TNCs, protecting them against political and other risks that most private insurance companies will not cover. Such risk is generally higher in developing countries, so the practical effect of these HCMs is to support FDI in developing countries.

For example, the United States Overseas Private Investment Corporation (OPIC) extends coverage for United States FDI in developing countries that sign an Investment

Incentive Agreement creating a framework for OPIC's activities. The model agreement affirms as its objective to "promote the development of the economic resources and productive capacities" of the developing country "through investment support. . .in the form of investment insurance and reinsurance, debt and equity investments and investment guarantees" (UNCTAD, 1998a, p. 297). In Lomé IV, under article 260, the contracting parties "affirm the importance of concluding between States, in their mutual interest, investment promotion and protection agreements which could also provide the basis for insurance and guarantee schemes". Article 2 of the Asian-African Legal Consultative Committee Revised Draft of Model Agreements for Promotion and Protection of Investments also cites investment guarantees as an appropriate FDI incentive that should be offered to investments in other contracting states.

The same type of investment insurance can be supported or provided through regional and international bodies. The Cotonou Agreement reaffirms the importance of investment protection and calls investment guarantees "an increasingly important tool for development finance". The Agreement states that "co-operation shall therefore ensure the increasing availability and use of risk insurance as a risk-mitigating mechanism in order to boost investor confidence in the ACP States". Support is to cover reinsurance schemes, partial guarantees for debt financing and national and regional guarantee funds. Launching a new initiative, the Agreement calls for the ACP-EU Development Finance Cooperation Committee to "undertake a joint study on the proposal to set up an ACP-EU Guarantee Agency to provide and manage investment guarantee programmes" (Cotonou Agreement, 2000, p. 50).

The Convention Establishing the Inter-Arab Investment Guarantee Corporation was approved in 1974. As stated in the preamble, signatory countries sought "to promote the flow of capital between their territories in order to finance their development efforts for the benefit of their peoples".

Recognizing that Arab investors can play an important role in this development if reasonable security is assured, the Convention endeavoured "to provide such security against the non-commercial risks which may confront inter-Arab investment and which are difficult for the investor to avert". The Corporation was authorized to provide both direct insurance and reinsurance for inter-Arab FDI, providing reasonable compensation for losses caused by covered risks.

The most important instrument in this field is the Convention Establishing MIGA, approved in 1988. MIGA's objective, under article 2, is "to encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries". In its preamble, the Agency's operating premise is "that the flow of foreign investment to developing countries would be facilitated and further encouraged by alleviating concerns related to non-commercial risk". Therefore, MIGA works as a complement to national and regional FDI guarantee programmes as well as private insurers to issue guarantees, including coinsurance and reinsurance, against non-commercial risk (box 3).

Box 3. MIGA: operational highlights for fiscal year 1999

"For the first time in its history, MIGA issued more than $1 billion in guarantee (insurance) coverage in a single fiscal year. The $1.3 billion of coverage issued in 72 guarantee contracts during fiscal 1999, insures investment projects in 29 developing member countries... In total, MIGA has issued 420 guarantee contracts for $5.5 billion in issued coverage in 66 developing countries and transition economies. MIGA insurance has facilitated more than $30 billion in FDI in these countries".

The Agency also obtained approval in 1999 for an increase in its authorized capital resources. MIGA's capital base will be doubled in order to permit continued expansion of the Agency's services in encouraging the flow of FDI to developing countries and transition economies through its guarantee programme and investment

/…

(Box 3, concluded)

marketing services. Among MIGA's many other activities during the year were: providing training for Tunisia's Foreign Investment Promotion Agency in preparation for an FDI promotion mission; assisting in organizing an Africa-Asia Business Forum for regional entrepreneurs to enhance trade and FDI cooperation; and providing advisors for China, Viet Nam and Thailand to improve FDI promotion capabilities and procedures.

Source: MIGA ,1999.

F. Market access regulations

Market access regulations embodied in HCMs pertain mainly to trade-related measures that can influence FDI decisions by affecting the export potential of actual or prospective FDI in developing countries. As components of a broader category of IRTMs (UNCTAD, 1999c), these HCMs may grant preferential market access to exports from specified countries, including particularly favoured developing countries. Such preferences create a trade-related incentive to locate FDI in favoured host countries compared to non-favoured host countries (including other developing countries) when a significant portion of the FDI project's output is intended for export sale in the home country's market. Conversely, HCMs can also be used to restrict imports from foreign facilities, thereby discouraging potential FDI outflows that might otherwise seek comparative advantage production sites in developing countries where exports could competitively service the home country market.

Special import regimes (such as the Lomé Conventions' or the United States' Generalized System of Preferences programme) enhance the attractiveness of selected countries' investment climate by granting the favoured countries low or duty-free status for their exports. These HCMs can shape the pattern of FDI location decisions and thereby alter related trade flows, as occurred with cross-border *maquiladora* factories established to take advantage of sections 806/7 of the United States' tariff schedule which charge duty only on new value-added when goods, initially exported for final production or assembly, re-entered the United States market. TNCs have utilized such trade preference schemes to develop a variety of foreign production-sharing operations, lowering manufacturing costs by locating FDI in lower-wage developing countries that benefit from duty reductions on goods exported back to the United States.

