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TOWARDS A NEW GENERATION OF INTERNATIONAL INVESTMENT POLICIES: UNCTAD'S FRESH APPROACH TO MULTILATERAL INVESTMENT POLICY-MAKING

Updated in light of the *World Investment Report 2013*.

Highlights

- In response to changing economic realities and multiple crises, investment policy-making is experiencing a paradigm shift. As a result, inclusive growth and sustainable development have emerged as key policy objectives.
- At the international level, policy-making faces multiple challenges. The most pertinent of these are how to strengthen the sustainability dimension of international investment agreements (IIAs); how to preserve appropriate regulatory space for host countries; how to deal with the complexity of a fragmented treaty regime characterised by overlaps and incoherence; and how to address serious deficiencies in investor-State dispute settlement (ISDS).
- UNCTAD, and its recently launched *Investment Policy Framework for Sustainable Development* (IPFSD) offer a two pronged approach for addressing these challenges.
    - o First, IPFSD offers expert guidance for the future formulation of investment policies. Through its eleven core principles, its guidelines on national policy making and its options for IIA clauses, IPFSD provides direction for every level of investment policy-making.
    - o Second, UNCTAD complements this expert-led guidance with a universal, inclusive and transparent policy dialogue. Given its multi-stakeholder nature, UNCTAD offers a forum for a diverse set of actors ranging from civil society, business and academia to working- and high-level representatives and policy-makers from countries at all levels of development.
- The two prongs are not only mutually re-enforcing each other, but also complemented by UNCTAD's world-wide recognition of being the United Nations' focal point for issues related to investment and sustainable development.

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Introduction

Recent changes in the global political and economic environment, including a series of crises in finance, food security and the environment, are leading to a new generation of foreign investment policies that place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment.

On the international plane, made up of nearly 3,200 international investment agreements (IIAs), the pressing policy challenges include:

- strengthening the development dimension of the investment policy regime;
- ensuring sufficient policy space for host countries by balancing public and private interests;
- addressing serious deficiencies of the current system of investor-State dispute settlement (ISDS); and
- resolving issues stemming from the increasing complexity of the international investment policy regime.

These challenges would be best solved through coordinated efforts. UNCTAD's experience in this area, most recently embodied in its *Investment Policy Framework for Sustainable Development*, can serve as a foundation for future consensus-building on international investment policies.

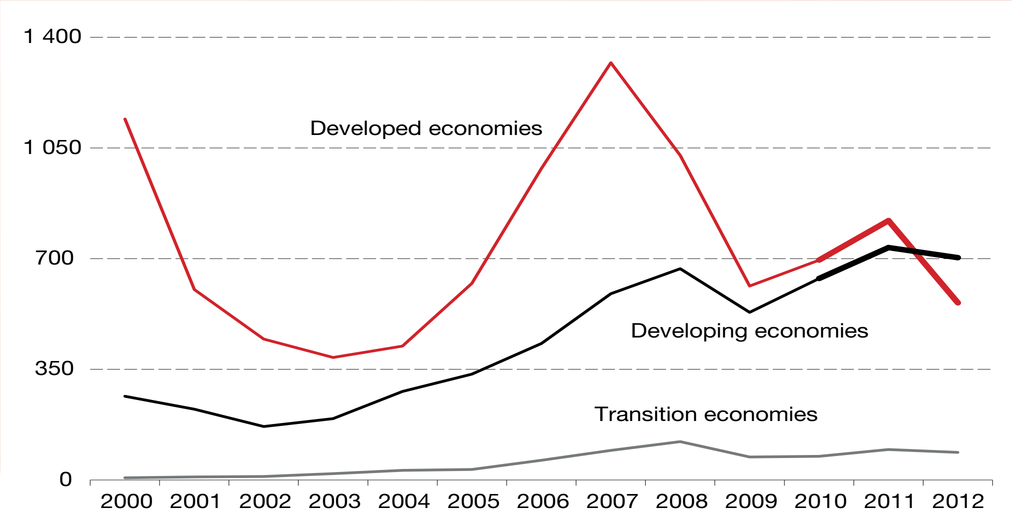
This note (A) provides an overview of the relevant changes in the economic and policy environment; (B) discusses the key trends and pressing challenges in international investment policy making; and (C) puts forward the idea of multilateral consensus-building as a way to deal with existing challenges and sets out some considerations with regard to this process.

