THE POLICY/LEGAL AND INSTITUTIONAL FRAMEWORK FOR FDI

Workshop on Promotion and Facilitation of Foreign Direct Investment for Sustainable Development in Uzbekistan, Tashkent, 20-21 December 2017
OUTLINE OF PRESENTATION

- Policy and institutional framework for FDI

- (Sector focus: FDI in agriculture)

- The need for sustainability

- Legal framework for FDI
POLICY AND INSTITUTIONAL FRAMEWORK FOR FDI
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?
INVESTMENT POLICY: WHO?

- Central ministry: Ministry of Trade and Industry
- Line ministries (by sector): energy, mining, industry, ICT, telecommunications, transport, etc.
- Involvement of other ministries: social development, environment to ensure sustainability
- Coordination is key! But often lacking
- Strong link between trade and investment policy but also investment and science, technology and innovation (STI)
- Investment promotion agency?
- Labour unions, chambers of commerce, civil society consultations are important
- Uzbekistan: what is the role of the State Investment Committee?
INVESTMENT SCREENING AND PROMOTION: WHO?

- Ministry of Planning/Industry and Trade
- Other line ministries
- Chambers of commerce
- Export Processing Zone authorities
- Central body: Investment Promotion Agency
- Combining Trade and Investment Promotion Agency?
- One-stop shop?

Uzbekistan:
- Registration: Ministry of Justice
- State Committee?
- What is the role of the local authorities (Khokimiyats)?
Elected members of parliament formulate the laws

Relevant ministries/government provide inputs to laws, play a role in overall regulation (often by sector)

Special bodies

Central banks

Consultation with private sector and civil society

Importance of inclusive and transparent process

Essential: implementation and enforcement, rule of law

What is the role of the IPA?
Investment policy and regulation is a function of various ministries and lawmakers, 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.
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
“SMART” FDI POLICY GOALS

- **SPECIFIC**: Break down objectives and expected impact for priority sectors and activities
- **MEASURABLE**: Focused set of quantifiable indicators
- **ATTAINABLE**: Realistic target setting (based on peer review)
- **RELEVANT**: Goals attained and indicators measured should be linked and attributable to FDI
- **TIME-BOUND**: Goals should be achieved within a stipulated time frame for sustainable development: short-term, medium-term, long-term (strategic)

FDI policy should identify priorities and measures to attain goals based on cost effectiveness
WHY YOU WANT TO ATTRACT FDI?
SOME POSSIBLE OBJECTIVES

- access foreign technologies and skills;
- close the domestic savings-investment gap;
- provide domestic employment;
- undertake privatization in an environment of weak domestic private sector;
- stimulate domestic competition;
- improve sustainable business practices;
- develop domestic infrastructure under public-private partnerships;
- close balance-of-payment deficits;
- close government budget deficits;
- gain or expand access to foreign markets;
- strengthen national competitiveness across the board;
- allow domestic SMEs and other domestic enterprises to effectively integrate into regional or global value chains;
- or any combination of the above.
INVESTMENT POLICY AND PROMOTION CONSIDERATIONS

- Understand FDI determinants!
- Which type (e.g. market? resource? supply-chain? labour-intensive? R&D?)
- Which form (e.g. greenfield, M&A, JV, 100% ownership, HQ?)
- Which location (SEZ, province, port, capital city?)
- Which sectors (agriculture, manufacturing, services?)
- Which source countries?
- Coordination among relevant institutions and ministries
- Sustainability
**LIBERALIZATION VS. REGULATION**

- Liberalization of what?
  - FDI regime (sectors, ownership, performance requirements, etc.)
  - General business operations/registrations/start up
  - Economy as a whole
  - Land ownership
  - World Bank Ease of doing Business refers

- Pace of liberalization: controlled and sustainable
- Balance with prudential supervision and regulation
- Liberalization for **efficiency** but regulation for **stability**. Both are needed!
- Regulation usually needed to ensure fair competition, environmental and social issues, finance and taxes, etc.
- Investment liberalization alone is not sufficient to attract FDI
INVESTMENT LIBERALIZATION NORMALLY MEANS REDUCING:

- Restrictions on sectors in which FDI can be made;
- Restrictions on the value of FDI;
- Restrictions on the level of foreign ownership;
- Compulsory joint ventures with local firms;
- Controls on repatriation of profits;
- Performance requirements, e.g. export requirements, local content requirements, technology transfer requirements, skills development requirements; trade balancing requirements;
- Import restrictions.
Privatization attracts (strategic-asset) FDI as it improves the investment climate

Privatization stimulates economic growth and financial sector development

However, many state-owned enterprises operate in sensitive sectors and often as monopolies not open to FDI