For example, Mexico and Caribbean countries qualifying for preferential tariff reductions obtained most of a sharp outflow of FDI ($971 million to $1.3 billion) from United States' apparel firms from 1993-1997. During this period, the share of total apparel imports from Mexico and qualifying Caribbean countries rose from 16 per cent to 27 per cent while Asia's share declined. The investment pattern shifted again after Mexico's NAFTA benefits gave it a new trade advantage over FDI located in the Caribbean. The shift reportedly caused some 250 apparel plants to close in the Caribbean countries, with an accompanying loss of 123,000 jobs (ECLAC, 2000, pp. 180-184).

Rules-of-origin requirements are linked to trade preferences schemes for developing countries and can function in either a positive or negative fashion in terms of promoting beneficial FDI flows. When formulated in a positive manner, rules of origin can promote high quality FDI in favoured developing countries by restricting trade preferences to goods substantially produced in those countries. Unless rules of origin require a beneficial stage or level of value-added production in the developing country prior to export, corporations can be tempted to transship goods through a favoured export location rather than establishing significant new production facilities there. However, rules of origin that are too strict, or that specify particular stages of production inappropriate for a developing country's circumstances, can serve to restrict or nullify a trade preference system's potential advantages.

When defined in the context of a regional trade agreement, rules of origin can affect FDI location decisions by determining the relative trade advantage granted to internal producers relative to production facilities located outside the trade area. For example, the North American Free Trade Agreement (NAFTA) rules of origin reportedly influenced United States TNCs to invest in new facilities in the home country market rather than lower-cost Asian investment sites and to shift production from Asia to Mexico. Similarly, a rules-of-origin definition that required locating the wafer fabrication stage of semiconductor manufacturer in the European Union, in order to avoid a 14 per cent tariff, reportedly increased such investment within the European Union, at the expense of less costly sites in Asia and the United States (UNCTAD, 1999c, p. 15).

No international consensus exists on substantive content standards for rules of origin, leaving each importing country to set its own regulations unilaterally or in bilateral or regional trade agreements. WTO discussions have included a longer-term objective of developing harmonized rules of origin for member countries. Progress thus far is limited to an agreement only on general principles that individual countries should adopt rules-of-origin measures that are transparent; do not restrict, distort or disrupt international trade; are administered in a consistent, uniform, impartial and reasonable manner; and are based on a positive standard (stating what confers origin rather than what does not) (WTO, 1998). No direct consideration is given to the potential impact rules of origin may have on FDI.

Anti-dumping regulations constitute another HCM that can influence FDI by inhibiting competitive home market access for exports from a TNC's existing or prospective foreign facilities. Increased anti-dumping investigations and prosecutions over the past two decades have heightened business concern that a prospective FDI project in a developing country might run afoul of such regulations, threatening import penalties on intended export sales back to the home country market. This increased risk and uncertainty may cause TNCs to forgo otherwise beneficial and cost-effective FDI projects.

The restrictive impact of anti-dumping procedures may especially disadvantage FDI prospects for economies in transition. No consensus exists on the complicated procedures used by various countries to determine appropriate pricing strategies for imported products and, hence, whether unfair dumping is occurring. In countries with formerly centrally planned economies, a presumption that free market forces are not strong enough to generate accurate information on costs of production can lead the importing country to use imputed cost calculations in ways that make anti-dumping penalties more likely, thereby discouraging export-related FDI from locating in those host countries (Moran, 1998, pp. 110-111).

In the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT), 1994, a provision on Developing Country Members (Article 15) calls for special consideration of these countries needs in the administration of anti-dumping regulations:

> "It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members" (WTO, 1994, p. 163).

Application of this preferential standard to HCMs that, in practice, administer anti-dumping procedures is not specified, leaving follow-up implementation indeterminate, in the hands of importing country regulators. No express consideration is given to the impact that anti-dumping duties can have on FDI flows to developing countries.

Product certification standards, whether specified unilaterally or agreed upon in some form of regional trade agreement, comprise another HCM affecting market access that can influence FDI decisions and location patterns. When HCMs require that imported products meet specific standards in such areas as product safety, quality or environmental impact, the detailed specification of those standards, as well as the nature of the certification process, can function to preclude or disadvantage market access for exports from FDI projects whose viability depends upon effective and competitive access to the home country market. International trade rules are only just beginning to address the many sectoral and issue-specific permutations for HCMs in this area, and no particular attention is being paid to the potential for distortions to FDI locations decisions, as opposed to trade flows. In the meantime, these market-access effects can influence corporate FDI decisions by shaping profit projections for existing or potential foreign facilities, perhaps discouraging FDI that otherwise might be drawn to developing countries with comparative production advantages.

G. Extraterritorial controls

Extraterritorial controls represent one method of implementing HCMs, including some types of measures already discussed, that raise special cross-cutting issues where concerns can arise regarding how HCMs are administered. Examples of the extraterritorial extension of HCMs are found historically in fiscal measures, competition policy and trade regulations, while new debates are emerging with regard to labour and environmental regulations. When national controls are extended unilaterally, outside the territorial boundaries of a home country, the extraterritorial application of those HCMs intrude upon the legal jurisdiction of another sovereign country. The issue of extraterritorial legal application raises broad issues involving the conflict of sovereign national laws that cannot be covered in depth in this paper. However, a few FDI-related aspects of this issue merit attention.

The international business community urged restrictions on the extraterritorial extension of HCMs in the ICC Guidelines for International Investment. That document, under paragraph 2 of chapter V, proposed that home Governments "Should not seek to interfere with the legal order of the host country by extending the application of its national laws, directives and regulations to the investor's operations in the host country". A similar position is taken in the Pacific Basin Charter on International Investments which, under the heading "Legislation", states that "Governments should respect the jurisdictional integrity of those economies in which its nationals operate and should not attempt to extend to international enterprises the jurisdiction of their laws and regulations in such a way as to influence business activities in other economies".

