8th Meeting of the Asia-Pacific Foreign Direct Investment (FDI) Network
United Nations Conference Centre, Bangkok, Thailand, 25-26 September 2018

SUMMARY NOTES

INTRODUCTION

The 8th Meeting of the Asia-Pacific Foreign Direct Investment (FDI) Network was held in Bangkok, Thailand on 25 and 26 September 2018. The Meeting was attended by 25 representatives from 19 countries including Armenia, Azerbaijan, Bhutan, Cambodia, Fiji, France, India, Kyrgyzstan, Lao People’s Democratic Republic, Mongolia, Myanmar, Nepal, Papua New Guinea, Philippines, Russian Federation, Sri Lanka, Timor-Leste, Uzbekistan, and Viet Nam. Fourteen resource persons presented at the Meeting.

The aim of the Network is to share experiences and best practices on FDI policy making, promotion and facilitation in the region. For this purpose, the 8th Meeting discussed current developments and challenges in investment rule making and FDI related policies, and explored ways to improve the national legal frameworks and policies along with international investment agreements (IIA) system to ensure better support to the implementation of the 2030 Agenda for Sustainable Development and achievement of the associated sustainable development goals (SDGs). Network members also discussed national experiences, best practices and challenges faced in the region, which were channeled into the deliberations at the global level at the UNCTAD World Investment Forum (WIF) 2018 (22-26 October, Geneva, Switzerland).

(1) The Meeting was opened by Mia Mikic, Director, Trade, Investment and Innovation Division (TIID), United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). She outlined the importance of FDI as means of implementation of the SDGs due to its significant contributions to economic, environmental and social development. Noting the challenging global business environment, especially with ongoing trade wars between major partners, she stressed the importance of sustainable investment for long-term benefits for countries and business alike.

(2) Marc Proksch, Chief, Investment and Enterprise Development Section (IEDS), TIID, ESCAP gave an introduction of the Meeting’s objective and structure. Noting the increasing threats from rising nationalism and protectionism which created great uncertainties for investments, he highlighted the importance of image building and investment facilitation for attracting sustainable investment. He also emphasized the role of the Network as a platform for policymakers and experts to share experience and learn from each other.

(3) All presentations and the programme can be accessed at: https://www.unescap.org/events/eighth-meeting-asia-pacific-foreign-direct-investment-fdi-network
SUMMARY OF PRESENTATIONS AND DISCUSSION

Day 1: Foreign direct investment promotion and facilitation, 25 September 2018

A. Trends and developments in foreign direct investment (FDI), national policies and international agreements on investment (IIAs) in Asia and the Pacific

(4) Soo Hyun Kim, Associate Economic Affairs Officer, IEDS, TIID, ESCAP introduced key trends and developments in FDI, national FDI policies, and IIAs in the Asia-Pacific region based on the Asia-Pacific Trade and Investment Report (APTIR) 2018 (upcoming). She noted that both global and regional FDI inflows have been on a decline since 2017, but that the Asia-Pacific region remained a strong investment destination and accounted for 39% of total global FDI inflows. She provided an overview of changes in FDI policy measures from January 2017 to June 2018, which mainly covered easing of regulations for FDI and strengthening investment facilitation, though there was also a significant number of restrictive or regulatory investment policy measures. She also pointed out a slowdown in international investment treaty-signing with India having the highest number of terminated bilateral investment treaties in the observed period. The Meeting highlighted the need for continued research on these topics to support evidence-based decisions by member States.

B. Measuring investment policy reform in the Asia-Pacific region

(5) Stephen Thomsen, Head, Investment Policy Reviews, OECD introduced the OECD FDI Regulatory Restrictiveness Index, an important tool for measuring the performance of investment policy reforms in 22 sectors. He explained that all countries discriminated against foreign investors in at least one sector and implemented some form of screening process or equity restrictions with the goal of minimizing harmful investment and of pursuing maximum benefits via linkages with local industries and spillovers. He highlighted that, on average, restrictions were still relatively high in the Asia-Pacific region, but has been coming down over time. He also noted that restrictions would impose cost on the economy by deterring FDI which must be assessed against any potential gains from discrimination against foreign investors.

