

FOREIGN DIRECT INVESTMENT

INTRODUCTION

This chapter presents an overview of the different mechanisms and incentives states and international organizations use to encourage and monitor foreign direct investment (FDI). This chapter also outlines the broad provisions in the Darfur Peace Agreement (DPA) that recognize the importance of FDI and provides sample language parties may consider in drafting provisions for FDI in any peace agreement.

Foreign direct investment is generally a long-term investment by a company in one state (the “parent company”) to acquire ownership and control of assets located in another state’s economy. The parent company and the foreign affiliate together form a transnational corporation or, if the business is unincorporated, a multinational enterprise.

CORE ELEMENTS

Introduction to Foreign Direct Investment

Foreign direct investment (FDI) is a long-term investment by a company in one state (the “parent company”) to acquire assets located in another state’s economy. The parent company and the foreign affiliate together form a transnational corporation or, if the business is unincorporated, a multinational enterprise. To qualify as FDI, the parent company must retain control over its foreign affiliate for the purposes of the investment. The United Nations defines control as owning 10% or more of the ordinary shares or voting power of an incorporated firm, or its equivalent for an unincorporated firm.¹ Thus, FDI differs from portfolio investments, such as stocks and bonds, because foreign investors have control over their investments.

Foreign ownership occurs in four general categories according to the terms of money transfer, and the type of integration levels involved. These categories are: (1) Greenfield investments; (2) mergers and acquisitions; (3) horizontal FDI; and (4) vertical FDI.

¹ UNITED NATIONS STATISTICAL DIVISION, *available at* <http://unstats.un.org/unsd/sna1993/toclev8.asp?L1=4&L2=2> (last accessed Sept. 24, 2007).

Greenfield investments are direct investments in new facilities or in the expansion of existing facilities. Greenfield investments are typically the primary target of a host state's promotional efforts as they create new production capacity and jobs, while also increasing technological and intellectual advancement. This can lead to better jobs and deeper connections to the global marketplace. However, one risk is that the new businesses directly compete with local industry. Foreign companies are sometimes able to produce goods more cheaply by using advanced technology and more efficient production processes. Despite the fact that consumers might benefit from cheaper products, strong competition from foreign companies could harm local industry. Another risk of Greenfield investment is that production profits often return to the multinational's home, not the local economy. This is in contrast to local industries, whose profits distribute among the domestic economy.

Brownfield investment takes the form of mergers and acquisitions. Brownfield investment is the most common type of FDI and occurs with the transfer of existing assets from local firms to foreign firms. Transnational mergers occur when the assets and operation of firms from different countries combine to establish a new legal entity. Transnational acquisitions occur when the control of assets and operations transfer from a local to a foreign company, with the local company becoming an affiliate of the foreign company.

Horizontal FDI is a parent company investing in the same industry abroad in which the parent company operates at home. Vertical FDI, in contrast, generally takes one of two forms: (1) backward vertical FDI, where a parent company provides inputs for a local firm's domestic production process; or (2) forward vertical FDI, in which a parent company sells the outputs of a local firm's domestic production.²

Ensuring predictable treatment of foreign investors may encourage FDI. Bilateral Investment Treaties (BITs) aid in this predictable treatment and attract foreign investment. BITs are agreements establishing the terms and conditions for private investment by nationals and companies of one state in the state of the other. BITs provide for compensation in instances of state expropriation of a foreign investor's assets. An investor will obtain this compensation through a claim before an independent arbitral tribunal.

² UNITED NATIONS, FOREIGN DIRECT INVESTMENT IN ASIAN AND CAUCASIAN ECONOMIES: POLICIES AND ISSUES, *available at* http://www.unescap.org/tid/publication/aptir2362_summaries.pdf (last accessed Sept. 25, 2007).

Tax treaties are another way to encourage FDI. A tax treaty is an agreement between the governments of two states that specifically addresses tax issues as a means to promote trade and investment between the two state entities. The main goal of tax treaties is to avoid double taxation of citizens who earn foreign income.

Many organizations exist that promote foreign direct investment. The three main types of organizations that promote FDI are: (1) multilateral FDI organizations; (2) bilateral foreign direct organizations; and (3) governmental FDI organizations. Typically, an FDI organization will focus its efforts on specific regions.

Advantages of Foreign Direct Investment

The benefits of foreign direct investment for the host state are significant, including knowledge and technology transfer to domestic firms and the labor force, productivity and economic benefits for the local economy, enhanced competition, and improved access for exports abroad. Moreover, since FDI does not create debt, it is a preferred method of financing external current account deficits.³ This is especially true in developing countries, where these deficits may be large and sustained. Export led foreign trade and licensing of intellectual property may act as substitutes to FDI. They do not, however, offer the knowledge and technology benefits that FDI does.

FDI is a package of tangible and intangible resources, all of which can make FDI an engine for long term growth. FDI, by its very definition, involves the establishment of lasting relationships that engage the factors of production of the states involved. At the same time, the corporate networks established in the process can serve as economic diplomatic liaisons between states. FDI encourages integration between trading partners - not only through capital exchanges, but also through exchanges of technology, know-how and skills, as well as imports and

³ Current account is the measure of money that flows between any individual state and all other states. It is calculated by adding three economic indicators: Balance of Payments (exports less imports of goods and services), Net Factor Income (such as interest and dividends on foreign assets like stocks or bonds) and Net Transfer Payments (such as FDI and foreign aid). If the amount is positive, then there is a current account surplus; if negative, then there is a current account deficit.

exports.⁴ Thus, FDI may deepen the economic interdependence between trading partners.

Disadvantages of Foreign Direct Investment

States wishing to encourage FDI must also consider some of its disadvantages. Local governments may provide large investors with generous concessions in return for their investments. These investors often use an accounting tactic known as transfer pricing⁵ to minimize their tax obligations. FDI may also give rise to a potentially volatile balance of payment flows, resulting in currency fluctuations. Despite these disadvantages, many states actively work to attract foreign direct investment.

Policy makers face some difficulties when trying to attract FDI.⁶ These potential disadvantages are: ineffectiveness, inefficiency, opportunity costs, and deadweight loss.⁷

Ineffectiveness occurs when FDI incentives fail to produce benefits to the host economy. In other words, the budgetary costs of attracting FDI exceed the benefits. This situation may arise when authorities apply faulty cost-benefit analysis (or no cost-benefit analysis at all) to their incentive programs, such as

⁴ Karl Sauvart, INTERNATIONAL TRADE AND INVESTMENT TRENDS, *available at* <http://www.apec.org.au/docs/citer1.htm> (last accessed Sept. 26, 2007).

⁵ Transfer pricing is a term used to describe all aspects of intercompany pricing arrangements between related businesses. Transfer pricing can be used by multinationals to maximize their profits by avoiding taxes and by obtaining tax rebates. For example, goods from the production division may be sold to the marketing division, or goods from a parent company may be sold to a foreign subsidiary, with the choice of the transfer price affecting the division of the total profit among the parts of the company, thus affecting the taxes paid.

⁶ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), CHECKLIST FOR FOREIGN DIRECT INVESTMENT INCENTIVE POLICIES, *available at* <http://www.oecd.org/dataoecd/45/21/2506900.pdf> (last accessed Sept. 25, 2007); INTERNATIONAL MONETARY FUND (IMF), SUMMARY OF PROCEEDINGS: CONFERENCE ON FOREIGN DIRECT INVESTMENT: OPPORTUNITIES AND CHALLENGES FOR CAMBODIA, LAOS, AND VIETNAM, INTERNATIONAL MONETARY FUND (IMF), Aug. 21, 2002, *available at* <http://www.imf.org/external/pubs/ft/seminar/2002/fdi/eng/summary.htm> (last accessed Sept. 25, 2007).

⁷ For a discussion on innovative means in attracting inward investment see; INNOVATIVE SOURCES OF DEVELOPMENT FINANCE AND DOMESTIC RESOURCE MOBILIZATION, *available at* http://www.helsinki.fi/netcomm/ImgLib/24/89/hp_track2_addison_mavrotas.pdf (last accessed Sept. 19, 2007).

when the predicted benefits are overly optimistic, or the predicted costs are overly high.