Among themselves, developing countries have adopted treaty provisions that proscribe an extraterritorial application of HCMs. For example, article 17-12 of the Treaty on Free Trade Between the Republic of Colombia, the Republic of Venezuela and the United Mexican States provides that "No Party may, with respect to the investments of its investors constituted and organized according to the laws and regulations of another Party, exercise jurisdiction or adopt any measure which results in the extraterritorial application of its laws or constitutes a hindrance to trade between the Parties or between a Party and a non-Party". A similar provision is found in Mexico's Free Trade Agreements with Costa Rica and Nicaragua, respectively.

Rather than prohibiting extraterritorial applications, the OECD's Declaration on International Investment and Multinational Enterprises adopts a Decision on Conflicting Requirements that calls upon member countries to minimize the imposition of conflicting regulations on TNCs. An elaboration of that Decision endorses moderation and restraint in contemplating new legislation or enforcement actions involving jurisdictional claims that would conflict with other sovereign countries. Consultation based on a respect and accommodation for the interests of other countries is advocated. The revised OECD Guidelines for Multinational Enterprises, adopted on 27 June 2000, continued this policy position with a statement of principle that "When multinational enterprises are subject to conflicting requirements by adhering countries, the governments concerned will co-operate in good faith with a view to resolving problems that may arise" (OECD, 2000b, p. 3).

These principles on conflicting requirements are reflected in bilateral cooperation agreements on antitrust matters between the United States and Germany, Australia, Canada and Brazil, as well as bilateral cooperation accords on bribery between the United States and the European Union. However, such principles are usually found only in agreements among OECD member countries and, therefore, do not constitute a general standard for how regulatory HCMs might impact on developing country interests. With regard to antitrust policy, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices offers a somewhat nuanced standard with regard to how regulatory HCMs should be administered. A provision granting "preferential or differential treatment for developing countries" suggests that "States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries". This provision would implicitly cover the extraterritorial application of anti-competitive HCMs in developing countries as well as potentially adverse extraterritorial impacts on developing countries that may arise from applying anti-competitive controls nationally.

A few other IIAs contain provisions addressing HCMs that also seek to limit the extraterritorial effects of regulatory controls, whether or not the controls would necessarily involve a formal application of national law outside the home country's borders. For example, the Canada-Chile Free Trade Agreement contains a provision on financial transfers related to an investment that places a restriction on the use of HCMs that might force investors to transfer earnings to the home country. Article G-09(3) states that "Neither Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of the other Party". The APEC Non-Binding Investment Principles, under the heading "Removal of Barriers to Capital Exports", endorses a more general statement "that regulatory and institutional barriers to the outflow of investment will be minimized".

Recent discussions on labour relations and environmental issues also suggest how HCMs in these areas might affect FDI. Few such HCMs have thus far been extended extraterritorially, but national debates occur in some countries regarding whether TNCs should be forced to comply with home country labour and environmental standards, wherever their TNCs operate. Attempts in the European Community, Canada and the United States to apply employment standards to TNCs that continued operations in the formerly apartheid South Africa suggest how such HCMs might work (UNCTAD, 2000a, pp. 38-39). The preference given in some contemporary FDI promotion programmes to projects incorporating environmental improvement standards (UNCTAD and EC, 1996, p. 72) show how HCMs could be structured to extend home country priorities, even without an extraterritorial application of regulatory controls on the country's TNCs.

* * *

A review of IIAs reveals some useful approaches in linking agreement provisions to HCM actions. Promotional efforts appear best coordinated and developed within the context of regional arrangements between developed and developing country areas, whereas bilateral treaties often leave host developing countries at a disadvantage in seeking a balanced level of mutual commitment. Agreements between and among developing countries suggest several new avenues for enhancing cooperative FDI promotion. In general, however, the potential impact of HCMs remains largely within the unilateral discretion of developed home countries where their impact on development may have been a concern secondary to the interests of the home country and its own TNCs. Discussions of IIAs may offer an opportunity to open this third point of the investment triangle to a somewhat more international consideration, including particularly the nature of HCMs and how they may be addressed in IIAs in ways that enhance their beneficial impact on development.

Notes

1 For example, the original development-promotion goals of the United States' Overseas Private Investment Corporation (OPIC) have been progressively modified to exclude coverage of FDI projects that might harm United States' domestic business or employment interests. Similarly, FDI-related components in development assistance packages offered by developed countries can include requirements that "tie" the aid to projects that clearly benefit home country business and national interests.

2 Unless otherwise noted, all instruments cited herein may be found in UNCTAD, 1996 and 2000c.

Section III

INTERACTION WITH OTHER ISSUES AND CONCEPTS

The concept of HCMs relates to other issues included in IIAs that are discussed in additional papers in this Series (table 1). This section discusses briefly the nature of the most significant points of interaction.

Table 1. Interaction across issues and concepts

Concepts in other papers	Home country measures
Scope and definition	0
Admission and establishment	0
Incentives	++
Investment-related trade measures	++
National treatment	0
Most-favoured-nation treatment	++
Fair and equitable treatment	0
Taxation	++
Transfer pricing	++
Competition	+
Transfer of technology	++
Employment	+
Social responsibility	+
Environment	+
Host country operational measures	0
Illicit payments	+
Taking of property	+
State contracts	0
Transfer of funds	+
Transparency	+
Dispute settlement (investor-State)	0
Dispute settlement (State-State)	+

Source: UNCTAD.