C. Country presentation: Russian Federation

(6) Ms. Anna Kostina, Officer, Ministry of Economic Development of Russian Federation made a presentation on the investment environment in the Russian Federation. She noted that the Russian Federation was working on a national entrepreneurship initiative focusing on six directions (developing competition, improving regulations, registration of firms, facilitating access for SMEs to government procurement and tax administration, export promotion and improvement of business evaluation) in five areas (construction, customs administration, access to the power grid, registration of property, and corporate governance). A question was raised about how the Russian Government collaborated with business. She answered that the Government established expert groups, where business representatives and the Government could discuss current issues and design joint effort for business purposes.
D. Establishing a stronger Asia-Pacific FDI Network: online platform

Mr. Jonas Flake, Trade, Investment and Innovation Division, ESCAP made a presentation on an initiative that would incorporate the Network under the Asia-Pacific Research and Training Network on Trade (ARTNeT), to be called ARTNET on FDI. It will provide a channel for continuous discussions between government focal points, advisors and other interested parties of the Network. He presented the intended structure of the website and suggested contents, such as publications and a list of focal points. The Meeting generally supported the proposal and commended ESCAP’s efforts towards the establishment of this platform. The Meeting also emphasized the interrelated nature between trade and investment, and suggested that more efforts should to be put into cross-fertilization between the current ARTNeT and envisaged ARTNET on FDI. Focal points were requested to provide further feedback and to update their information for the preparation of the launch, which will take place in early 2019.

E. Attracting sustainable FDI in strategic sectors

Andreas Dressler, Managing Director, FDI Center shared his views on how to attract sustainable FDI in strategic sectors. He first emphasized the need for a comprehensive FDI strategy for FDI attraction, explaining that FDI strategies provide links between policies and operations. He stressed that FDI strategies for attracting investment would provide governments or organizations with a clear direction to attract investment in preferred areas and sectors. He also listed the key components of such a strategy in selecting target sectors. The Meeting discussed good practices, specifically referring to the example of Iceland, on how sustainable investment can be achieved, with a number of policy suggestions.

Stephen Olson, Research Fellow, Hinrich Foundation gave insights on how to promote sustainable global trade and investment. He introduced the Sustainable Trade Index (STI), which evaluates 19 Asian economies and the United States of America across the three pillars of sustainable development (economic, social and environment). The overall results for 2018 indicated that there was a broad regression in sustainable trade, especially among richer economies. While there were improvements in the economic pillar, its potential impact is offset by the backsliding on social and economic aspects. He suggested that with the global market becoming more competitive, sustainability played a bigger role in companies’ investment decisions, especially to ensure long term returns. He noted that during the last two decades private companies have taken the lead in sustainability, but governments have not always kept up. At the same time, there was a shift from company level to industry level sustainability standards.

William Speller, Economist, United Nations Conference on Trade and Development, presented the key findings of a joint research by UNCTAD and the World Bank based on an over ten-years field work and shared lessons on FDI in agriculture. He pointed that investors and governments who seek only short-term financial returns on investment were unlikely to reap them. He emphasized that dedicated policies and initiatives were required to extract development outcomes such as economic linkages, technology transfer and job creation, for attracting agriculture investment. He further explained that business models and financial viability of investments are important for reaping long-term sustainability benefits. He concluded by
observing that FDI played a critical role in raising farmers’ income and had a pioneering impact in developing or rejuvenating the industry.