Inefficiency occurs when incentives produce benefits that outweigh the costs, but authorities fail to properly maximize the benefits and minimize the costs. This includes instances where lower costs might have obtained similar results; the difference between the actual and the potential cost is waste.

Opportunity costs, costs of not investing in the second best alternative, can occur when resources available to attract FDI are scarce. Budgetary constraints usually force policy makers to consider alternative usage of funds. Policy makers want to make sure they receive the most benefit from their investment. Thus, incentive schemes that are both effective and efficient may nevertheless be wasteful if financing funds are misused.

Deadweight loss occurs in one of four situations. First, when authorities subsidize investment projects that do not need incentives to occur. Second, when authorities fail to draft policies that adequately specify the intended recipients. This could result in benefits going to non-target groups, leading to increased costs or diminished impact. For example, a tax benefit for small businesses which ends up allowing larger businesses to take advantage of it even when they do not need the assistance. Third, when authorities feel political pressure to match FDI incentives in one sector by offering subsidies to businesses in another sector. Lastly, when authorities offer particularly generous FDI incentives to some projects, they create a benchmark that future investors use to demand comparable generosity.

Domestic Laws Regulating FDI

One of the essential elements of attracting foreign direct investment is ensuring the predictable treatment of foreign investors. States often develop clear, open, and transparent domestic laws to encourage FDI.⁸ Domestic laws regulating FDI may address the following areas: (1) freedom to invest; (2) transfers; (3) treatment; (4) dispute settlement; (5) incentives; and (6) ownership requirements.

⁸ EUROPEAN COMMISSION, TRADE AND INVESTMENT: TOWARDS A BASIC FRAMEWORK FOR FOREIGN DIRECT INVESTMENT, *available at* <http://ec.europa.eu/trade/issues/sectoral/investment/1806ti.htm> (last accessed Sept. 25, 2007.) (“[C]hanges in applicable domestic laws and regulations should be brought about in as transparent a manner as possible. Difficulties in establishing knowledge of the laws and regulations of the host economy have been identified by international investors as an important brake to their propensity to invest abroad.”).

Freedom to Invest

In May 1995, the Organization for Economic Co-operation and Development (OECD) member governments launched negotiations on a Multilateral Agreement on Investment (MAI) at the Annual Meeting of the OECD Council at Ministerial level. The proposed objective of the MAI was to provide a broad multilateral framework for international investment with high standards for the freedom to invest. Negotiations were discontinued in April 1998 and have not resumed.⁹ In the absence of international rules, some states adopt differing approaches.

In some states, foreign investors may participate in most economic activities. These states are attractive for FDI as they provide foreign investors with the greatest amount of investment opportunities. However, other states restrict the investment opportunities open to foreign investors. When they exist, these restrictions on foreign investment typically focus on certain sectors or sub-sectors of an economy.

Many states include a provision in their domestic laws giving foreign investors a right to invest in the state. In Bulgaria, the law on FDI allows for a “foreign person” to invest “under the terms set out for Bulgarian persons” and grants foreign investors equal rights with [Bulgarian persons], unless otherwise provided by law.”¹⁰ In Vietnam, “[f]oreign investors may establish in Vietnam an enterprise with one hundred (100) per cent foreign owned capital.”¹¹ In Mongolia, foreigners may invest “in all areas of production and services which are not prohibited by the laws of Mongolia.”¹² The Ukraine has a similar provision in its FDI law.¹³

⁹ OECD, MULTILATERAL AGREEMENT ON INVESTMENT (Draft), *available at* <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> (last accessed Sept. 18, 2007)

¹⁰ Law on Foreign Investment in Bulgaria, art. 2, (1997), Act No. 97, *available at* http://www.fifoost.org/bulgarien/recht/en/foreigninvest/bul_f_invest_law.php (last accessed Sept. 25, 2007).

¹¹ Law on Foreign Investment in Vietnam, art. 15, (1996), *available at* <http://www.vietnamembassy.org.uk/chapter2.html> (last accessed Sept. 15, 2007).

¹² Foreign Investment law of Mongolia, art. 4(1) (1993), Act. No.86, *available at* <http://www.indiana.edu/~mongsoc/mong/invest.htm> (last accessed Sept. 24, 2007).

¹³ The Law of Ukraine on the Regime of Foreign Investment, art. 4 (1996), Act No. , *available at* http://www3.sympatico.ca/tem-ukraine/law_fir.htm (last accessed Sept. 28, 2007).) (“Foreign

Some states, however, limit the foreign investors' rights to certain industries or sectors. The Ghana Investment Promotion Centre Act of 1994 provides that "[t]he enterprises specified in the Schedule to this Act are reserved for Ghanaians and may not be undertaken by a non-Ghanaian."¹⁴ In Bosnia and Herzegovina, foreigners cannot own more than 49% of a company that produces military equipment.¹⁵

Transfers

The right to transfer freely assets out of the state is an important protection in domestic FDI laws. Foreigners are more likely to invest in a state if they can access their profits by freely transferring their assets out of the state. The freedom to transfer assets adds predictability and security to a foreign investment.

In Syria, foreign investors may repatriate all of their assets.¹⁶ In Bosnia and Herzegovina, domestic law provides foreign investors with the freedom to repatriate their earnings, including profits, dividends, and interest.¹⁷ Egyptian law

investment can be made in any objects, investment in which is not prohibited by the laws of Ukraine.”).

¹⁴ Ghana Investment Promotion Centre Act, sec. 18 (1994), Act No. 478, *available at* <http://www.ghanaembassy.or.jp/business/objective-center.html> (last accessed Sept. 18, 2007) (The following economic activities are excluded from any kind of foreign investment: “1. The sale of anything whatsoever in a market, petty trading, hawking or selling from a kiosk at any place; 2. Operation of taxi service and car hire service (a non-Ghanaian may undertake this service provided he has a minimum fleet of ten new vehicles); 3. All aspects of pool betting business and lotteries, except football pools; 4. Operation of beauty saloons and barber shops.

¹⁵ Law on Direct Foreign Investment Policy in Bosnia and Herzegovina, art. 4(a) (1998), *available at* http://www.vladars.net/pdf/law_direct_foreign_investment_BiH.pdf (last accessed Sept. 28, 2007).

¹⁶ Syria Investment Law No. 10 of April 25, 1991, art. 25, *available at* http://www.caeu.net/Investment_Laws/en/syria/syria_en.htm (last accessed Sept. 27, 2007) (“[T]he Central Bank of Syria shall allow the transfer abroad of the external funds invested in the project, together with the profits and revenues, in the same currencies brought in, or in any other transferable currency.”).

¹⁷ Law on Direct Foreign Investment Policy in Bosnia and Herzegovina, art. 11, sec. c (1998), *available at* http://www.vladars.net/pdf/law_direct_foreign_investment_BiH.pdf (last accessed Sept. 25, 2007).

allows foreign investors to repatriate profits upon their proper registration with the government agency responsible for investment.¹⁸

Treatment

Treatment provisions in domestic FDI laws may provide certainty and predictability to a foreign investor. Domestic FDI laws can address the treatment of foreign investors by the domestic government in three main ways: (1) national treatment; (2) most-favored nation treatment; and (3) expropriation.

National Treatment

Many states provide foreign investors protection equal to that of domestic investors. Bosnia and Herzegovina guarantees, “foreign investors shall have the same rights and obligations as the residents of Bosnia and Herzegovina.”¹⁹ In Jordan, “the non-Jordanian Investor investing in any project . . . shall be afforded the same treatment as the Jordanian investor.”²⁰ Saudi Arabian law provides that foreign investors “shall enjoy all the benefits, incentives, and guarantees enjoyed by a national project according to regulations and directives.”²¹

A foreign investor would likely prefer to invest in a state that offers national treatment and, thus, treats foreign investors on par with domestic investors. A foreigner’s investment is likely more secure and able to profit in a state without nationality-based discrimination.²²

Most-Favored Nation Treatment

¹⁸ ANIMA: EUROMEDITERRANEAN NETWORK OF INVESTMENT PROMOTION AGENCIES, INVESTING IN EGYPT, http://www.animaweb.org/pays_egypte_pourquoiinvestir_en.php (last accessed Sept. 25, 2007).

