UNITED NATIONS ESCAP
Economic and Social Commission for Asia and the Pacific

NATIONAL AND INTERNATIONAL INVESTMENT POLICY: WAY FORWARD

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SOME BASIC QUESTIONS

- What is investment policy? Complement or substitute for industrial policy?
- What types of investment? For what level of development?
- Who does investment policy, regulation, promotion (required institutional framework)?
- How does national investment policy interact with regional/global policy?
- What is the link between investment policy and investment law(s)? Is there a need for a national investment law?
- How can we rebalance and redirect FDI for sustainable development (i.e. contribution to SDGs)?
- How can we effectively address the global nature of FDI through national/regional level action? OR:
- Is the time ripe for a global agreement on investment?

GLOBALIZED TNC CHARACTERISTICS

- World-wide sourcing/supply chain management
- Global market presence essential
- Cost minimization and intensive use of ICT/automation
- Customized end-products
- Intangible assets (brands, skills, innovation) more important than tangible assets (factories, warehouses, dealer networks)
- Increasing importance of SMEs as TNCs
- Increasing importance of emerging economies as outward investors
- Increase in state-owned enterprises and sovereign wealth funds as foreign investors
- Increase in FDI flows but not in productive investment
- The services sector accounts for almost tow-thirds of global FDI stock

INSTITUTIONAL FRAMEWORK: KEEP KEY FUNCTIONS SEPARATE

- Investment policy and promotion
- Investment regulation and promotion

Investment policy and regulation is a function of various ministries and law makers, while investment promotion is about marketing and providing information and helping the investor setting up and realizing his investment. These functions require different skills at different level and cannot/should not be combined in one agency

DEVELOPMENTS IN INVESTMENT POLICY

- **1980s: "getting the prices right": eliminate micro- policies (e.g. subsidies)**
- **1990s: "getting the policies right": embrace macro-economic policies (e.g. deregulation and liberalization) to promote global integration; active investment policy to attract FDI**
- **2000s: "enabling environment": fostering legal, regulatory and political institutions which provide stability, protection and transparency to (foreign) investors and social infrastructure (e.g. education and health care); active investment promotion and facilitation, including aftercare. Growth of IPAs**
- **2010s: (a) "inclusive growth and sustainable development": foreign investments strongly embedded in the host business climate contributing to economic developments in a sustainable way; (b) national security concerns**

DEVELOPMENTS IN INVESTMENT PROMOTION

- 1980s: economic and financial liberalization: focus on macroeconomics
- 1990s: Increased attention to active investment promotion through Investment Promotion Agencies
- 2000s: Increased competition among developing countries for FDI through incentives; rise of IIAs; more sophisticated investment promotion techniques using websites and investor targeting
- 2010s: Shift from investment promotion to investment facilitation (aftercare)

INVESTMENT POLICY IS CLOSELY LINKED TO:

- Economic and development policy
- Trade policy
- Competition policy
- Privatization policy
- Labour policy (increasing employment)
- Enterprise development and value chain integration (forging linkages)
- STI policy
- Transport policy
- Environment and energy policy

IMPROVING INVESTMENT CLIMATE (WORLD BANK)

- Investment climate: the location-specific factors that shape the opportunities and incentives for firms to invest productively, create jobs, and expand
- A good investment climate improves outcomes for society as a whole
- A good investment climate provides opportunities and incentives for firms—from microenterprises to multinationals—to invest productively, create jobs, and expand
- A good investment climate encourages firms to invest by removing unjustified costs, risks, and barriers to competition
- Improving policy predictability can increase the likelihood of new investment by more than 30 per cent