Key: 0 = negligible or no interaction.
+ = moderate interaction.
++ = extensive interaction.

- **Incentives:** Discussions regarding IIAs normally address this issue as it relates to host country incentives offered to attract FDI, where the debate focuses on whether or when such incentives actually work. The concept also applies to incentives that can be offered by capital-exporting countries through HCMs used to promote FDI to various developing countries. Financial and fiscal incentives in the forms of grants, loans, equity participation and tax exemptions or reductions comprise important elements of FDI promotional efforts extended in the context of national or regional development assistance. Although investment incentives may distort FDI flows under certain circumstances, such incentives may also be needed to overcome market imperfections. The rationale for these types of HCMs incentives is similar to the justification for host developing countries offering incentives to attract FDI. Just as developing countries may require special and differential treatment in any IIA provisions governing incentives to attract inward FDI, capital-exporting nations that employ HCMs to promote FDI to developing host countries may also merit special exemptions from possible restrictions. In fact, HCMs incentives that promote FDI for developmental purposes may be preferable to host country incentives to attract FDI, since the cost of the incentive is borne by the capital-exporting country rather than the capital-importing country (UNCTAD, forthcoming a).

- **Investment-related trade measures:** Some HCMs fall into the category of trade measures that have an impact on FDI (UNCTAD, 1999c). These HCMs can be used to promote FDI to developing countries, such as granting special duty preferences to imports from developing countries, thereby enhancing that country’s attractiveness as a site for export-related TNC investment. Conversely, HCMs may also comprise trade regulations, such as anti-dumping standards or rules-of-origin definitions, that discourage FDI by threatening import penalties that offset the comparative production advantages offered by prospective investment sites in host developing countries.

- **Most-favoured-nation treatment:** The issues concerning HCMs raised in this paper relate to MFN treatment primarily in the negative, i.e. HCMs that promote FDI to developing countries generally accord preferential treatment only to selected host countries and, therefore, do not act under the MFN principle. Some promotional HCMs even differentiate within the general category of developing countries and grant a preferred status to the least developed countries only. A completely non-discriminatory application of the MFN principle to HCMs would, indeed, preclude the possibility of conferring special and differential treatment on developing countries in the context of promotional FDI activities (UNCTAD, 1999d).

- **Taxation:** Taxation regulations in a home country can affect the prospective profitability of FDI, thereby influencing the potential for FDI, including to developing host countries. Specific taxation HCMs, such as foreign tax credit systems and tax sparing provisions, can be used to promote FDI, particularly for development purposes (UNCTAD, 2000d). The applicability of specific HCMs and the nature of their impact is often determined through the negotiation of bilateral taxation treaties.

- **Transfer pricing:** The administration of transfer pricing regulations by home country tax authorities can influence the distribution of income among a TNC's foreign affiliates, affecting the potential tax revenue due to different countries (UNCTAD, 1999e). The impact of HCMs dealing with transfer pricing policies can thereby positively or negatively influence the profitability of FDI in specific host countries, including developing countries. Lacking an international agreement on transfer pricing policies and practices, bilateral taxation treaties can be used to reach agreement on the application of transfer pricing standards and procedures in specific home-host country relationships.

- **Transfer of technology:** Technology transfer can be encouraged or restricted by the operations of HCMs. Development assistance programmes by capital-exporting countries may include specific provisions or preferences supporting FDI that incorporates technology transfer to spur the economies of host developing countries. Technical assistance elements can help improve a developing country's capacity to receive and employ newer technologies as well as to comply with the requirements of accords such as the TRIPS agreement or various environmental pacts. Because advanced technologies generally emerge from, and are transferred by, TNCs from the more developed countries, their HCMs can be instrumental in determining the extent and conditions under which technology is transferred to host developing countries (UNCTAD, forthcoming b).

CONCLUSION:

ECONOMIC AND DEVELOPMENT IMPLICATIONS AND POLICY OPTIONS

The concept of HCMs has traditionally attracted little attention in the context of IIA discussions, but this topic represents an important element for the development impact of IIAs on host developing countries. By definition, HCMs are undertaken by home country Governments. All home countries have measures that affect FDI flows. HCMs in developed home countries can influence both the magnitude and quality of FDI flows to developing countries. These measures, which are overwhelmingly unilateral in their design and application, differ widely in scope and strength. Hence, if common policy positions and implementation commitments were undertaken in conjunction with international agreements, the resulting standards could significantly influence the substance and administration of HCMs as they affect FDI flows, especially to developing countries. IIA provisions addressing HCMs could lend greater transparency, predictability and stability to the manner by which HCMs influence development concerns.

This section outlines a few of the ways in which the consideration of HCMs might enter into discussions on IIA issues, including policy options developing countries might favour to advance their development objectives. Most options suggested are not mutually exclusive and could be chosen conjointly, although decisions regarding relative priorities among them might prove necessary during the course of any negotiations. The options range across a continuum from the absence of any provisions addressing HCMs to detailed policy provisions linked to specific implementation commitments.