¹⁹ Law on Direct Foreign Investment Policy in Bosnia and Herzegovina, art. 8, sec. a (1998).

²⁰ Jordan Investment Promotion Law of 1995, art. 24, sec. B (amended in 2000), *available at* http://www.jordanecb.org/pdf/Investment_Promotion_Law.pdf (last accessed Sept. 24, 2007).

²¹ Saudi Arabia Foreign Investment Act, art. 6, (2000) *available at* <http://www.sagia.gov.sa/en/business-environment/investment-laws/the-foreign-investment-act.html> (last accessed Sept. 24, 2007).

²² For more information on national treatment see UNITED NATIONS, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS, *available at* <http://www.unctad.org/en/docs/psiteiid11v4.en.pdf> (last accessed Sept. 18, 2007).

Similar to national treatment, which treats all foreign investors the same as domestic investors, most-favored nation (MFN) treatment is when a state treats all foreign investors alike. A state will not treat a foreign investor from state #1 differently than a foreign investor from state #2 simply because the foreign investors are from different states.²³ MFN treatment ensures a foreign investor equal terms of business with other foreign investors.²⁴

Expropriation

Protecting the property rights of foreign investors makes FDI feasible and attractive to investors. Many domestic FDI laws contain provisions protecting FDI from expropriation, thus allowing the domestic government to expropriate the foreign investment only in limited and justified situations.

Some states provide that domestic governments may only expropriate foreign investments if the government taking is in the public interest and accompanied by just compensation. Bosnia and Herzegovina provide that FDI “shall not be subject to any act of nationalization, expropriation, requisition, or measures which have similar effects, except in the public interest in accordance with applicable laws and regulations, without any type of discrimination and against the payment of appropriate compensation.”²⁵

Iranian law stipulates that the government “guarantees fair compensation where the promulgation of a special legislation deprives the owner of capital from ownership.”²⁶ Ukrainian law provides that the government “may not seize foreign investments, with the exception of emergency measures in the event of natural disaster, accidents, epidemics, or epizootic.”²⁷ When a government does expropriate assets owned by foreign investors, the investor may seek compensation through a dispute resolution mechanism.

²³ Law on Direct Foreign Investment Policy in Bosnia and Herzegovina, art. 8, sec. b.

²⁴ For more information on MFN treatment with regards to bilateral, regional, and multilateral agreements see UNITED NATIONS, UNCTAD SERIES ON INTERNATIONAL INVESTMENT POLICIES FOR DEVELOPMENT (2004), *available at* <http://www.unctad.org/Templates/webflyer.asp?docid=5736&intItemID=2310&lang=1&mode=downloads> (last accessed Sept. 18, 2007).

²⁵ Law on Direct Foreign Investment Policy in Bosnia and Herzegovina, art. 16 (1998).

²⁶ Law Concerning the Attraction and Protection of Foreign Investments in Iran, art. 3 (1994) *available at* http://www.irvl.net/foreign_investments_in_iran.htm (last accessed Sept. 25, 2007).

²⁷ The Law of Ukraine on the Regime of Foreign Investment, art. 9, (1996).

*Dispute Settlement*²⁸

Effective dispute settlement procedures may provide investor security in foreign investments. Most domestic laws encouraging FDI provide the foreign investor with the option of selecting the forum for the settlement of disputes. Bosnia and Herzegovina provides that FDI “disputes shall be resolved by the relevant courts in Bosnia and Herzegovina, unless the parties concerned agree on another procedure for the resolution of disputes, including but not limited to local or international conciliation or arbitration.”²⁹

Jordanian law provides that if a dispute between a foreign investor and the Jordanian government is not settled within six months, the parties may “resort to litigation or may refer the dispute to ‘The International Center for the Settlement of Investment Disputes’ (ICSID) for settlement by conciliation or arbitration.”³⁰ The ICSID is an autonomous international organization that provides for arbitration of disputes between member countries and investors who are nationals of member countries.³¹

However, some states restrict the available dispute resolution devices. Iranian law restricts dispute resolution to the domestic court system. Iranian law provides that “[i]n case of disputes, investigation of claims for fair compensation guaranteed by the Government shall be undertaken by competent Iranian courts.”³² Similarly, in Saudi Arabia, disputes not settled amicably “shall be settled according to regulations.”³³ In these states, the issue of national treatment becomes important for the foreign investor, who will not want to be provided less legal rights than a domestic investor.

²⁸ For a brief overview of dispute settlement provisions in FDI laws, see Luke Eric Peterson, FRIEDRICH EBERT STIFTUNG, THE GLOBAL GOVERNANCE OF FOREIGN DIRECT INVESTMENT: MADLY OFF IN ALL DIRECTIONS, *available at* <http://www.fes-geneva.org/publications/OccasionalPapers/FESOccPapers19.pdf> (last accessed Sept. 25, 2007).

²⁹ Law on Direct Foreign Investment Policy in Bosnia and Herzegovina, art. 16 (1998).

³⁰ Jordan Investment Promotion Law of 1995, art. 33 (amended in 2000).

³¹ THE WORLD BANK, ABOUT THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), *available at* <http://www.worldbank.org/icsid/about/about.htm> (last accessed Sept. 2, 2007).

³² Law Concerning the Attraction and Protection of Foreign Investments in Iran, art. 3 (1994).

³³ Saudi Arabia Foreign Investment Act, art. 13 (2000).

Incentives

Some domestic laws include financial incentives to foreign investors to encourage FDI. In Korea, domestic laws provide for cash grants and reduced or eliminated rental fees of government land, for specific categories of foreign investors.³⁴ Additionally, taxes on foreign investments in Korea “may be reduced or exempted in accordance with” domestic law.³⁵ In Jordan, domestic law provides for complementary facilities and tax exemptions for several sectors, including agriculture, hotels, hospitals, and the development of maritime and rail transport systems.³⁶ Syrian law exempts taxes on the import of vehicles, equipment, and machines necessary to set up, expand, and develop a project. These imports must be used exclusively for that project’s goals.³⁷ Tax incentives are very common and discussed in detail later in this chapter.

Ownership Requirements

States may impose restrictions on foreign ownership of property. Three broad types of ownership restrictions exist: (1) asset ownership restrictions in general; (2) real estate acquisition restrictions; and (3) equity ownership restrictions. States also have a fourth option of placing no restrictions on foreign ownership. Allowing a greater percentage of foreign ownership provides for enhanced investment opportunities and makes the state more attractive to FDI.

Asset ownership restrictions occur when some states expressly prohibit foreign investors from owning particular types of domestic assets. In Ghana, the Ghana Investment Promotion Centre Act of 1994 prohibits foreigners from entering certain industries, including: beauty salons, barbershops, taxi services (if the taxi fleet is less than ten vehicles), and selling goods or services from a kiosk.³⁸ Further, Vietnam “will not license any foreign investment project in sectors or regions which may have adverse effects on national defense, national security, cultural and historical heritage, fine custom, and tradition, or the ecological

³⁴ Jongseok An, FDI AND CORPORATE TAXATION IN KOREA, KOREAN INSTITUTE OF PUBLIC FINANCE, *available at* <http://www.econ.hit-u.ac.jp/~ap3/apppfdi6/paper/KOREA.pdf> (last accessed Sept. 25, 2007).

³⁵ South Korea Foreign Investment Promotion Act, art. 9 (1998) *available at* <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN011487.pdf> (last accessed Sept. 24, 2007).

³⁶ Jordan Investment Promotion Law of 1995, art. 3 (amended in 2000).

³⁷ Syria Investment Law No. 10 of April 25, 1991, arts. 11, sec. .a; art., 12, sec. .a.

³⁸ Ghana Investment Promotion Centre Act, sec. 18 (1994).

environment.”³⁹ States may use this type of absolute ownership restriction to safeguard protected domestic industries.