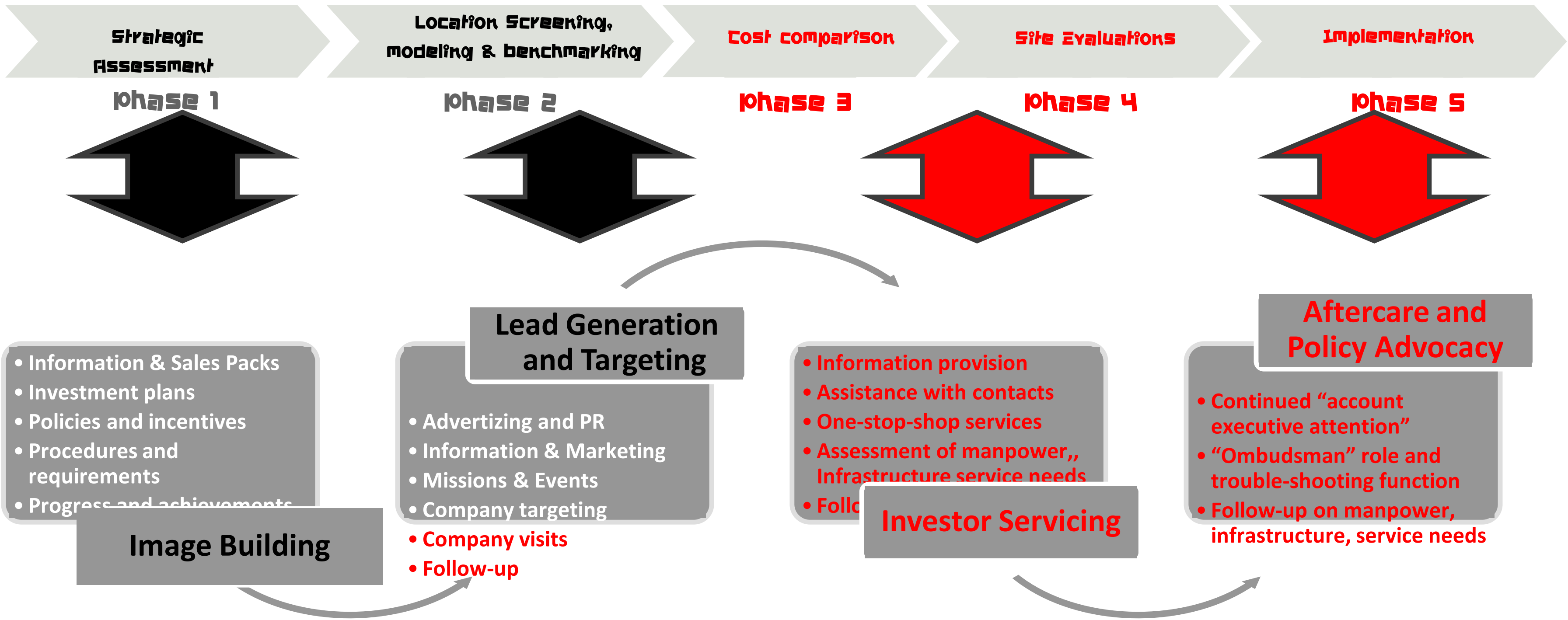
IMPROVING INVESTMENT CLIMATE BY:

- Reducing risk of policy uncertainty and arbitrary regulation
- Reducing high costs of doing business (taxes, corruption, customs clearance and duties, cost of borrowing, cost of utilities, labour etc.)
- Reducing barriers in both pre-establishment and post-establishment phase of investment
- Improving labour skills
- Improving access to high quality infrastructure
- World Bank Ease of Doing Business refers

ISSUES IN FOREIGN INVESTMENT LAW

- Do you need it?
- Do you need to discriminate between foreign and domestic investment?
- Consistency with other laws (national and international) is very important
- Insufficient by itself to establish proper legal regime for FDI

WHERE INVESTORS (CLIENTS) MEET GOVERNMENTS (IPAs): INVESTMENT FACILITATION



THE GOALS AND RATIONALE OF INVESTMENT FACILITATION

- Facilitate initial investment, retain that investment, and expansion of existing investment.
- Increase the satisfaction of existing investors (your "customers") through proper after care and policy advocacy

Key message:

Existing investors can become important partners for promoting your country (but only if they are happy)!

NEW GENERATION OF INVESTMENT POLICIES (UNCTAD WIR 2012)

- Investment policies have consequently evolved to a new generation of investment policies that strive to:
  - Create inclusive growth and sustainable development through the benefits of FDI
  - Create synergies with wider economic development goals or industrial policies and achieve seamless integration in development strategies
  - Foster responsible investor behaviour and incorporate principles of corporate social responsibility (CSR)
  - Ensure policy effectiveness in their design and implementation and in the institutional environment within which they operate

UNCTAD'S IPFSD: CORE PRINCIPLES

- Policy coherence
- Public governance and institutions
- Dynamic policymaking
- Balanced rights and obligations
- Right to regulate
- Openness to investment
- Investment protection and treatment
- Investment promotion and facilitation
- Corporate governance and responsibility
- International cooperation