An evaluation of included options would cover two related but distinguishable dimensions. One consideration is the scope (variety and number) of policy measures that might be incorporated in IIAs; a second element is the relative strength of the commitment undertaken, including the specification of implementation and follow-up monitoring mechanisms. In the context of IIAs, the practical effectiveness of provisions addressing HCMs can be indicated by both the relative strength of the language used for policy commitments and the level of detail set forth on the programmatic follow-up required to implement an agreement. The more precise and directive the policy language and the more directly linked such statements are to specific follow-up processes, the more the results are likely to benefit developing countries.

A. Option 1: no provision on HCMs

Although the range of HCMs affecting FDI is broad, few IIAs currently address many of these measures. One option is simply to follow the bulk of past practice by not including provisions relating to HCMs from consideration in IIAs. This approach would place maximum emphasis on national sovereignty over policy decisions. Home country Governments, predominately in the developed countries, would retain full unilateral control over the design, formulation and implementation of their own HCMs, including the impact on FDI flows. Any measures adopted to promote FDI to developing countries could be tailored to favour only those host countries selected by each individual home country Government. These HCMs also could be expected generally to promote the interests of the home country's TNCs, with beneficial impacts on the home country's economy.

B. Option 2: hortatory statements on HCMs

Where IIAs do currently address HCMs, the provisions seldom employ more than vague or simply hortatory language in their policy provisions. A second option, therefore, is for IIAs to incorporate broad, hortatory declarations regarding general policy positions or goals. For example, provisions might recognize the contribution that increased FDI can make to economic growth in developing countries and state that home countries endorse or even encourage such FDI. A somewhat more activist position might proclaim an intention to promote FDI flows to developing countries, with or without a qualifying phrase about whether such flows should be directed by market forces, but lacking any specified follow-up commitments.

C. Option 3: general policy declarations linked to agreed joint follow-up activities

Home country policy positions regarding FDI promotion to developing countries are often vaguely formulated and problematic in their implementation. An option in IIA negotiations is to link general policy language to agreement on joint follow-up procedures that would provide substantive implementation through more specific coordinated and cooperative undertakings.

For example, although BITs contain binding obligations regarding the protection of FDI, most treaties between developed and developing countries contain, at best, only hortatory policy language regarding HCMs to encourage FDI flows to the host country partner. However, some BITs and regional economic agreements signed among developing countries contain clearer references to promotional responsibilities, often linked to an agreement on joint discussions and activities between the countries' respective investment promotion agencies. Greater attention might be paid in IIAs to how the language of policy declarations regarding FDI promotion could be linked to specific HCM implementation commitments. Approaches that build on joint programmatic undertakings, such as cooperative information exchange, assisted outreach to home country business groups, and FDI seminars and missions, could spur home country follow-up while involving the host country more actively in the planning, design and implementation of shared promotional activities.

Policy statements in other types of international agreements can present the same challenge of linking general policy language to follow-up implementation. The GATS represents a significant achievement in terms of incorporating a stated policy position in the preamble that highlights the development of developing countries as one of the agreement's primary goals, followed by more specific commitments, particularly in article IV, that seeks to increase the participation of developing countries in trade in services. This article is drafted as a "shall" commitment rather than the more typical "best endeavours" provision usually attached to agreements that call for special and differential treatment for developing countries. In practice, this improved policy language has not yet been translated into the realization of negotiating priorities anticipated by developing countries (Shahin, 1999).

When the GATS commitment were reaffirmed in the Cotonou Agreement of June 2000 by the signatories of that Agreement, a list of targeted service industries was included that indicates how specific sectoral goals could help guide implementation actions. Defining these types of goals regarding developmental objectives, including FDI promotion, could increase the significance of declaratory policy statements in IIAs by linking them to practical programmatic implementation or follow-on negotiations (UNCTAD, 1999f, p. 6).

A related consideration is how HCM implementation procedures might address general TNC conduct standards that might be specified in IIA provisions. For example, some BITs restrict TNC benefits, such as FDI protection, to investments that conform with host country laws. The BIT between Australia and Indonesia specifies that the investment must be made "in conformity with the laws, regulations and investment policies applicable from time to time" (UNCTAD, 1998a, p. 36). This general HCM standard, administered by home country regulations, can help ensure that only FDI desirable for development purposes will receive treaty protection. National investment guarantee programmes can effectively deny compensation claims for expropriations in cases in which an investor has violated host country law. Such standards might be considered a recognition of minimum investor responsibilities to any host country, as agreed in IIA provisions and enforced through HCM implementation procedures.

When IIAs promote FDI for development purposes, follow-up programmes offering incentives such as financial or fiscal assistance might also link such assistance to TNC performance standards related to the anticipated developmental effects. For example, projects receiving preferential treatment because of their proposed technology transfer benefits should be expected to actualize such plans, or forfeit the promotional benefit. Joint follow-up and monitoring activities might incorporate an integral role for the host developing country in assessing relevant TNC performance relative to these development objectives.

D. Option 4: binding provisions on specific HCMs, with follow-up mechanisms

A fourth option for IIA negotiations is to extend their scope by moving beyond general language to incorporate binding provisions on specific HCMs. The breadth of such an approach would depend on the number and variety of HCMs addressed and the strength of the provisions would vary with their specificity as well as the nature of associated follow-up and monitoring mechanisms. Possible candidates for inclusion can be found in the earlier section on "Stocktaking and analysis". Five types of HCMs merit separate discussion regarding how IIA provisions might deal with them.