Equity ownership restrictions generally occur when a state does not prohibit foreign investors from entering into a domestic industry but require a certain percentage of a domestic firm’s ownership remain in domestic hands. In Algeria, foreign companies may own up to 71% of a hydrocarbons firm, while foreign purchasing banks may only own 51% of a firm.⁴⁰ In Iran, foreign investors may only own 49% of an Iranian company, though this percentage also depends on the merits of each project.⁴¹

Some states have real estate acquisition restrictions, which prohibit foreign investors from owning domestic land. Although less of these laws exist today, many examples of state practice still exist. In China, the land belongs to the people. Foreign investors cannot own land, but they may obtain long-term land leases.⁴² In the United Arab Emirates, only domestic citizens can own land.⁴³

Some states place no limitations on foreign ownership or control of corporations. In Vietnam, foreign investors can own 100% of domestic companies, provided these companies are not involved in protected industries.⁴⁴ These states are attractive for FDI because they provide the greatest amount of investment opportunities to foreign investors.

Bilateral Investment Treaties

Bilateral Investment Treaties (BITs) can encourage foreign direct investment. BITs protect business investments in foreign jurisdictions enabling

³⁹ Law on Foreign Investment in Vietnam, art. 15, (1996).

⁴⁰ UNITED STATES COMMERCIAL SERVICE, ALGERIA – OPENNESS TO INVESTMENT, *available at* http://www.buyusa.gov/algeria/en/openness_to_foreign_investment.html (last accessed Sept. 24, 2007).

⁴¹ Law Concerning the Attraction and Protection of Foreign Investments in Iran, General Note (1994).

⁴² Joyce Palomar, *Land Tenure Security as a Market Stimulator in China*, 12 DUKE J. OF COMP. & INT’L L. 7 (2002).

⁴³ Jean-Yves P. Steyt, Comparative Foreign Direct Investment Law: Determinants of the Legal Framework and the Level of Openness and Attractiveness of Host Economies, *available at* <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1031&context=cornell/lps> (last accessed Sept. 26, 2007).

⁴⁴ Law on Foreign Investment in Vietnam, art. 15 (1996).

investors to seek damages from the foreign government through a claim before an independent arbitral tribunal.⁴⁵ At the end of 2003, approximately 2,200 BITs were in force worldwide.⁴⁶

Most BITs are between developed capital exporting states and developing capital importing states.⁴⁷ Capital exporting states typically negotiate BITs to protect their investors and provide them with stability in foreign jurisdictions. Capital importing states typically sign BITs with the expectation of attracting much needed foreign investment.⁴⁸

Typically, BITs contain provisions guaranteeing the investor national and most-favored nation treatment, and offering the investor protection against expropriation. Investors have the opportunity to seek recourse via a predetermined dispute resolution mechanism. The International Center for the Settlement of Investment Disputes offers both substantive provisions for the resolution of disputes, as well as institutional support.⁴⁹ Other mechanisms, such as the United Nations Commission on International Trade Law Model Law, may also prove effective at resolving disputes.⁵⁰ Essential to all BITs is the New York Convention on the Enforceability of Arbitral Awards, which requires its signatories to uphold and enforce any valid decision of an arbitral panel.⁵¹ In addition, with the great proliferation of BITs over the past decade, many states, including Canada, the

⁴⁵ John W. Boscariol and Orlando E. Silva, *Protecting Foreign Investors BIT by BIT*, THE INVESTOR'S WEEKLY, Jul. 7, 2004, available at <http://www.tradeobservatory.org/headlines.cfm?refID=36214> (last accessed Sept. 3, 2007).

⁴⁶ UNCTAD INVESTMENT INSTRUMENTS ONLINE, UNCTAD ANALYSIS OF BITs, available at http://www.unctadxi.org/templates/Page___1007.aspx (last accessed Sept. 4, 2007).

⁴⁷ A capital exporting state invests more money in foreign assets than foreign states invest money in the capital exporting state's domestic assets while a capital importing state has more foreign money invested in its domestic assets than the capital importing state invests money in the assets of foreign states.

⁴⁸ John W. Boscariol and Orlando E. Silva, *Protecting Foreign Investors BIT by BIT*, THE INVESTOR'S WEEKLY, Jul. 7, 2004.

⁴⁹ THE WORLD BANK, ABOUT ICSID, available at <http://www.worldbank.org/icsid/about/about.htm> (last accessed Sept. 29, 2007).

⁵⁰ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, FAQ - ORIGIN, MANDATE AND COMPOSITION, available at http://www.uncitral.org/uncitral/en/about/origin_faq.html (last accessed Sept. 26, 2007).

⁵¹ UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, July 6, 1988, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (last accessed Sept. 26, 2007).

United States, and the United Kingdom, developed Model BITs. These serve as templates for the vast majority of BITs currently in force or under negotiation.

Elements

Although the substantive investment obligations imposed on host governments may differ from one BIT to another, they typically include the following:⁵²

- The foreign investor must be treated no less favorable than a domestic investor (national treatment) or investors from any other state (most-favored-nation treatment);
- The foreign investor must be treated fairly in accordance with international law, and be entitled to the full protection and security given to domestic investors;
- Expropriation, or measures equivalent to expropriation, must be for a public purpose, non-discriminatory, under due process of law, and accompanied by payment of prompt, adequate, and effective compensation.

A BIT may also include obligations relating to transfers of funds out of the host territory, performance requirements, and measures concerning the nationality of senior management and boards of directors. Some BITs contain “umbrella clauses” that require a host government observe all of its contractual obligations with respect to investments in its territory.⁵³ In addition, many BITs have specific provisions for certain types of measures or sectors, including taxation, subsidies, national security, financial services, and cultural activities.

Dispute Resolution Mechanisms

The main advantage of a BIT is its dispute resolution mechanism. In addition to government-to-government procedures, BITs often contain a private investor-state dispute mechanism enabling private foreign entities to sue host

⁵² John W. Boscariol and Orlando E. Silva, *Protecting Foreign Investors BIT by BIT*, THE INVESTOR'S WEEKLY, Jul. 7, 2004.

⁵³ FRESHFIELDS BRUCKHAUS DERINGER, PUBLIC INTERNATIONAL LAW NEWS, October 21, 2003, available at <http://www.spr-consilio.com/artint3.htm> (last accessed Sept. 25, 2007).

governments for damages arising out of their failure to comply with their investment obligations.⁵⁴

The most common dispute resolution method for BITs is the International Center for the Settlement of Investment Disputes (ICSID). The ICSID provides both a framework and institutional support for the settlement of disputes between a foreign investor and a host government. In addition to the ICSID, several other organizations provide ad hoc mechanisms for the settlement of disputes.

The International Center for the Settlement of Investment Disputes

ICSID is the most popular choice of forum for the settlement of international investment disputes between a foreign investor and a host state.⁵⁵ Pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,⁵⁶ ICSID provides facilities for the conciliation and arbitration of disputes between member states and investors who qualify as nationals of other member countries.

Resorting to the ICSID to resolve a dispute is a voluntary decision. Therefore, at its own discretion, each party may or may not wish to pursue ICSID arbitration. Once the parties consent to resolving their dispute through ICSID arbitration neither party can unilaterally withdraw its consent. Moreover, the ICSID Convention requires all Contracting States, whether parties to the dispute or not, to recognize and enforce ICSID arbitral awards.⁵⁷

United Nations Commission on International Trade Law

The United Nations General Assembly established the United Nations Commission on International Trade Law (UNCITRAL) in 1966.⁵⁸ In establishing the Commission, the General Assembly recognized that differences in state laws

⁵⁴ This mechanism is available regardless of whether the investor already has a contractual or arbitration arrangement with the host state or one of its governmental entities.

⁵⁵ THE WORLD BANK, ABOUT ICSID.

⁵⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Oct. 14, 1966), *available at* <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> (last accessed Sept. 25, 2007).

⁵⁷ THE WORLD BANK, ABOUT ICSID, *available at* <http://www.worldbank.org/icsid/about/about.htm> (last accessed Sept. 29, 2007).

⁵⁸ UN G.A. Res. 2205(XXI) (Dec. 17 1966).

governing international trade created obstacles to the flow of trade. The General Assembly regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.⁵⁹ To this end, in 1985 the UNCITRAL developed the Model Law on International Commercial Arbitration (Model Law).⁶⁰

The Model Law provides a more liberal framework than the ICSID because it offers disputing parties a broad scope for agreeing on the rules of procedure. Where such agreement is lacking, the Model Law gives wide discretion to the arbitrators regarding the conduct of the proceeding.