(11) Simon Lacey, Vice-President, Global Government Affairs, Trade Facilitation and Market Access, Huawei Technologies Co., Ltd presented optimal investment conditions in the ICT and technology industries. He started with identifying the lead factors affecting a host country’s attractiveness to investors and distinguished those factors that were largely beyond government control (market size, proximity to other regional markets, economic vitality of the population, purchasing power of the population) from those factors that could be influenced by sound policies and proper leadership (skills, infrastructure and logistics, ease of doing business, upstream and downstream supply chains). He explained that, if possible, Huawei will set up joint research centers with operators, and also try and align itself closely with host government and even provide policy advice in areas such as IT network building, national broadband plans, spectrum allocation and cybersecurity. He concluded with providing characteristics of an optimal investment regime for FDI in ICT with particular reference to market access, national treatment and partnerships.

F. Country Presentations

(12) Mr. Vijay Kumar Tyagi, Director (FDI), Department of Economic Affairs, Ministry of Finance, India informed the Meeting of the various initiatives undertaken by the Government of India to improve the policy regime and the business environment with the goal of FDI promotion. The government put in place an investor-friendly policy which is more transparent, predictable and easily comprehensible. A series of reforms were implemented to improve the business environment such as significantly reducing the time and the number of procedures required to register a business, to apply for a construction permit, to obtain electricity. He also said the Government was trying to make efforts to reduce the cost of production to increase competitiveness via tax policy, among others, including the Goods and Service Tax (GST) form of taxation to avoid multiple and cascade taxation. He explained that India has been showing stable progress, and continued liberalization of FDI with FDI in almost 90% of all sectors in India being approved through the automatic approval routes.

(13) Ms. Phan Thi Thanh Nhan, Official, Foreign Investment Agency, Ministry of Planning and Investment, Viet Nam introduced the investment situation in Viet Nam. The country had attracted increased inflows of FDI in the past few decades helped by a positive investment environment. In order to avoid the “middle income trap” and achieve high-income status, Viet Nam adopted a next-generation FDI promotion strategy focusing on attracting FDI in high-tech, environment-friendly and less energy-consuming sectors, developing FDI in a sustainable manner with an emphasis on quality and socio-economic impact; and strengthening linkages with domestic enterprises. This strategy specifically targets FDI in businesses which generate higher wages, promote human capital development, stimulate more efficient use of resources, trigger spillovers with local businesses and SMEs, and increase the competitiveness of overall Viet Nam.

G. Public-private partnerships for sustainable investment

(14) Tientip Subhanij, Chief, Financing for Development Section, Macroeconomic Policy and Financing for Development, ESCAP briefed on public-private partnership (PPP) and infrastructure financing in Asia and
the Pacific and introduced findings from the ESCAP PPP Survey 2018. She explained that in the region domestic public funding accounted for the main part of infrastructure financing. Due to the asset-liability mismatch and currency mismatch, large international commercial banks, which had previously provided a significant portion of infrastructure financing, has been deleveraging since the global financial crisis. In such a situation, capital markets and institutional investors were deemed as essential financing sources. In Asian countries with special needs the lack of both public and private funds is compensated for by official development assistance (ODA). She emphasized the need for international collaboration and experience sharing to forge effective PPPs. She also outlined ESCAP’s activities and support for member States in this area.

(15) Bostjan Skalar, Executive Director - CEO, World Association of Investment Promotion Agencies (WAIPA) talked about the need for international partnership in promoting investment for the successful achievement of the SDGs and stressed the role of investment promotion agencies (IPA). He identified the following success criteria for IPAs: identifying and targeting strategic sectors; multi-stakeholders’ dialogues, coordination and partnerships; clear set of rules for private investors, IPAs and governments. He also identified the need for further linkages and technical assistance for IPAs, enhanced investment facilitation and more regional cooperation to ensure sustainability. He emphasized the need for more investment to maintain growth momentum in the region and the importance of PPPs to potentially fill the gap. Nevertheless, PPPs were heavily concentrated in East and South Asia (90% of that in China and India). More than half of the PPPs were in energy and a third in transport, which reflected the region’s needs. The point was raised that the concept of PPP was confusing, and therefore there was a need for further exploration of the definition of PPP and roles for different stakeholders.