1. Option 4a: delivery mechanisms for FDI financial assistance. IIAs could seek improved coordination among the multiplicity of HCMs in various capital-exporting countries that provide financial assistance aimed at supporting FDI to developing countries. Some efforts are unilateral initiatives while other HCMs operate in support of international development assistance programmes. Unilateral national programmes retain maximum discretion and control in the hands of the capital-exporting country and can place significant and inefficient burdens on developing countries that confront procedural "red tape" in complying with the requirements of each national programme. Effective coordination is also sometimes lacking among the various governmental and inter-governmental financial assistance programmes.

Negotiating objectives for IIAs could include provisions to help improve coordinated delivery of financial assistance for FDI promotion while minimizing inefficient restrictions, such as "tied aid" limitations, often placed on unilateral or bilateral assistance mechanisms. Provisions designed to increase the participation of developing countries in governance decisions regarding assistance programme operations could enhance their effectiveness through a more cooperative partnership approach (OECD, 2000a, pp.18-19). Linked financial assistance programmes could place clear priority on addressing the developing countries' requirements. In "A Guide to Donor Support", the OECD's Development Assistance Committee recognized that "Historically, donors have tended to provide assistance in ways benefiting both donor and recipient country enterprises in this area: greater emphasis should be placed on appropriately responding to recipient country enterprise needs"(OECD, 1995, p. 20).

A related evaluation and choice could also be made in IIAs regarding whether or how to apply the MFN principle in provisions that set priorities or criteria for determining the recipients of financial assistance for FDI promotion. Certainly a distinction can be made between developed and developing countries on the same basis as countries qualify for special and differential treatment under various trade accords or international development aid. However, some FDI promotion programmes give priority attention to the least developed countries. Financial assistance is also sometimes granted on a preferential basis to FDI projects in specific industries or with certain firms, especially SMEs. Many HCMs also tailor development assistance mechanisms to advance specific policy goals, such as channeling FDI promotional funds to support projects that foster environmental protection. The rationale and administration of preferential country or project criteria as specified in an IIA could be analysed carefully and established in a transparent fashion, with full developing country participation in setting the priorities given to meeting core development objectives. Ongoing monitoring of programme implementation and periodic re-evaluation of the agreed criteria could help assure effective attainment of expected results.

2. Option 4b: fiscal HCMs as regards taxation and transfer pricing. The scope of IIAs could be expanded to incorporate specific fiscal measures that promote FDI. Currently, fiscal issues tend to be decided through unilateral HCMs or negotiated in the context of bilateral taxation treaties, where host developing countries are often at a disadvantage in discussions with capital-exporting developed countries. An option in IIA negotiations is to seek the inclusion of specialized provisions on taxation issues, such as tax sparing, that could implement general policy pledges for special and differential treatment favouring developmental objectives. Similar provisions might address transfer pricing issues, ratifying adjustment mechanisms that will not result in a loss of tax revenue for developing host countries, thereby endorsing a developing country exception from the approach promoted in the OECD's Model Tax Convention. Practical implementation of IIA policy positions on taxation and transfer pricing issues could benefit from follow-up commitments to greater information sharing and technical assistance, perhaps patterned on provisions in the TRIPS and GATS agreements, in order to improve administrative capabilities in host developing countries relative to the global operations of TNCs (UNCTAD, 2000d, p. 79).

3. Option 4c: technical assistance to meet policy commitments. Some HCMs offer technical assistance that is designed to increase a host developing country's capabilities to implement international commitments, such as the TRIPS Agreement, that will improve the overall investment climate. Developed country Governments generally have a self-interest in providing this type of technical assistance to assure developing countries are able to implement various international agreements. Nevertheless, in negotiating IIA commitments, a developing country's policy obligations could be made clearly contingent on the actual provision of technical assistance that is fully sufficient to implement specified standards. This explicit link between policy commitment and implementation capability would strengthen the assurance of follow-up actions to support IIA implementation while enhancing technical administration skills within host developing countries.

4. Option 4d: technology transfer through coordinated development priorities. Promoting effective technology transfer through IIAs may require a coordinated approach among developed and developing countries regarding development priorities and implementation strategies, both of which would affect the nature, magnitude and impact of technology transfer provisions. By encompassing technology measures in IIAs, developing countries can participate more fully in shaping sectoral and project priorities for transfer of technology projects and programmes. Traditionally, HCM priorities are set primarily by unilateral home country decisions that generally assist FDI that will offer some proportionate mix of mutual benefits for both home and host countries. Increased consultation and coordination in designing promotional priorities in IIAs can help assure maximum developmental impact from assisted technology transfer projects.

The scope of IIA provisions covering HCMs could include both capacity-building activities and support for direct, project-based technology transfers. Policy commitments on investment promotion could help enhance a host developing country's receptive capacity for FDI that would embody or require the use of newer, demanding technologies, including sophisticated telecommunications or quality testing facilities. Other provisions might directly target FDI projects with a significant technology transfer component for preferential treatment by HCMs that offer financial or other promotional support programmes. Conversely, the scope of IIA provisions could also include standards and procedures that seek to curtail or minimize HCMs that restrict technology transfer by TNCs, particularly where no persuasive national security interests are involved. Monitoring, research and periodic consultations regarding the development impact arising from different forms of technology transfer could help inform and guide the use of promotional HCMs.