The Model Law has few mandatory rules, intended to ensure fairness and equal treatment of the disputing parties, and provide freedom and discretion for arbitration. It contains supplementary provisions to assist in arbitration where parties concerned do not agree on procedural rules, and has provisions on recognition and enforcement of arbitral awards that apply irrespective of the arbitral state. Whereas the 1958 New York Convention dealt only with foreign awards, the UNCITRAL Model Law no longer makes such a territorial distinction. Instead, UNCITRAL draws a new line on the more substantive ground of whether the arbitration proceeding is international.⁶¹

Enforcement of Awards

Most bilateral investment treaties provide that the governments consent to the submission of a claim to arbitration under the BIT in accordance with the requirements of international conventions for the recognition and enforcement of arbitral awards, primarily the 1958 New York Convention.⁶² The New York Convention is widely recognized as a foundation instrument of international arbitration requiring courts of contracting states to give effect to an agreement to

⁵⁹ UNCITRAL, ORIGIN, MANDATE AND COMPOSITION OF UNCITRAL, *available at* <http://www.uncitral.org/uncitral/en/about/origin.html> (last accessed Sept. 25, 2007).

⁶⁰ UNCITRAL, MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last accessed Sept. 25, 2007).

⁶¹ *Trade Law Commission Adopts Model Law on International Commercial Arbitration*, UN CHRONICLE, June 1985, *available at* http://www.findarticles.com/p/articles/mi_m1309/is_v22/ai_3795624 (last accessed Sept. 25, 2007).

⁶² John W. Boscariol and Orlando E. Silva, *Protecting Foreign Investors BIT by BIT*, THE INVESTOR'S WEEKLY, Jul. 7, 2004.

arbitrate when seized of an action in a matter subject to an arbitration agreement. States must also recognize and enforce awards made in other states, subject to specific limited exceptions.⁶³

Model Laws

The BITs' popularity among developed states prompted several to design model BITs that serve as a template or benchmark for future treaties. While variations exist, two basic model BITs emerged: (1) the "European model" based on a model endorsed by OECD Ministers in 1962; and (2) the "North American model" developed in the early 1980s.⁶⁴

The two models contain more or less the same concepts for protecting established investments: national treatment and most-favored nation treatment; free transfers of funds; prompt, adequate, and effective compensation in the case of expropriation; fair and equitable treatment; and full protection and security.⁶⁵ The only major distinctions are that the North American model disciplines the imposition of a number of performance requirements on investors or their investments and provides detail on some matters (for example, the right of entry and sojourn of aliens) than the European BITs.⁶⁶

Recently, some states, including Canada, Chile, Japan, Mexico, and the United States, reviewed their model BIT. Revisions primarily addressed the definitions of investment and investor aiming at limiting the scope of the treaty; fair and equitable treatment in order to clarify the standard; protection at the pre- and post-establishment levels; non-discrimination principles (national treatment and most-favored nation treatment) taking into account recent jurisprudence; expropriation using criteria to better define indirect expropriation; public interest

⁶³ UNCITRAL, 1958 - CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS - THE "NEW YORK" CONVENTION, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last accessed Sept. 25, 2007).

⁶⁴ OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, WORKING PAPERS ON INTERNATIONAL INVESTMENT, Number 2004/1, *available at* <http://www.oecd.org/dataoecd/8/43/31784519.pdf> (last accessed Sept. 25, 2007).

⁶⁵ OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, WORKING PAPERS ON INTERNATIONAL INVESTMENT, Number 2004/1.

⁶⁶ OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, WORKING PAPERS ON INTERNATIONAL INVESTMENT, Number 2004/1.

exceptions, such as protection of health, safety and environment; and more detailed investor-state dispute settlement provisions.⁶⁷

Tax Treaties and Tax Incentive Zones

Both tax treaties and tax incentives encourage foreign direct investment. Tax treaties are treaties that states enter into to address tax issues. These treaties help promote trade and investment between the two state entities party to agreement. Tax incentive zones are economic tax incentives aimed at creating a business and investment friendly environment.

Bilateral Tax Treaty Agreements

Tax treaties are agreements between states that deal specifically with tax issues and provide a means to promote trade and investment between the two states. The fundamental goal of most tax treaties is to avoid double taxation on citizens who earn foreign income. Under these treaties, businesses located in one state receive a reduction in taxes or an exemption from the income they receive from sources within the foreign state in which they are operating. Treaty provisions generally are reciprocal, and the provisions apply to both treaty signatories.⁶⁸

Tax treaties may increase FDI in several ways. First, they reduce or eliminate the economic disincentive of double taxation of foreign-earned profits. Treaties articulate clear rules for dealing with tax conflicts. In addition, the international codification of a state's tax policy reduces the likelihood a unilateral change in its tax policy. In these ways, tax treaties reduce the uncertainty of an investor's tax liability in the foreign state, thereby encouraging FDI.⁶⁹

⁶⁷ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BLUE BOOK ON BEST PRACTICE IN INVESTMENT PROMOTION AND FACILITATION, *available at* <http://www.unctad.org/Templates/Download.asp?docid=7230&lang=1&intItemID=2068> (last accessed Sept. 25, 2007).

⁶⁸ UNITED STATES INTERNAL REVENUE SERVICE, *available at* <http://www.irs.gov/businesses/small/international/article/0,,id=96454,00.html> (last accessed Sept. 25, 2007).

⁶⁹ UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES (YEAR?), *available at* <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan002084.pdf> (last accessed Sept. 25, 2007). Bilateral agreements are the accepted international norm when creating tax agreements. States often fashion their tax treaties after two internationally accepted models: the

Tax Incentives Zones

Tax incentive zones are economic tax incentives offered to attract business and investment. The direct incentive for a business to invest in a foreign economy under a tax incentive is the opportunity for the business to operate exempt from income tax or receive a greatly reduced tax rate. These incentives may either continue indefinitely or terminate after a period. Incentive zones may also permit certain types of businesses or operations that otherwise may not be permitted inside the state, or which otherwise may require some sort of special licensing to operate.

In general, the premise behind a free zone is usually that the investing business will be manufacturing and or marketing a product or service abroad. The benefit for the home state is that they can use tax incentive zones not only to increase investment but also to manage it by selecting geographical locations with the greatest need for investment.

Resource rich states often do not face difficulties in attracting FDI to their resources. Therefore, FDI in that sector might not be responsive to taxation, which means that in that sector tax revenues can rise without sacrificing any economic benefits FDI produces. In other industries, the volume of FDI responds negatively to taxation. In these industries, the host county has to make decisions between revenue gains of increased taxation against the economic costs of discouraging FDI.⁷⁰ Moreover, taxation in the resource sector might provide an effective revenue source to offset tax incentive zones.

Although different states have different competitive advantages, these geographically defined areas usually provide businesses access to vacant land, existing industrial and commercial infrastructure, a skilled workforce and abundant resources such as power and water supplies. However, if the reduction in revenue due to a tax incentive zone is less than the economic gains of FDI and the job

OECD model, and the UN model. In addition, the United States uses the U.S. Model Income Tax Convention as a starting point in bilateral treaty negotiations between the United States and other states; *See also* U.S. MODEL INCOME TAX CONVENTION (2006), *available at* <http://www.ustreas.gov/press/releases/reports/hp16801.pdf> (last accessed Sept. 25, 2007).

⁷⁰ Anwar Shah and Joel Slemrod, THE WORLD BANK, TAX SENSITIVITY OF FOREIGN DIRECT INVESTMENT, *available at* <http://info.worldbank.org/etools/library/latestversion.asp?206913> (last accessed Sept. 23, 2007).

creation that follows the incentive's implementation then the host economy might wish to consider targeted tax incentive zones.

In the Dominican Republic, foreign investors can enjoy 100% tax-free business income or a reduced rate of taxation when operating inside a free zone.⁷¹ This applies to all free zones that the investor uses. The business license does indicate a particular length of time based on the geographic location of the free zone. For example, if a business chooses to invest in a free zone location close to Santo Domingo or Santiago, it will obtain a twenty-year income tax exemption.⁷² If, however, the business chooses a location in a more rural area or an area where the government wants to encourage a company to invest, the businesses may receive a 25-year or longer exemption period.