FDI does bring management expertise and capital domestic enterprises may lack

Privatization best for companies that are subject to competition

Privatization process needs transparency (open bidding) and be based on the rule of law and due process
SUCCESS FACTORS FOR PRIVATIZATION

- Stable macroeconomic condition;
- Favourable legal framework;
- Sound economic policy;
- Available financial market;
- Multi-benefit objectives;
- Appropriate risk allocation and risk sharing;
- Commitment and responsibility of public and private sectors;
- Strong and good private consortium;
- Good governance;
- Project technical feasibility;
- Shared authority between public and private sectors;
- Political support;
- Social support;
- Well-organized and committed public agency in charge of privatization;
- Competitive procurement process;
- Transparent procurement process;
- Government guarantees;
- Thorough and realistic assessment of costs and benefits.
“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 is not just about generating profits for firms - if that were the goal, the focus could be limited to minimizing costs and risks. A good investment climate improves outcomes for society as a whole. That means that some costs and risks are properly borne by firms.”

Quotes by World Bank
MUCH CITED OBSTACLES TO FDI IN UZBEKISTAN

- Excessive State control
- Regulatory uncertainty
- Poor enforcement of rules/lack of competence and impartiality of the court system
- Insufficient level of labour skills
- Lacking infrastructure
- High costs of doing business/excessive red tape/corruption
- Difficulties with expatriation of profits/lack of currency convertibility
- Primitive financial system/lack of international accountancy standards
- No standard transparent screening process of FDI projects
- Complex import and export procedures/high import duties
Uzbekistan is ranked 74 among 190 economies in the ease of doing business, according to the latest World Bank annual ratings. The rank of Uzbekistan improved to 74 in 2017 from 87 in 2016 (after a decline from 82 in 2015). Ease of Doing Business in Uzbekistan averaged 127.30 from 2008 until 2017, reaching an all time high of 166 in 2011 and a record low of 74 in 2017.

In 2016, Uzbekistan’s corruption index was 156 out of 175 (Transparency International)
MAIN AREAS OF IMPROVEMENT

- **Starting a Business**: Uzbekistan made starting a business easier by rolling out a new platform for business registration, starting with name verification as the first step.

- **Dealing with Construction Permits**: Uzbekistan made dealing with construction permits easier by streamlining the process of obtaining approvals of land plot allocations from various agencies.

- **Getting Electricity**: Uzbekistan streamlined the process of obtaining an electricity connection by introducing a turnkey service at the utility that fulfills all connection-related services, including the design and completion of the external connection.

- **Protecting Minority Investors**: Uzbekistan strengthened minority investor protections by increasing corporate transparency requirements.

- **Paying Taxes**: Uzbekistan made paying taxes easier and less costly by introducing an electronic system for filing and paying VAT, land tax, unified social payments, CIT, infrastructure development tax, environmental tax, personal pension fund contributions and cumulative pension contributions. On the other hand, land tax rates were increased.
THE ISSUE OF COMPETITIVENESS

Porter's "Diamond"
UZBEKISTAN’S COMPETITIVE ADVANTAGES

- Geographic position as bridge between Central, South and East Asia
- Member of SCO (but not its free trade zone) but not of EEU
- Part of Belt and Road initiative
- Availability of energy, both fossil based and renewable
- Cultural heritage/tourism
- Potentially large market: high population and many young people
- Entrepreneurial heritage
- Low labour costs and high level of literacy
- Reform-oriented government
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.
SECTORS IN WHICH UZBEKISTAN HAS COMPETITIVE ADVANTAGES

- Agriculture and agro-industry/fruits/cotton
- Natural resources: natural gas, oil, cotton
- Mining (gold/copper/uranium)
- Infrastructure
- Telecommunications and power
- Light industry: textiles, garments, food and beverages, ceramics, chemical, electronics and IT
- Tourism/hotels
- Real estate and industrial estates
- Export-oriented vs. import substitution
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 currency controls and facilitating currency convertibility
- Reducing barriers in both pre-establishment and post-establishment phase of investment
- Improving labour skills
- Improving land tenure security
- Improving access to high quality infrastructure
- Pursue trade facilitation
- Enforce adherence to international financial reporting standards
- World Bank Ease of Doing Business refers
- Promote global and regional economic integration: EEU/WTO
IMPROVING INVESTMENT CLIMATE: THE ROLE OF TRADE FACILITATION

- Simplify and harmonize trade procedures in accordance with international recommendations such as UN/CEFACT (http://www.unece.org/cefact/recommendations/rec_index.html)
- As part of this exercise, adopt paperless trading systems and single window systems. Such single windows can be regionalized within the context of a certain regional integration agreement, such as the ASEAN Single Window
- Implement the WTO agreements and provisions related to trade facilitation, in particular the WTO Trade Facilitation Agreement.
- Sign ESCAP Framework Agreement on the Facilitation of Cross-Border Paperless Trade
- Countries may also wish to explore membership of the World Customs Organization (WCO) and become party to its various international agreements and conventions and implement its recommendations
Technology and innovation capacity attract FDI