(16) Siva Devireddy, Founder & CEO, GoCoop, India introduced his business, which is an online marketplace for the artisanal handcrafts from India. The main hurdle was the fragmentation of the industry in terms of geography and communication inclusiveness. He spoke about the power of technology to connect artisans in remote villages in India with buyers globally. He went on to speak about his funding journey for Go Coop, touching upon the importance of FDI, including for social enterprises.

H. Country Presentation: Cambodia

(17) Mr. Suon Sophal, Director, Public Relations and Investment Promotion Department, Council for Development of Cambodia, Cambodia delivered a presentation on leveraging industrial development for sustainable investment in Cambodia. After introducing the country’s investment performance and trends over the last ten years, he introduced the prioritized industries in the country. He noted the efforts of the government in encouraging NGOs, private sector, and civil society to develop infrastructure and service delivery through partnerships and participation, and the efforts of the private sector in infrastructure development. It was noted that more effort would be put in developing the legal framework, facilitation and promotion of FDI that could benefit small and medium-sized enterprises (SMEs) in all sectors but especially in newly emerging industries, and industries that use technology to create value-added and jobs. Under the new government, Cambodia has adopted very ambitious strategic objectives and policy priorities in development and was also seeking cooperation with international organizations.
I. Integrating sustainable development in IIAs: case of the Asia-Pacific LDCs and LLDCs

(18) Mr. Karl Sauvant, Resident Senior Fellow, Columbia Centre on Sustainable Investment; Senior Fellow, International Centre for Trade and Sustainable Development (ICTSD) (by video-link) elaborated on the need for identifying the characteristics of sustainable FDI. He pointed out the crucial role of sustainable FDI in achieving SDGs, and therefore certain sustainability characteristics should be made clear for all to understand. He introduced the indicative list of FDI sustainability characteristics. By referring to “common FDI sustainability characteristics” and “emerging common FDI sustainability characteristics”, stakeholders could define the type of investment they want. He encouraged governments to use these sustainability characteristics in their international investment agreements, as the list is widely accepted and supported, including by MNEs and business associations. He noted that this convergence, in turn, could have a strong signaling effect for all stakeholders seeking to promote sustainable FDI.

(19) Manjiao Chi, Professor and Founding Director of the Center for International Economic Law and Policy, Law School, University of International Business and Economics (UIBE) made a presentation based on an empirical study supported by ESCAP on sustainable development provisions (SDPs) in BITs of Asian-Pacific least developed countries (LDCs) and landlocked developing countries (LLDCs). His research examined 20 selected IIAs as well as 340 BITs involving Asian pacific LDCs and LLDCs. He introduced the major types and subtypes of sustainable development provisions and explained that BITs of Asia-Pacific LDCs and LLDCs were less sustainable development-oriented when compared with sample IIAs in general. Acknowledging that there was no one-size-fits-all model of sustainable development-oriented IIAs, he stressed the need to consider the role of non-state stakeholders and soft law rules in the existing IIA system. He also emphasized the importance of capacity building, inter-state cooperation and stakeholder engagement. Moreover, he noted that Asian-Pacific LDCs and LLDCs needed to keep observing the development in regard to the interpretation and application of SDPs in IIAs. In response to a question on the issue of anti-corruption cooperation provisions in terms of time and treaty practice, he explained that anti-corruption provisions were beyond the scope of his research neither a profound part of BITs.