Ghana calls its free zone the BF Tema Export Processing Zone. Tema is an industrial center as well as the largest major port in Ghana. The main economic incentive provided in Ghana's law is a 100% exemption granted to investors from payment of income tax on profits for ten years.⁷³ After the ten-year period, the income tax rate cannot exceed 8%. The law also provides for a total exemption from payment of withholding taxes from dividends arising out of free zone investments. Further, the government provides relief from double taxation for foreign investors and their employees.⁷⁴

The Jebel Ali Free Zone (JAFZ), located in the Jebel Ali area of Dubai, United Arab Emirates, is a complex economic zone servicing the Dubai Port.⁷⁵ The government does not tax the income or profits of foreign investors within the zone and does not place restrictions on foreign exchange or transfer of capital. The government also allows foreign investors to own 100% of the equity in a local

⁷¹ U.S. DEPARTMENT OF STATE, DOMINICAN REPUBLIC, *available at* <http://www.state.gov/r/pa/ei/bgn/35639.htm> (last accessed Sept. 25, 2007).

⁷² DOMINICAN REPUBLIC, DOMINICAN REPUBLIC FREE ZONE, *available at* http://www.dominicanrepublicpage.com/Free_Zone_Information.html (last accessed Sept. 24, 2007).

⁷³ GHANA FREE ZONES BOARD, TEMA EXPORT PROCESSING ZONE, *available at* http://www.gfzb.com/corp_div_details_gfzb.cfm?EmpID=168&BrandsID=45 (last accessed Sept. 25, 2007).

⁷⁴ GHANA EMBASSY, FREE TRADE ZONE – EXPORT PROCESSING ZONE, *available at* <http://www.ghanaembassy.or.jp/business/free-trade-zone.html> (last accessed Sept. 25, 2007).

⁷⁵ JAFZA, EMPOWERING BUSINESS, *available at*, <http://www.jafza.co.ae/jafza/content/section2.aspx> (last accessed Sept. 25, 2007). The Dubai Port ranks thirteenth in the world in terms of container traffic.

enterprise and provides operational support and business continuity facilities.⁷⁶ Within the free zones, investors may enter into multi-year leases. They also have easy access to sea and airports, buildings for lease, energy connections (often at subsidized prices), and assistance in labor recruitment.⁷⁷

Foreign Direct Investment Organizations

Many organizations promote and/or finance foreign direct investment. These organizations include: (1) multilateral FDI organizations; (2) bilateral foreign direct organizations; and (3) governmental FDI organizations.

Multilateral Foreign Direct Investment Organizations

Multilateral FDI organizations are institutions with a membership base consisting of multiple states. Each of these organizations operates as an independent entity.⁷⁸ The main purpose of multilateral FDI organizations is to provide sound economic advice and capital for FDI in developing states.⁷⁹ The World Bank, International Monetary Fund, Islamic Development Bank, United Nations Development Program, and the Nordic Investment Bank are examples of multilateral FDI organizations.

The World Bank Group

The World Bank Group is a multilateral FDI organization that provides financial and technical assistance to developing states.⁸⁰ The organization's goal is to alleviate poverty and improve the standard of living in developing states and

⁷⁶ R & W INTERNATIONAL, JEBEL ALI FREE ZONE, *available at*, <http://www.rwintl.com/jebel/> (last accessed Sept. 25, 2007).

⁷⁷ US DEPARTMENT OF STATE, UNITED ARAB EMIRATES, *available at* <http://www.state.gov/e/eeb/ifd/2005/42194.htm> (last accessed January. 26, 2007).

⁷⁸ THE WORLD BANK, HOME, ABOUT US, MULTILATERAL AND BILATERAL DEVELOPMENT AGENCIES, *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040612~menuPK:41694~pagePK:43912~piPK:44037~theSitePK:29708,00.html> (last accessed Sept. 4, 2007).

⁷⁹ THE WORLD BANK, HOME, ABOUT US, MULTILATERAL AND BILATERAL DEVELOPMENT AGENCIES.

⁸⁰ THE WORLD BANK, HOME, ABOUT US, ORGANIZATION, *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last accessed Sept. 4, 2007).

regions. The World Bank Group includes five different institutions and affiliates: (1) the International Development Association; (2) the International Bank for Reconstruction and Development; (3) the International Finance Corporation; (4) the Multilateral Investment Guarantee Agency; and (5) the International Centre for the Settlement of Investment Disputes.⁸¹

The International Development Association (IDA) is the World Bank Group division that provides FDI to the poorest states in the world.⁸² The IDA provides interest free loans and grants to those states with the greatest need. The IDA is the single largest donor of funds to the poorest countries in the world.⁸³

The International Finance Corporation (IFC) is the member of the World Bank Group that supports private FDI in developing states.⁸⁴ The IFC attempts to ensure that the investment projects it promotes are not only financially beneficial but also positively influence the environment and the social well being of the host state. The belief of this institution is that such an investment strategy will ultimately lead to poverty reduction and an improvement in people's lives.⁸⁵

The International Bank for Reconstruction & Development (IBRD) is the division of the World Bank Group that provides loans, financing, and technical assistance to middle-income and creditworthy developing states.⁸⁶ The IBRD

⁸¹ THE WORLD BANK, HOME, ABOUT US, ORGANIZATION.

⁸² The WORLD BANK, INTERNATIONAL DEVELOPMENT ASSOCIATION, ABOUT US, IDA, WHAT IS IDA?, *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21206704~menuPK:83991~pagePK:51236175~piPK:437394~theSitePK:73154,00.html> (last accessed Sept. 4, 2007).

⁸³ THE WORLD BANK, INTERNATIONAL DEVELOPMENT ASSOCIATION, ABOUT US, IDA, WHAT IS IDA?

⁸⁴ INTERNATIONAL FINANCE CORPORATION, ABOUT IFC, IFC'S MISSION, *available at* <http://ifc1.ifc.org/ifcext/about.nsf/Content/Mission> (last accessed Sept. 4, 2007).

⁸⁵ INTERNATIONAL FINANCE CORPORATION, ABOUT IFC, IFC'S MISSION.

⁸⁶ THE WORLD BANK, INTERNATIONAL BANK FOR RECONSTRUCTION & DEVELOPMENT, HOME, ABOUT US, IBRD, BACKGROUND, *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,contentMDK:21130269~menuPK:3168298~pagePK:64168445~piPK:64168309~theSitePK:3046012,00.html> (last accessed Sept. 26, 2007).

typically aims to promote stability in the market place and social reform through its financing activities.⁸⁷

The World Bank's Multilateral Investment Guarantee Agency (MIGA) is responsible for encouraging investment and insurance activities in states considered to have an unfriendly business environment. To accomplish this task the MIGA provides the following services to investors and insurers in developing states: (1) political risk insurance; (2) technical assistance with investment opportunities; and (3) dispute mediate services.⁸⁸ Specifically, the MIGA focuses its operations: (1) on states and regions where there is a need for development in infrastructure; (2) in conflict-affected areas; and (3) in developing states and their financial markets.⁸⁹

As discussed above, the International Centre for the Settlement of Investment Disputes (ICSID) is an organization that settles investment disputes between member states and foreign investors who are nationals of member states. The ICSID is a division of the World Bank Group, established in 1966 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The ICSID promotes FDI through facilitating expedient resolution of disputes.⁹⁰

International Monetary Fund

The International Monetary Fund (IMF) is a multilateral FDI organization. The main goals of the IMF include: (1) facilitation of international monetary cooperation; (2) assistance in the growth and balance of international trade; (3) provision of aid in assuring exchange stability; (4) organization of a multilateral system of payments; and (5) provision of financing for member states with inadequate resources to meet their balance of payment requirements.⁹¹ The IMF attempts to accomplish these goals through the constant surveillance of each

⁸⁷ THE WORLD BANK, INTERNATIONAL BANK FOR RECONSTRUCTION & DEVELOPMENT, HOME, ABOUT US, IBRD, BACKGROUND.