5. Option 4e: FDI impacts from market-access HCMs. The investment impact of trade-related HCMs that affect market access has not been widely recognized and, therefore, as with other types of IRTMs, has seldom been addressed in IIAs. An option to broaden the scope of IIA negotiations could encompass provisions to encourage rules-of-origin definitions that maximize the beneficial effects of trade preference schemes for developing countries while minimizing their use to restrict home country market access in ways that discourage export-related FDI projects in developing countries. Procedures that incorporate developing country input into the formulation of regulatory HCM definitions applying rules-of-origin criteria could strengthen the link between trade preference goals and actual outcomes, helping insure that chosen criteria most appropriately support the developing countries' socio-economic objectives.

Negotiations on IIAs could also consider specifying that countries applying anti-dumping, rules-of-origin or product-certification regulations consider how their actions may affect FDI prospects for developing countries. Policy provisions could include a specific reference to the special situation of developing countries, similar to article 15 in the GATT anti-dumping agreement. To strengthen implementation, an additional step might be to establish an applied follow-up procedure such as requiring an FDI-impact statement as part of the process of formulating such regulations or assessing punitive duties. Both international trade and IIA discussions could address the FDI impacts on developing countries from how trade-related HCM shape market access, but the full significance of these effects may not be fully appreciated if viewed only from a traditional trade policy perspective.

E. Evaluate extraterritorial HCM applications and impacts

The possible extraterritorial reach of HCMs presents a cross-cutting consideration for how options related to HCMs might be incorporated into IIAs, rather than a separate option in itself. The generally preferred policy approach for developing countries has been to favour a prohibition on extraterritorial law applications, not least because only the largest developed countries have historically possessed the effective power to enforce such claims, often on smaller, developing countries. Some current instruments reflect this developing country position, such as Mexico's treaties with several Latin American neighbours that prohibit the extraterritorial extension of home country law. By contrast, developed home countries have pursued a different policy approach in efforts to minimize conflicting requirements, such as through the OECD Decision on this topic, without attempting a prohibition on extraterritoriality claims.

A policy dilemma may arise as more developing countries move into the role of serving as both a home and a host country. Generalized prohibitions on extraterritoriality could foreclose potential options for home developing countries, including the possibility to claim a share of tax revenue generated by their TNCs' foreign affiliates or otherwise monitor and supervise their activities. Conversely, the ability of developed home countries to regulate their own TNCs' foreign operations could, under certain circumstances, be administered in ways that promote developmental objectives. For example, IIA provisions on financial or fiscal HCMs might call for home country monitoring and regulatory efforts aimed at preventing TNC involvement with improper or illegal capital flight from host developing countries.

Similar exceptions may arise even with regard to issues, such as labour standards, where developing countries are concerned about proposals to extend home country regulatory standards to cover the operations of foreign affiliates. Although such extraterritorial applications could constitute an unwelcome infringement on national sovereignty in most cases, exceptional circumstances are conceivable; for example, most countries supported applying TNC workplace standards such as the Sullivan principles to oppose South Africa's former apartheid policies. A critical distinction in IIA provisions between a general principle of extraterritorial restraint and the possibility for exceptional applications might rest on the existence of genuine international consensus on a common global standard. Nevertheless, both the substance and procedure of how IIAs might address extraterritoriality issues merit a careful evaluation of possible options, particularly relative to their potential impact on developing country interests.

APPENDIX

Outcome of the UNCTAD Expert Meeting on Home Country Measures held in Geneva from 8 to 10 November 2000

1. The Expert Meeting on Home Country Measures discussed a range of issues for consideration by the Commission on Investment, Technology and Related Financial Issues pursuant to paragraphs 123 and 118 of the Bangkok Plan of Action (TD/386).[1] Experts made presentations and exchanged views on national experiences and best practices in six broad categories of major types of existing home country measures used by both developed and developing countries to promote outward FDI, including transfer of technology.

2. Experts noted that 90 per cent of all FDI originates in developed countries, but that developing countries are increasingly becoming home countries as well.

3. For each of the identified measures, the expert debate focused on (a) stocktaking; (b) rationale; (c) analysis; (d) best practices; and (e) effectiveness and possible improvements. Experts noted that:

(a) Home country measures (HCMs) are all policy measures taken by the home countries of firms that choose to invest abroad designed to encourage FDI flows to other countries. Their formulation and application may involve both home and host country Government and private sector organizations.

HCMs exist at the national, regional and multilateral levels and involve a broad variety of measures, ranging from information provision, technical assistance and capacity-building, to financial, fiscal and insurance measures, investment-related trade measures, and measures related to the transfer of technology. Given this variety, HCMs have to be adaptable and flexible, since "no one size fits all".

(b) HCMs are applied for a variety of reasons, including to allow companies to exploit better their competencies and competitive advantages, to further the mutual benefit and co-operation of home and host countries; to further the economic integration of the home country into the world economy; to overcome market access problems; to utilize better domestic exports; to overcome domestic supply-side problems (especially in the area of raw materials, labour and technology); and to strengthen regional cooperation in the promotion of outward investment.

(c) HCMs can exert influence on the flow of FDI and technology particularly to and between developing countries and the impact these flows have on development. This influence can be increased through tailor-made approaches and regional and country targeting. The effectiveness of HCMs is enhanced by an enabling environment in host countries, especially legal security.