J. Country presentations

(20) Mr. Enkhbold Vorshilov, Director-General, Department of Foreign Trade and Economic Cooperation, Ministry of Foreign Affairs, Ulaanbaatar, Mongolia presented Mongolia’s FDI promotion policy. He explained that investment in Mongolia is currently protected by the law set up in 2013, which aims to provide equal treatment for foreign and national entities, to facilitate getting licenses and approvals, tax and non-tax incentives under more liberalized market conditions. He also referred to the work of the Investment Protection Council which handles investment disputes and investor complaints related to the recent cases of cancellation of licenses in the mining sector. He noted that the Government also focused on the development of other sectors, such as agriculture, energy and tourism.
(21) Mr. Khomraj Koirala, Joint Secretary, Economic Management Division, National Planning Commission Secretariat, Nepal, presented investment policy and the regulatory framework for investment in Nepal. By disaggregating the financing need for the achievement of SDGs by each SDG, he established the investment requirement for the 2016-30 period as 47.79 per cent of the GDP on average. Building upon this background, he introduced the investment policy of Nepal which aims at making the national economy competitive and dynamic through maintenance of trade balance by import substitution and export promotion attracting foreign capital, technology, skill and knowledge in national priority sectors (energy, transportation, agriculture, tourism, manufacturing, mines and minerals, and ICT). Under the wider framework to make the national economy competitive and dynamic, the Government’s investment policy encouraged and mobilized foreign capital and technology investment in priority sectors for import substitution, export promotion and infrastructure development.

(22) Mr. Than Aung Kyaw, Deputy Director General, Directorate of Investment and Company Administration (DICA) and Sufian Jusoh, Director, Institute of Malaysian and International Studies (IKMAS), National University of Malaysia presented on positioning Myanmar as an attractive new investment destination in South-East Asia. Myanmar mainly focuses on investment in five sectors: oil and gas, manufacturing, infrastructure, agriculture and tourism. In October 2016, Myanmar introduced an Investment Law Reform which aims at overcoming market access restrictions and streamlining the complicated approval process. Prior to the reform, Myanmar investment law was ambiguous and inadequate; market access was limited, and the investment approval process was complicated. He noted that the reform was necessary and was a step in the right direction and applied to both domestic and foreign investors. He concluded by a discussion of key challenges of making Myanmar attractive for foreign investors.

(23) Ms. Ganga Hiroshini Palakatiya, Deputy Director (Research & Policy Advocacy), Board of Investment of Sri Lanka gave an overview of her country and presented the supportive business environment and legal framework to attract FDI. Drawing attention to the improving performance of FDI in creating exports incomes and jobs, she pointed out the challenges that Sri Lanka needed to overcome further ahead. She particularly emphasized that noted that FDI has been increasingly concentrated in infrastructure, and it rather should focus more towards manufacturing, services and agriculture to strike the right balance. Sri Lanka was taking various actions to ensure investor confidence and predictability. For instance, since the country had no investment law at the moment, harmonizing investment policy with government development policy is one of the major steps to ensure investor confidence. She also explained recent reforms and initiatives taken to facilitate investment as guided by UNCTAD such as targeted investment and acceleration of approval process.

(24) Mr. Khamraev Oybek, Head of Department, the State Committee for Investments, Uzbekistan delivered a presentation of Uzbekistan’s reforms. Over the last twenty months, a large-scale transformation and liberalization of the economy had been underway. He noted that one of the five priority reforms in the Development Strategy for 2017–2021 (adopted in February 2017) in Uzbekistan was for FDI. In 2017–2018, the country managed to make notable progress in these reform areas,
including liberalization of the currency exchange regulations. A new system of land allocation and construction regulations was among the key elements of the legal reforms. He also pointed out that the Government, through the State Committee of Uzbekistan for Investments, ensured “front to end” support for current and potential investors.

**k. Modernizing IIAs: best practices and challenges in the Asia-Pacific region**

(25) Sufian Jusoh, Director, Institute of Malaysian and International Studies (IKMAS), National University of Malaysia made a presentation on “ASEAN Comprehensive Investment Agreement as a model for best practices in ASIA-PACIFIC IIA (and for domestic law)”. After describing the history of the ASEAN Comprehensive Investment Agreement (ACIA), he noted its potential to be a benchmark for modernization and harmonization of IIAs in ASEAN member countries, with reference to many aspects including liberalization, protection, facilitation and promotion of FDI. He referred to examples of harmonization efforts between ACIA and national laws in countries such as Lao People’s Democratic Republic, Myanmar and Timor Leste.