NATIONAL FDI POLICY CHALLENGES
(UNCTAD IPFSD, 2012)

- Integrating investment policy in development strategy
  - Channeling investment to areas key for the build-up of productive capacity and international competitiveness
  - Ensuring coherence with the host of policy areas geared towards overall development objectives
- Incorporating sustainable development objectives in investment policy
  - Maximizing positive and minimizing negative impacts of investment
  - Fostering responsible investor behaviour
- Ensuring investment policy relevance and effectiveness
  - Building stronger institutions to implement investment policy
  - Measuring the sustainable development impact of investment

INTERNATIONAL FDI POLICY CHALLENGES
(UNCTAD IPFSD, 2012)

- Strengthening the development dimension of IIAs
  - Safeguarding policy space for sustainable development needs
  - Making investment promotion provisions more concrete and consistent with sustainable development objectives
- Balancing rights and obligations of states and investors
  - Reflecting investor responsibilities in IIAs
  - Learning from and building on CSR principles
- Managing the systemic complexity of the IIA regime
  - Dealing with gaps, overlaps and inconsistencies in IIA coverage and content and resolving institutional and dispute settlement issues
  - Ensuring effective interaction and coherence with other public policies (e.g. climate change, labour) and systems (e.g. trading, financial)

PROMOTING SOCIALLY RESPONSIBLE INVESTMENT

- **OECD guidelines for Multinational Enterprises:** http://www.oecd.org/corporate/mne
- **United Nations Global Compact principles:** https://www.unglobalcompact.org
- **ISO 26000 series on social responsibility:** http://www.iso.org/iso/home/standards/iso26000.htm
- **United Nations Guiding Principles on Business and Human Rights:** http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
- **ILO conventions:** http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm

POTENTIAL PITFALLS/LOOPHOLES TO BE ADDRESSED BY INVESTMENT POLICY

- Ownership restrictions vs. establishing nationality
- Anticompetitive practices by foreign affiliates
- Volatile flows of investment and related payments deleterious for the balance of payments
- Tax avoidance and abusive transfer pricing by foreign affiliates (BEPS: Base Erosion and Profit Shifting)
- Transfers of polluting activities or technologies
- Crowding out local firms and suppressing domestic entrepreneurial development
- Crowding out local products, technologies, networks and business practices with harmful socio-cultural effects
- Concessions to TNCs, especially in export processing zones, allowing them to skirt labour and environmental regulations
- Excessive influence of TNCs on economic affairs and decision-making, with possible negative effects on industrial development and national security

In short: a balancing act between the interests of investors and the host country

OTHER IMPORTANT POINTS TO CONSIDER

- Global FDI largely motivated by M&As and corporate reconfiguration
- Global consolidation of value chains
- Performance requirements are often counterproductive and may be prohibited by international law
- Incentives waste resources and lead to a race to the bottom. They are usually “icing on the cake”: use them sparingly and carefully
- Good governance: importance of solid national legal framework, rule of law and proper enforcement, absence of red tape

IMPORTANCE OF REGIONAL COOPERATION

Binding vs. non-binding

- Investment cooperation and facilitation
- Investment promotion
- Investment liberalization
- Investment protection
- Investment agreements

Individual vs. collective actions

Best practice: ASEAN Investment Area and subsequent ASEAN Comprehensive Investment Agreement (ACIA)

REGIONAL COOPERATION ACROSS THE BOARD CAN SUPPORT FDI ATTRACTION

- Regional FDI incentive schemes
- Joint R&D and technology development
- Regional patent filing system
- Regional technical standards
- Joint databases on supporting industries and technology suppliers
- Harmonized competition policies
- Regional credit/ insurance guarantee schemes
- Regional linkage systems
- Joint regional investment promotion agency
- Macro-economic and financial policy coordination
- Regional currency alignment schemes
- Regional chambers of commerce (e.g. GMS-Business Forum)
- Regional connectivity in roads, railroads, electricity, broadband etc.