⁸⁸ MULTILATERAL INVESTMENT GUARANTEE AGENCY, ABOUT MIGA, *available at* <http://www.miga.org/sitelevel2/level2.cfm?id=1069> (last accessed Sept. 4, 2007).

⁸⁹ MULTILATERAL INVESTMENT GUARANTEE AGENCY, ABOUT MIGA .

⁹⁰ THE WORLD BANK, ABOUT ICSID, *available at* <http://www.worldbank.org/icsid/about/about.htm> (last accessed Sept. 29, 2007).

⁹¹ INTERNATIONAL MONETARY FUND, THE IMF AT A GLANCE, *available at* <http://www.imf.org/external/np/exr/facts/glance.htm> (last accessed Sept. 27, 2007).

member state's economy. The IMF also offers financial and technical advice to any member state that requires such assistance.⁹²

Islamic Development Bank

The Islamic Development Bank is an organization of 56 Islamic member states. The Bank's purpose is to provide economic aid and facilitate social development in Islamic states.⁹³ Membership in the Islamic Development Bank is contingent upon whether a state: (1) is a member of the Organization of the Islamic Conference; (2) contributes capital to the Bank's fund; and (3) agrees to abide by the terms set forth by the Bank. The Bank operates by making equity investments and providing grants to member states. The Bank also establishes special funds for providing support to non-member Muslim states.⁹⁴

United Nations Development Programme

The United Nations Development Programme is the United Nations institution that aims to promote all aspects of development worldwide. The Programme provides developing states with a connection to the knowledge, experience, and resources necessary to build strong local economies. The Programme's mission is to aid emerging economies with the challenges of: (1) improving democratic governance; (2) reducing poverty; (3) the prevention of and recovery from crisis; (4) providing the poor with clean and efficient sources of energy; and (5) the prevention of the spread of HIV/AIDS.⁹⁵

Nordic Investment Bank

The Nordic Investment Bank⁹⁶ is a multilateral FDI organization promotes investment in member countries by supplying long-term financing solutions with a focus on projects that improve infrastructure and the environment, and that

⁹² INTERNATIONAL MONETARY FUND, TECHNICAL ASSISTANCE, *available at* <http://www.imf.org/external/np/exr/facts/tech.htm> (last accessed Sept. 26, 2007).

⁹³ ISLAMIC DEVELOPMENT BANK, IDB IN BRIEF, *available at* http://www.isdb.org/english_docs/idb_home/backgrnd.htm (last accessed Sept. 4, 2007).

⁹⁴ ISLAMIC DEVELOPMENT BANK, IDB IN BRIEF, *available at* http://www.isdb.org/english_docs/idb_home/backgrnd.htm (last accessed Mar 4, 2007).

⁹⁵ UNITED NATIONAL DEVELOPMENT PROGRAMME, ABOUT UNDP, *available at* <http://www.undp.org/about/> (last accessed Sept. 4, 2007).

⁹⁶ Eight Nordic and European member states established the bank.

promote small and medium size businesses.⁹⁷ The Nordic Investment Bank also provides long-term loans for projects in non-member states in the Middle East.⁹⁸

Bilateral Foreign Direct Investment Organizations

Bilateral foreign direct investment organizations are FDI institutions sponsored by individual states. Bilateral FDI organizations promote a state's international development policy by providing capital for FDI. The Agence Francaise de Development, Finnish Fund for Industrial Cooperation, Industrialization Fund for Developing Countries, and the Japan Bank for International Cooperation are examples of bilateral FDI organizations.⁹⁹

Agence Francaise de Development

The Agence Francaise de Development is a bilateral investment organization managed by government of France. The Agence implements French foreign development investments. The stated mission of the Agence Francaise de Development includes the alleviation of poverty, the enhancement of economic growth through financing, and the protection of public goods.¹⁰⁰

Finnish Fund for Industrial Cooperation

The Finnish Fund for Industrial Cooperation is an organization that provides capital for Finnish projects in developing states. The Finnish Fund finances projects that use Finnish technology or that include Finnish partners.¹⁰¹ The Finnish government, along with other Finnish organizations, owns the Finnish Fund.

Industrialization Fund for Developing Countries

⁹⁷ NORDIC INVESTMENT BANK, MISSION AND STRATEGY, *available at* <http://www.nib.int/about/mission.html> (last accessed Sept. 4, 2007).

⁹⁸ NORDIC INVESTMENT BANK, LENDING IN NON-MEMBER COUNTRIES., *available at* http://www.nib.int/lending/int_lending.html (last accessed Sept. 27, 2007).

⁹⁹ HARVARD BUSINESS SCHOOL, PROJECT FINANCE PORTAL, *available at* <http://www.people.hbs.edu/besty/projfinportal/mdasbdas.htm> (last accessed Sept. 4, 2007).

¹⁰⁰ AGENCE FRANCAISE DE DEVELOPMENT, OUR MISSION: FINANCING DEVELOPMENTS, *available at* <http://www.afd.fr/jahia/Jahia/home/Mission/lang/en> (last accessed Sept. 4, 2007).

¹⁰¹ FINNISH FUND FOR INDUSTRIAL COOPERATION, FINNFUND IN BRIEF, *available at* http://www.finnfund.fi/en_GB/ (last accessed Sept. 4, 2007).

The Industrialization Fund for Developing Countries is an organization that provides FDI in developing states in partnership with Danish companies and businesses. The Fund provides several services including advising developing states on economic issues, financing projects, and guaranteeing commercial loans.¹⁰² The Fund operates to promote the interests of the Danish government in regards to international development and investment policy.

Japan Bank for International Cooperation

The Japan Bank for International Cooperation is a legislatively created entity that aims to promote the interests of Japan through international investment.¹⁰³ In addition to its promotion of Japan's overseas interests, the Bank participates in FDI opportunities that provide for economic stability and social development in developing states. The Bank provides low-cost, long-term capital for projects in developing states that encourage self-help and local sustainability.¹⁰⁴

Governmental Foreign Direct Investment Organizations

In addition to multilateral and bilateral investment organizations, states also establish governmental agencies to promote FDI. Some of these agencies promote both international investment in the domestic economy¹⁰⁵ and outward investment from domestic companies into foreign economies.¹⁰⁶

Government Agencies Promoting Foreign Direct Investment

The task of promoting FDI in a state's economy benefits the state as a whole. The rewards associated with increased FDI are not accessible in an

¹⁰² INDUSTRIALIZATION FUND FOR DEVELOPING COUNTRIES, ABOUT IFU, *available at* http://www.ifu.dk/Menu/About_IFU (last accessed Sept. 4, 2007).

¹⁰³ JAPAN BANK FOR INTERNATIONAL COOPERATION, PROFILE OF JBIC, *available at* <http://www.jbic.go.jp/english/base/profile/organize/index.php> (last accessed Sept. 4, 2007).

¹⁰⁴ JAPAN BANK FOR INTERNATIONAL COOPERATION, ABOUT, OVERVIEW OF OPERATIONS, *available at* <http://www.jbic.go.jp/english/base/about/profile/index.php> (last accessed Sept. 4, 2007).

¹⁰⁵ WORLD ASSOCIATION OF INVESTMENT PROMOTION AGENCIES, MEMBERS LIST, *available at* <http://www.waipa.org/members.htm> (last accessed Sept. 4, 2007).

¹⁰⁶ WORLD ASSOCIATION OF INVESTMENT PROMOTION AGENCIES, INVESTMENT ORGANIZATIONS, OUTWARD INVESTMENT AGENCIES, *available at* http://www.waipa.org/inv_organizations.htm (last accessed Sept. 4, 2007).

economic forum that would result in any single private firm generating profits from promotion activities.¹⁰⁷ Therefore, the task of promoting FDI falls to the government because no single domestic firm will profit substantially from promoting FDI.

Usually, governments establish agencies whose sole responsibility is to encourage foreign investment. Jordan, Egypt, and Montenegro are states that use governmental agencies to promote FDI.