A. The evolving context for IIAs

1. Changing investment landscape

The investment and investor landscape has undergone fundamental changes in recent years (figure 1). Since 2010, developing and transition economies have absorbed more than half of global FDI inflows, and in 2012 FDI flows to developing economies, for the first time ever, exceeded those to developed countries – with US$142 billion more (*WIR 2013*).

Figure 1. Global FDI inflows, developed, developing and transition economies, 2000-2012
(Billions of US dollars)



Source: UNCTAD.

Developing economies have not only become important recipients of FDI, they are increasingly large investors themselves, with their share in world outflows reaching a record of 31 per cent (*WIR 2013*). While these countries might previously have been more concerned with the pressure they faced to provide protection for investments made by others, they now also have to consider the security and treatment of their own investors' interests abroad.

Today, transnational corporations (TNCs) and their international production networks play a significant role, with foreign affiliates' economic activity having increased in 2012 across all major indicators of international production (sales, value added, assets, exports and employment) (table 1). In that year, foreign affiliates employed an estimated 72 million people, who generated US$ 26 trillion in sales and US$ 6.6 trillion in value added. Data from UNCTAD's annual survey of the largest 100 TNCs suggest that the foreign sales and employment of these firms grow significantly faster than those in their home economy.

Table 1. Selected indicators of FDI and international production, 1990, 2011

Item	Value at current prices (Billions of dollars)	
	1990	2012
FDI inward stock	2 078	22 813
Income on inward FDI	75	1 507
Rate of return on inward FDI (per cent)	*4.0*	*6.6*
Income on outward FDI	122	1 461
Rate of return on outward FDI (per cent)	*6.0*	*6.2*
Sales of foreign affiliates	5 102	25 980
Value-added (product) of foreign affiliates	1 018	6 607
Total assets of foreign affiliates	4 599	86 574
Exports of foreign affiliates	1 498	7 479
Employment by foreign affiliates (thousands)	21 458	71 695

Source: UNCTAD.

2. Policy development

A series of crises in finance, energy, food security and the environment have revealed persistent global imbalances and social challenges, especially with regard to poverty alleviation. These crises and challenges are having profound effects on the way policy is shaped at the global level. First, current crises have accentuated a longer-term shift in economic weight from developed countries to emerging markets. Second, the financial crisis in particular has strengthened the role of governments in the economy, in both the developed and the developing world. Third, the nature of the challenges, which no country can address in isolation, makes international coordination imperative. And fourth, the global political and economic context and the challenges that need to be addressed – with social and environmental concerns taking centre stage – are leading policymakers to reflect on an emerging new development paradigm that places inclusive and sustainable development goals on the same footing as economic growth.

One important policy trend is that governments have become more active in economic policies. More and more governments are moving away from a "hands-off" approach to economic growth and development that had prevailed previously.

Industrial policies and industrial development strategies are proliferating in developing and developed countries alike. This trend reflects, in part, a renewed realism about the economic and social costs of unregulated market forces. A stronger role of the State also manifests itself with regard to other sustainability issues. New social and environmental regulations are being introduced or existing rules reinforced; governments are increasing efforts to promote actively the move towards sustainable development, for example through the encouragement of low-carbon FDI (*WIR 2010*, *WIR 2011*, *WIR 2012, WIR 2013*).

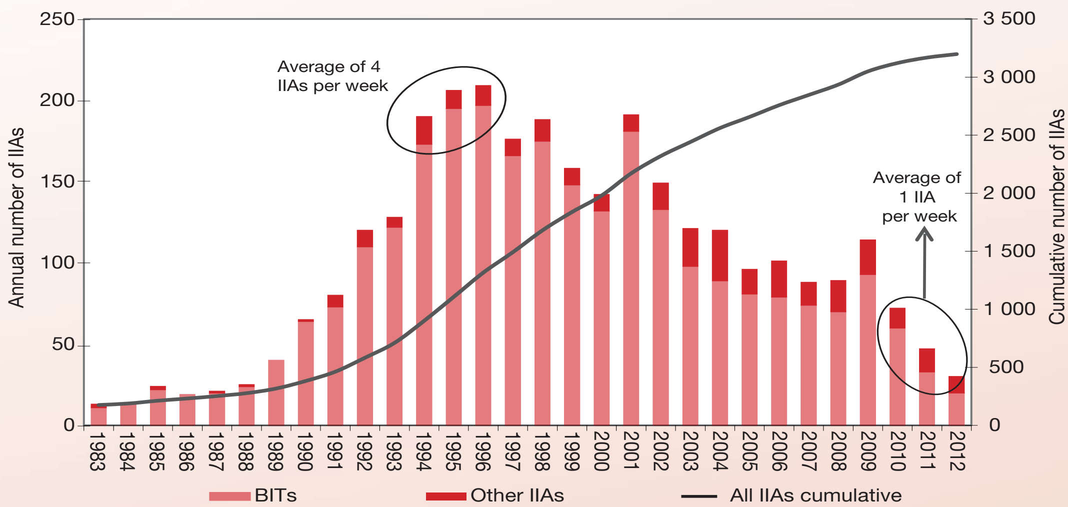
As a result, a "new generation" of investment policies is emerging, pursuing a broader and more intricate development policy agenda. Broadly, "new generation" investment policies are characterized by (i) a recognition of the role of investment as a primary driver of economic growth and development, and the consequent realization that investment policies are a central part of development strategies; and (ii) a desire to pursue sustainable development through responsible investment, placing social and environmental goals on the same footing as economic growth and development objectives (*WIR 2012*).