(d) Best practices in the area of HCMs include:

(i) providing accurate, up-to-date and high quality information in the appropriate languages to companies on investment opportunities, especially by modern methods, including the Internet. Experts noted that best practice in this area included the inter-active linking of home and host country sources. Failure to provide the right information at the right time can have a negative impact;

(ii) instituting regular home-host country exchanges, including through the financing of home country personnel in investment-support and business-facilitation functions in host countries;

(iii) promoting creative mechanisms to overcome cultural and linguistic gaps, e.g. undertaking FDI promotion training programmes in home countries, including support service and language training and utilizing chambers of commerce and industry associations;

(iv) making effective use of interregional exchange forums on issues related to investment promotion, involving outward FDI institutions and investment promotion agencies;

(v) providing financial assistance to the investor, including equity support, particularly for small and medium-sized enterprises (SMEs) and for investment in least developed countries (LDCs);

(vi) providing investment insurance coverage, particularly for political and country risk;

(vii) agreements on investment promotion and protection, as well as on the avoidance of double taxation;

(viii) providing "after-care" support services to outward investors, such as bridging loans to foreign affiliates facing unexpected crises in host countries;

(ix) improving market access, such as Generalized System of Preferences (GSP) schemes, the Africa Growth and Opportunity Act of the United States and the European Commission's proposals concerning market access for LDCs;

(x) encouraging technology transfer and supporting host countries' absorptive capacity.

These best practices ought to be emulated, where appropriate, and applied in a co-operative spirit.

International arrangements can, and in some areas already do, provide a framework in some areas.

(e) Factors that could contribute to an increased effectiveness of HCMs include:

(i) effective coordination of all aspects of each home country's efforts, especially for the benefit of their SMEs, so as to increase awareness of investment opportunities, particularly in developing countries;

(ii) greater transparency, minimization of bureaucracy and simplification and standardization of application and implementation procedures, so as to maximize HCMs' utilization. This is especially important in assistng LDCs that lack the capacity to take full advantage of available HCMs;

(iii) collaboration, both bilaterally and multilaterally, between home and host country institutions, such as investment promotion agencies and industry associations, including cooperative training;

(iv) supporting the establishment of industrial infrastructure in host countries, through e.g. the establishment of consortia involving firms from several home countries to invest in major infrastructure projects in developing countries;

(v) a facilitating role by home country Governments to build capacity in host countries to receive and benefit from investment;

(vi) ensuring that HCMs and national, regional and international financial assistance programmes (official development assistance) are mutually supportive;

(vii) effective implementation of international commitments relating to technology and its transfer, including the Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS agreement), by host and home countries.

4. Experts noted that in light of the above, home countries, including the private sector, should be invited to develop further their efforts to encourage FDI flows particularly to and between developing countries, and especially to the least developed countries.

5. Experts also noted that host countries, including their private sectors, should be invited to take advantage of the opportunities arising from HCMs and should actively seek to develop linkages between their own inward investment promotion efforts and HCMs offered by home countries. In this context, experts noted that the World Association of Investment Promotion Agencies (WAIPA) is an institution that provides for the exchange of information among investment promotion agencies.

6. UNCTAD should provide a signposting service to relevant home country reference sources on outward investment measures, including through a periodically updated *Handbook on Outward Investment Agencies and Institutions*. It should encourage countries contemplating new or updated HCMs to draw on this information, so as to help increase their effectiveness. In the context of its assistance in improving the enabling environment, UNCTAD should help developing countries in particular in their efforts to make effective use of all HCMs.

7. Experts requested the secretariat to expand the compendium of relevant provisions in agreements pertaining to the transfer of technology to cover also regional and bilateral agreements. In addition, experts identified some issues that could be considered for further intergovernmental deliberation. In particular, research would be desirable into what measures Governments had taken to implement the provisions of international agreements on transfer of technology."

Source: UNCTAD, 2000e.

* * *

Note

1 Paragraph 123: "to study existing home country measures that could be considered in programmes to support efforts of developing countries to attract FDI and benefit from it". Paragraph 118 "identify and disseminate information concerning existing home country measures that encourage transfer of technology in various modes to developing countries, in particular least developed countries" (TD/386) (UNCTAD, 2000f).

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In order to improve the quality and relevance of the work of the UNCTAD Division on Investment, Technology and Enterprise Development, it would be useful to receive the views of readers on this and other similar publications. It would therefore be greatly appreciated if you could complete the following questionnaire and return it to:

Readership Survey
UNCTAD Division on Investment, Technology and Enterprise Development
United Nations Office at Geneva
Palais des Nations
Room E-10069
CH-1211 Geneva 10
Switzerland
Fax: 41-22 907-0194

1. Name and address of respondent (optional):

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2. Which of the following best describes your area of work?

Government	☐	Public enterprise	☐
Private enterprise institution	☐	Academic or research	☐
International organization	☐	Media	☐
Not-for-profit organization	☐	Other (specify)	

3. In which country do you work? ________________

4. What is your assessment of the contents of this publication?

Excellent	☐	Adequate	☐
Good	☐	Poor	☐

5. How useful is this publication to your work?

Very useful ☐ Of some use ☐ Irrelevant ☐

6. Please indicate the three things you liked best about this publication:

7. Please indicate the three things you liked least about this publication:

8. If you have read more than the present publication of the UNCTAD Division on Investment, Technology and Enterprise Development, what is your overall assessment of them?

Consistently good ☐ Usually good, but with some exceptions ☐

Generally mediocre ☐ Poor ☐

9. On the average, how useful are these publications to you in your work?

Very useful ☐ Of some use ☐ Irrelevant ☐

10. Are you a regular recipient of ***Transnational Corporations*** (formerly ***The CTC Reporter***), the Division's tri-annual refereed journal?

Yes ☐ No ☐

If not, please check here if you would like to receive a sample copy sent to the name and address you have given above ☐