**L. Synergies between IIAs and national legal framework for investment**

(27) Elisabeth Tuerk, International Investment Agreements Section, Division on Investment and Enterprise, UNCTAD (by video-link) shared her insights on “Synergies between IIAs and the national legal framework for investment”. She introduced UNCTAD’s reform package for the IIA regime, which covers three phases of sustainable development-oriented IIA reform: Phase 1 involving policy options for treaty clauses addressing the five priority areas for sustainable development-oriented treaty making; phase 2 involving ten reform mechanisms that countries can use to modernize existing old-generation treaties; and phase 3 involving policy guidance for three prongs of action towards ensuring overall investment policy coherence for sustainable development. She discussed the trends towards the increasing number of sustainable development-oriented IIAs, which is part of phase 3. She noted that policy coherence does not necessarily require uniform legal language and that achieving a satisfactory level of investment policy coherence is not instantaneous. She also stressed that IIA reform should look at IIAs in their entirety, ensure an inclusive and transparent reform process and do not lose sight of sustainability as the key requirement of the reform.

(28) Julien Chaisse, Centre for Financial Regulation and Economic Development, Faculty of Law, The Chinese University of Hong Kong, China made a presentation on domestic tax policies and IIAs. He noted the importance of understanding the relationship between tax law and foreign investment law. Tax disputes can be shifted to investor-state arbitration due to the lack of systematic tax exception in investment treaties. It was noted that weak regimes in protecting foreign investment increase tax-related investment disputes. He emphasized that the reform should be focused on maximizing synergies between the IIA regime and the national legal framework for investment as well as managing the interaction between IIAs and other bodies of international law affecting investment. He also raised the issue of the proliferation of specific economic zones. He noted that this suggests fierce competition for FDI and risk of failure, especially for those zones that lack clear purpose and management and, hence, investors. He
emphasized the importance of carefully designed tax measures in investment policy reforms to avoid investment disputes.

**M. ISDS prevention and management**

**Review options to pro-active prevention and management of investor-state dispute settlement (ISDS)**

(28) *Rajesh Babu Ravindran, Professor of law, Indian Institute of Management Calcutta, India* made a presentation on Asia-Pacific Regional Mediation Organization (ARMO) Initiative. He started his presentation with providing a background introduction to the Asia-Pacific Regional Mediation Organization (ARMO) Initiative and its working group. ARMO was created in 2017 by a group of Asia-Pacific scholars and practicing lawyers as a regional intergovernmental organization for the amicable resolution of disputes among states of the Asia-Pacific region mediation, covering the full range of international issues. He reported on the progress achieved by its working group and welcomed comments on and visits to its website.

(29) *Vee Vian Thien, Registered Foreign Lawyer, Allen & Overy* made a presentation on prevention and management of ISDS (Investor-State Dispute Settlement). She provided various examples based on personal experiences and practice in order to introduce ways to prevent and manage ISDS. One of the reasons for a dispute could be state measures which may trigger a breach of contract or breach of investment treaty. The number of ISDS cases have followed an increasing trend since 1990s. Therefore, she suggested the following three ways to prevent and manage ISDS: strategic treaty structuring, inserting specific contractual provisions such as stabilization clauses, and preventing issues that could lead to dispute. She noted that the concepts of “investor” and “investment” should be carefully defined. She concluded by presenting some proposals for reform, including establishment of a two-tiered system of tenured judges, an appellate mechanism, and procedural safeguards against “frivolous claims” and other procedural aspects, improving transparency, reducing costs and facilitating access to the system by developing and least developed countries, and establishment of a multilateral investment court.

(30) In closing, Marc Proksch thanked all participants and informed that ESCAP intended to strengthen the Network and involve members more closely in the secretariat’s investment work.