B. International investment policy making: current trends and challenges

1. Key trends in IIA rulemaking

By the end of 2012, the overall number of IIAs approached 3,200 agreements, including close to 2,850 BITs and some 350 "other IIAs"[1] (figure 2). Almost every country is party to one or more IIAs. This treaty network offers protection to approximately two-thirds of global FDI stock and covers one-fifth of possible bilateral investment relationships (*WIR 2011*).

Figure 2. Trends of BITs and "other IIAs", 1980–2012



Source: UNCTAD. *Data for 2012 are preliminary.*

[1] "Other IIAs" include agreements such as free trade agreements (FTAs) or economic partnership agreements, and usually fall in one of three categories: (i) IIAs including obligations commonly found in BITs; (ii) agreements with limited investment-related provisions; and (iii) IIAs focusing on investment cooperation and/or providing for a negotiating mandate on investment (*WIR 2011, WIR 2012*).

In today's spaghetti bowl of IIAs, bilateral agreements constitute the overwhelming majority. However, in terms of economic significance, there has been a gradual *shift towards regionalism*. This is particularly the case with respect to current negotiations, where most prominent developments are the ongoing negotiation of the Trans-Pacific Partnership Agreement (TPP) (the combined economic weight of the participating States amounts to 35 percent of the global GDP), and the European Union's new investment treaty-making powers (any agreement concluded by the EU as a bloc will bring together at least 27+1 countries). Other regional groupings, such as ASEAN or Central America, have also emerged as regional investment actors. In most cases, regional treaties are at the same time FTAs and address trade and investment in a comprehensive manner (*WIR 2012*).

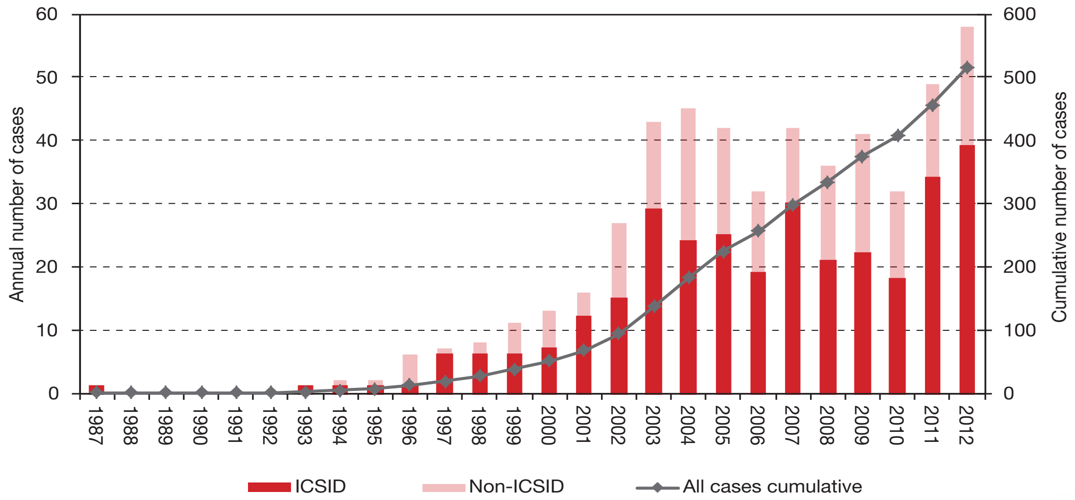
The shift to regionalism can bring about the consolidation and harmonization of investment rules and represent a step towards multilateralism. Currently, at least 110 countries were involved in 22 negotiations of regional agreements. However, where new regional treaties do not entail the phase-out of old bilateral ones, the result can be the opposite: instead of simplification and growing consistency, regionalization may lead to a multiplication of treaty layers, making the IIA network even more complex and prone to overlaps and inconsistencies. Nevertheless, current regional IIA negotiations present a window of opportunity to consolidate the existing network of BITs. Nine selected regional negotiations currently under way may potentially overlap with close to 270 BITs, which constitute nearly 10 per cent of the global BIT network (*WIR 2013*).