RECENT DEVELOPMENTS IN IIAs (UNCTAD)

- Number of BITs and DTTs steadily increasing, but at a declining rate
- More DTTs than BITs signed during last few years (partly due to efforts to eliminate tax havens)
- Increasing renegotiation of BITs
- FTAs and Economic Partnership Agreements with comprehensive investment chapters concluded at increasing rate
- Trend away from bilateral agreements to more integrated and inclusive approach/regional agreements

RECENT DEVELOPMENTS IN IIAS, CONT.

- From protection/promotion to include liberalization
- Increased rebalancing between investor and host country rights and obligations and economic and public policy objectives (e.g. environment)
- More innovative and precise language
- Ongoing review of arbitration rules; emphasis on dispute prevention and alternative dispute resolution (prevent “forum shopping”)
- Two Asian countries among world top ten signatories: China (no 2 with 128 BITs) and Rep. of Korea (no 10 with 90 BITs)

RECENT TRENDS IN IIAs: NUMBERS

- **As of September 2016, there were 1,100 IIAs in force that had one or more parties from the Asia-Pacific region (in force: 958 BITs & 142 TIPs; signed: 261 BITs & 24 TIPs ; under negotiation: 4 IIAs (all TIPs))**
- **In 2015 and 2016, the region added 14 new IIAs in force (5 BITs & 9 TIPs) and signed 21 new IIAs (13 BITs & 8 TIPs)**

- **Memo: Globally there are 2,616 IIAs in force (2,322 BITs & 294 TIPs) and 742 signed IIAs (665 BITs & 77 TIPs)**
- **In 2015 and 2016, the world added 25 new IIAs in force (15 BITs & 10 TIPs) and signed 40 new IIAs (29 BITs & 11 TIPs)**
- **TIP: International treaty with investment provisions**

DO IIAs HELP IN ATTRACTING FDI?

- IIAs can influence a company's decision to invest, but:
  - Role is limited (IIAs alone cannot do the job); economic determinants are more important
  - Impact is generally stronger in the case of FTAs with investment chapters than with regard to BITs
  - Also depends on the kind of FDI
  - The conclusion of IIAs need to be embedded in broader policies covering all host country determinants of FDI

REBALANCING REQUIRED?

- Some criticisms against current agreements
  - Too narrowly focused, addressing only the rights of the foreign investors (and not their obligations)
  - Investment protection provisions strong, investment promotion provisions weak
  - Dispute settlement mechanism has shortcomings (not transparent enough, prone to conflicts of interest)
    - In response, IISD developed in 2005 a "Model International Agreement on Investment for Sustainable Development"
    - UNCITRAL Rules and Convention on Transparency
    - United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency")
- At the same time
  - Agreements are about protection of investors and initiated to attract investments by decreasing the risk for investors.
  - The obligations of investors are to follow host country law.
  - How strong can you make promotion provisions, and why?
  - Countries are still more or less following the usual form of agreements, with some modifications (e.g. provisions related to environment & dispute settlement).

HOW CAN IIAs BE ADAPTED TO CONTRIBUTE TO SUSTAINABLE DEVELOPMENT (UNCTAD IPFSD)?

- Better definitions of "investment"
- Clarifications on MFN/NT ("like circumstances")
- Strengthening general exceptions/general obligations/investor obligations
- Include reference to international standards of responsible investment and responsible business practices
- Careful definitions of the scope of pre-establishment commitments
- Better define FET
- Insert appropriate social (labour) and environmental clauses that would allow governments to take appropriate measures for inclusive development without fearing a lawsuit
- Include provisions that shield host countries from unjustified liabilities and high procedural costs of ISDS
- Limit the Full Protection and Security provision to "physical" security and protection only and specifying that protection shall be commensurate with the country's level of development
- Introducing language that draws a line between a compensable indirect expropriation and the adverse effects endured by a foreign investor as a result of bona fide regulation in the public interest
  - e.g. Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (2007)

IMPORTANT PROVISIONS OF A MAI

- Balancing rights of investors with those of host governments
- Addressing sustainability issues: adherence to international standards on labour and environmental protection
- Prohibition on lowering health, safety, environmental, or labour standards to attract investment
- Embedding OECD guidelines on MNEs and other international principles of responsible business practices (e.g. Global Compact)
- Clearly defining “investment” and “investor” (limit to FDI)
- Early agreement on exceptions and carve-outs
- Addressing issues in ISDS: transparency, ambiguity, legitimacy, costs, access, etc. and keeping it manageable

Your questions please?

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