The government of Jordan created the Jordan Investment Board in 2003 to promote FDI.¹⁰⁸ The Jordanian Investment Board works with private sector investors in expediting registration and licensing requirements for investment projects and simplifying the overall investment process. The agency's goal is to use FDI in Jordan as a tool that will benefit the local job market, increase national exports, and advance the international transfer of technology.¹⁰⁹

The Egyptian General Authority for Investment and Free Zones is the government agency in Egypt concerned with both the oversight and promotion of FDI.¹¹⁰ The Egyptian General Authority provides numerous services to investors looking to invest in the Egyptian economy. Some of these services include business partner identification, expediting licensing and registration requirements, and project site assistance. The agency's goal is to expand the economic opportunities of Egypt to international investors by promoting foreign investment, provide investor services, and support investor friendly government regulations.¹¹¹

The Montenegrin Investment Promotion Agency works with both foreign and domestic investors to promote and increase investment within Montenegro. The goals of the Agency include increased investment in Montenegro and

¹⁰⁷ Lewis T. Wells, Jr. and Alvin G. Wint, *MARKETING A COUNTRY: PROMOTION AS A TOOL FOR ATTRACTING FOREIGN INVESTMENT*, available at <http://rru.worldbank.org/PapersLinks/Open.aspx?id=244> (last accessed Sept. 24, 2007).

¹⁰⁸ JORDAN INVESTMENT BOARD, ABOUT JIB, available at http://www.jordaninvestment.com/pages.php?menu_id=1&local_type=0&local_id=&local_details=&local_details1=&localsite_branchname=JIB (last accessed Sept. 4 2007).

¹⁰⁹ JORDAN INVESTMENT BOARD, ABOUT JIB.

¹¹⁰ GENERAL AUTHORITY FOR INVESTMENT AND FREE TRADE ZONES, available at <http://www.gafinet.org/index.htm> (last accessed Sept. 4, 2007).

¹¹¹ GENERAL AUTHORITY FOR INVESTMENT AND FREE TRADE ZONES, ABOUT GAFI, OUR MISSION, available at <http://www.gafinet.org/our-mission.htm> (last accessed Sept. 4, 2007).

increased economic development in the Montenegrin economy.¹¹² The Agency promotes investment by providing services such as information regarding the investment climate, assistance in obtaining business permits, and aiding in the location and identification of project sites.

DARFUR PEACE AGREEMENT

The Darfur Peace Agreement (DPA) broadly addresses FDI. The DPA recognizes that the private sector plays an important role in the development and recovery of Darfur.¹¹³ The most explicit DPA reference to FDI is the statement that an “economic and social” objective should be to develop an environment conducive to foreign investment.¹¹⁴

SAMPLE LANGUAGE

Article XXX

Freedom to Invest

Foreign persons [Persons are generally defined as an individual or organization] shall be subject to the same investment laws domestic persons are subject to [Subsequent provisions can set a percentage for the amount of foreign owned capital that can be used to establish of an enterprise.].¹¹⁵

AND/OR

Foreign Direct Investment shall be prohibited in [specified economic sectors].¹¹⁶

AND/OR

¹¹² MONTENEGRO INVESTMENT PROTECTION AGENCY, *WHAT CAN MIPA DO FOR YOU?* available at <http://www.mipa.cg.yu/aktiv.asp?str=mipaserv> (last accessed Sept. 12, 2007).

¹¹³ Darfur Peace Agreement, art. 19, para. 140, May 5, 2006, available at http://www.unmis.org/english/2006Docs/DPA_ABUJA-5-05-06-withSignatures.pdf (last accessed Sept. 17, 2007).

¹¹⁴ Darfur Peace Agreement, art. 17, para.107, sec. i.

¹¹⁵ This language is drawn from Bulgaria’s Law on Foreign Investment, art. 2, and from Vietnam’s Law on Foreign Investment, art. 15.

¹¹⁶ This language is drawn from Ghana’s Investment Promotion Centre Act of 1994, sec. 18.

A foreign person may own [A specified percentage, generally less than 50%] of a company [in specified economic sectors].¹¹⁷

Article XXX **Transfers**

The Government shall allow the transfer abroad of the external funds invested in a project, together with the profits and revenues, in the same currencies brought in, or in any other transferable currency. [Registration with the [Domestic Registering Agency] of these assets is required before they may be transferred].¹¹⁸

Article XXX **Treatment**

National Treatment

Foreign investors shall have the same rights and obligations as domestic investors.¹¹⁹

Most-favored Nation Treatment

The Government will not treat a foreign investor from [state #1] differently than a foreign investor from [state #2] simply because the foreign investors are from different states.¹²⁰

Expropriation

Foreign investments shall not be subject to any act of nationalization, expropriation, requisition, or measures that have similar effects, except in the public interest in accordance with applicable laws and regulations,

¹¹⁷ This language is drawn from Bosnia and Herzegovina's Law on Direct Foreign Investment, art. 4(a).

¹¹⁸ This language is from Syria's Investment Law No. 10, art. 25. Language is also drawn from Egyptian procedures required for the repatriation of monies earned in Egypt.

¹¹⁹ This language is from Bosnia and Herzegovina's Law on Direct Foreign Investment, art. 8(a).

¹²⁰ This language is drawn from Bosnia and Herzegovina's Law on Direct Foreign Investment, art. 8(b).

without any type of discrimination and against the payment of appropriate compensation.¹²¹

OR

Foreign investments shall not be subject to expropriation except where there is special legislation and fair compensation.¹²²

OR

Foreign Direct Investment shall not be expropriated except in cases of emergency, natural disaster, accidents, epidemics or epizootic where accompanied by fair compensation.¹²³

Article XXX **Dispute Settlement**

Disputes arising because of foreign investment shall be resolved in [A certain forum. Generally, these disputes are resolved in the relevant courts or in international arbitration. The parties to a contract may also agree on other procedures, i.e. local courts or international arbitration. The State may also restrict what forums resolve these disputes.].¹²⁴

Article XXX **Incentives**

The Government may provide tax incentives [Generally the reduction of taxes on FDI, the reduction or eliminate of rental fees for Government lands, etc.].¹²⁵

¹²¹ This language is from Bosnia and Herzegovina's Law on Direct Foreign Investment, art. 16.

¹²² This language is drawn from Iran's Law Concerning the Attraction and Protection of Foreign Investments, art. 3.

¹²³ This language is drawn from Ukraine's Regime of Foreign Investment, art. 9.

¹²⁴ This language is drawn from Bosnia and Herzegovina's Law on Direct Foreign Investment, art. 17, and from Jordan's Investment Promotion Law of 1995, art. 33. Some countries, like Saudi Arabia and Iran limit the available forums a foreign national may use.

¹²⁵ This language is drawn from Jordan's Investment Promotion Law of 1995, arts. 6-10.

Article XXX
Ownership Requirements

Foreign Direct Investment shall be prohibited in [certain economic sectors, i.e. defense, cultural and historical heritage].¹²⁶

OR

Foreign investors shall be restricted from owning domestic lands [Some countries allow for long-term leases on land.¹²⁷].

OR

A foreign person may own [A certain percentage. This is generally less than [50%.] of a company [certain economic sectors].¹²⁸

Article XXX
Bilateral Investment Treaties

The Government of Sudan hereby agrees to establish an initiative designed to encourage the development and implementation of Bilateral Investment Treaties with foreign states.

AND

The Government of Sudan hereby agrees that all investment related agreements signed by the Government of Sudan will favor all provinces equally, to the best extent possible, while taking into account unique capacities of specific provinces and their respective comparative advantages.

AND

The government of Sudan hereby agrees to work towards [ratification and/or implementation] of the [either the International Centre for the Settlement of

¹²⁶ This language is drawn from Ghana's Investment Promotion Centre Act, sec. 18.

¹²⁷ This language is drawn from Joyce Palomar's *Land Tenure Security as a Market Stimulator in China*, which outlines what Chinese policy regarding land ownership.

¹²⁸ This language is drawn from Bosnia and Herzegovina's Law on Direct Foreign Investment, art. 4(a).

Investment Disputes, the UN Commission on International Trade Model Law, or both].

AND

The Government of Sudan hereby agrees to work towards [ratification and/or implementation] of the New York Convention for the Enforcement of International Arbitral Awards.