Sustainability considerations have been gaining prominence in the negotiation of IIAs. Although many of the recently concluded IIAs follow the traditional BIT model that focuses solely on investment protection, others include innovations. Several of the new features are meant to ensure that the treaty does not interfere with, but instead contributes to, countries' sustainable development strategies that focus on inclusive economic growth, supports policies for industrial development, and addresses the environmental and social impacts of investment (*WIR 2012, WIR 2013*).

Another notable trend has been the ongoing reassessment by numerous countries of their IIAs. Governments have approached this in a different manner, including (i) revising their model BITs, (ii) renegotiating "old" BITs to replace them with "modern" ones, (iii) putting on hold the conclusion of any new agreements, and (iv) sometimes terminating existing BITs and denouncing the ICSID Convention (*WIR 2010*). At the same time, the IIA regime is reaching a juncture as 1,300 BITs will be at the stage where they could be terminated or renegotiated at any time hence offering an opportunity for treaty partners to revisit their agreements, with a view to addressing inconsistencies and overlaps in the multi-faceted and multi-layered IIA regime and to strengthen its development dimension (*WIR 2013*).

These actions have been taken largely in response to an increasing number of international investor-State claims that often touch upon sensitive public policy issues, may lead to unexpected interpretation of IIA provisions and/or entail a heavy financial toll on State budgets. There has been a steady growth of investment arbitration cases against host countries: by the end of 2012, the total number of known treaty-based disputes reached 514 (figure 3) and the total number of countries that have responded to one or more investment treaty claim increased to 95.

Figure 3. Known investor-State treaty-based disputes, 1987-2012



Source: UNCTAD.

2. Key challenges for international investment policy making

The above-mentioned policy developments have brought to light a number of demanding challenges.

First, policymakers in some countries, especially those seeking to implement industrial development strategies or adjust regulatory frameworks, have found that IIAs can unduly constrain domestic policy space. Many policymakers have observed that IIAs are focused almost exclusively on protecting investors and do not do enough to promote investment for development. While IIAs – implicitly or explicitly – recognize the sovereign right of host countries to regulate foreign investment in their territory, questions about the "right" balance between private and public interests in IIAs, and how to achieve it in technical terms, remain an important subject for discussion. Similarly, while IIAs – by ensuring stability of the legal regime – can play a role in stemming protectionist tendencies, it is also important that IIAs grant sufficient regulatory flexibility to respond to changing circumstances.

The second challenge involves adjusting the balance between the rights and obligations of States and investors. This means that in addition to the IIAs' goal of protecting foreign investments, more attention should be given to the corresponding responsibilities of investors. Further to investors' obligation to respect the laws of the host country, IIAs should give more prominence to the issue of corporate social responsibility.

The third challenge is to resolve issues stemming from the increasing complexity of the international investment regime. The current regime consists of thousands of treaties (mostly BITs, FTAs with investment provisions, and regional agreements). This construct has a number of systemic deficiencies, including gaps, overlaps and inconsistencies in coverage and content. Also, the "interconnect" between international investment policies and other policy areas such as trade, finance, competition or environmental (e.g. climate change) policies, is absent.

The fourth challenge stems from the shortcomings of the ISDS system. Concerns include (i) an expansive use of IIAs by investors that reaches beyond what was originally intended; (ii) contradictory interpretations of key IIA provisions by ad hoc tribunals, leading to uncertainty about their meaning; (iii) the inadequacy of ICSID's annulment or national judicial review mechanisms to correct substantive mistakes of arbitration tribunals; (iv) the emergence of a "club" of individuals who serve as counsel in some cases and arbitrators in others, often obtaining repeated appointments; (v) the practice of nominating arbitrators who are likely to support the position of the party appointing him/her; (vi) the secrecy of many proceedings; (vii) the high costs and considerable length of arbitration proceedings; and (viii) overall concerns about the legitimacy and equity of the arbitration system. These challenges have prompted a debate about the challenges and opportunities of ISDS. This discourse has been developing through relevant literature, academic/practitioner conferences and the advocacy work of civil society organizations. It has also been carried forward under the auspices of UNCTAD's Investment Commission and Expert Meetings, its multi-stakeholder World Investment Forum (WIF) and a series of informal conversations it has organized, as well as the OECD's Freedom-of-Investment Roundtables (*WIR 2012, WIR 2013*).

As its most recent contribution to this debate, UNCTAD has identified five broad path for reform:

1. Promoting alternative dispute resolution
2. Tailoring the existing system through individual IIAs
3. Limiting investors' access to ISDS
4. Introducing an appeals facility
5. Creating a standing investment tribunal

IIA stakeholders are prompted to assess the current system, with the available options and embark on concrete steps for reform. Collective efforts at the multilateral level can help develop a consensus about the preferred course of reform and ways to put it into action (*WIR 2013*).

C. UNCTAD's approach to multilateral investment policy-making

There is currently no appetite for negotiating a binding multilateral framework for investment. But there is a compelling need for a multilateral mechanism that deals with today's investment policy-making challenges at different levels.

In fact, UNCTAD has long been providing such a mechanism, as it has been – widely and firmly – recognized as the focal point of the United Nations system for dealing with IIA-related issues. Over the past years, UNCTAD has taken a two pronged approach, providing comprehensive expert-led guidance for investment policy-making and establishing a multilateral, multi-stakeholder forum for an inclusive dialogue for investment and sustainable development issues.

The approach advocated by UNCTAD has its origins in the 2008 "Accra Accord" which encouraged work in the form of interactive expert meetings with practical and actionable outcomes "*such as inventories of best practices, checklists, indicative guidelines, sets of criteria or principles, and model frameworks*".[2]

In this spirit, UNCTAD's Division on Investment and Enterprise launched in 2012 its *Investment Policy Framework for Sustainable Development* (IPFSD). The Framework is a comprehensive embodiment of UNCTAD's experience in the area of investment policy-making developed in line with the objectives of inclusive growth and sustainable development and through a process that involved top experts and a wide range of stakeholders. It is designed to serve as a key point of reference for investment policymakers and to become the basis for UNCTAD's capacity-building and technical cooperation in this area.

It is complemented by other aspects of UNCTAD's work relevant to multilateral consensus building, e.g. the Entrepreneurship Policy Framework, the Principles

[2] UNCTAD, *Accra Accord*, 25 April 2008, para. 207.

for Responsible Agricultural Investment (PRAI), contributions to various G20 work streams (such as those on long-term investment, corporate social responsibility, "green growth", global value chains, private investment and job creation, and investment policy monitoring), and the Division's inputs to various summits (such as G8, G20, ASEAN and APEC).

Currently, the IPFSD is at the stage of wide dissemination and pilot use. The next stage will involve its review in light of the feedback received and lessons learnt. The Framework was designed as a "living document" that can be discussed and updated continuously.

The remainder of this section discusses how the IPFSD-based process can, on the one hand, serve as a model, and on the other hand, feed into multilateral consensus-building on investment. To this end, it addresses the following aspects of the potential multilateral consensus-building, as inspired by the IPFSD: objectives, substance, process and end-use.

1. Objectives

In light of the challenges identified in section B above, the objectives of multilateral consensus-building include:

- strengthening the sustainable-development dimension of the international investment policy regime;
- preserving sufficient regulatory space for host countries through a better balancing of public and private interests;
- addressing serious deficiencies of the current system of ISDS; and
- resolving issues stemming from the increasing complexity of the international investment policy regime.

In addition, there is a need to increase synergy between investment policies and other policies at both national and international levels.

Multilateral consensus-building can bring important benefits. It can help identify areas of broad agreement and disagreement. This in itself can facilitate discussions directed at resolving potential disagreements. At a minimum, clarification of the extent of consensus in the IIA universe serves the interest of transparency and predictability. By improving – where possible – coherence between agreements, consensus-building can also further the clarity, stability and transparency of the IIA system. This work can gradually establish a development-friendly foundation for a possible future multilaterally binding investment regime.