FDI contributes to technology transfer and innovation

The quality of national and subnational innovation systems matter

Governments can promote cooperation among companies through clusters, science and technology parks, incubators and networking among all stakeholders in an NIS, e.g. academia, research institutes, private sector, foreign investors, and government agencies

A strong legal and regulatory framework that promotes competition and protects IPR is also required.
A national innovation system refers to the complex and interactive web of knowledge flows and relationships among industry, government and academia and making them work systematically to sustain innovation and science and technology development efforts.
A SAMPLE NIS (OECD)
GOVERNMENT POLICIES FOR STI/NIS

- Education and investment in human capital
- Networking (e.g. Silicon Valley)
- Creation and diffusion of technology and promotion of indigenous R&D
- Establishment of world-class metrology, standards, testing, and quality control (MSTQ) infrastructure to ensure that the quality of domestic industrial products meets international standards
- Nurture innovation and entrepreneurship culture
- Promoting and mainstreaming open innovation
- Free flow of national and international knowledge and flexible labour mobility:
  - Provide appropriate legal and regulatory framework
  - Provide an enabling infrastructure: incubation parks, science and technology or high-tech parks etc. (e.g. MSC)
- Promote technology and innovation financing mechanisms and modalities
- Maintain open trade and investment regimes: Mainstreaming gender in STI
POLICY FOCUS: CREATING LINKAGES WITH DOMESTIC ENTERPRISES

- Both vertical (backward and forward linkages) and horizontal linkages: focus is integration into global value chains
- Linkages will only be sustained if they are technically viable and commercially profitable for the firms involved

Successful linkages depend on:

- The existence of SMEs which have the potential to meet high TNC standards;
- The TNC corporate strategy (i.e. efficiency-seeking FDI has the highest chance of establishing vertical backward linkages while market-seeking FDI has the highest chance to establish horizontal linkages through joint ventures;
- The existence and efficiency of a set of supporting public policies.
SUCCESS FACTORS FOR JOINT VENTURES

- There is mutual understanding that the IJV is a distinct entity, not a subsidiary or branch of any of the partners.
- There is mutual understanding and alignment of the objective of the IJV and responsibilities of the partners.
- There is a high level of trust, respect and courtesy between the partners.
- The local partner is free from government or political interference (linked to mutual trust).
- The local partner has realistic expectations from gaining access to the foreign partners often superior assets, technology and knowledge and intellectual property. Such access needs to be specified in the IJV legal agreement.
- The IJV is not a product of a “forced marriage” (because of local legislation for instance).
- Both partners are committed to accord the necessary time and resources to make the IJV a success.
- Both partners have undertaken proper research and planning before concluding the IJV.
- There is more or less equal bargaining power and capacity between the partners.
- There is a clear objective and benefit to be derived from the partnership joining partners with different but complementary ownership advantages.
- The foreign partner maintains a certain strategic direction of which the IJV is an important part.
- Disputes between the parties are to be decided in a third country.
Policy Framework for Linkages

- Information and matchmaking (role of IPA), e.g. Thailand’s BOI BUILD facility
- Enhancing the capacity of SMEs and local suppliers (comprehensive package, focus, targeted including technology, marketing, finance, training)
- Encouraging TNCs to engage in linkages

Linkage programmes should be based on voluntary cluster approaches, not performance requirements
PERFORMANCE REQUIREMENTS PROHIBITED BY INTERNATIONAL LAW

- Performance requirements are largely counterproductive but may be linked to incentives
- WTO-TRIMS explicitly prohibits:
  - Local content requirements
  - Trade balancing requirements
  - Foreign exchange restrictions
  - Export restrictions
  - Quantitative restrictions
  - Requirements that violate national treatment

- Prohibited or conditioned: provisions in free (preferential) trade agreements/economic partnership agreements/international investment agreements (BITs)
PERFORMANCE REQUIREMENTS WHICH COULD BE MANDATORY

- Conform to internationally recognized principles and standards related to responsible business conduct and CSR, including:
  - OECD guidelines for MNEs
  - Guiding principles on business and human rights
  - Global Compact
  - ILO conventions on decent work, including Tripartite Declaration of principles concerning multinational enterprises and social policy (MNE Declaration)

- Environmental assessments and pollution control
- Benefit sharing in natural resources
- Abstain from political meddling and peddling to vested local interests
## UNDERSTANDING THE ROLE OF INCENTIVES IN THE CORPORATE INVESTMENT PROCESS

### Phases of the Corporate Investment Process

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<td><strong>Define project and goals</strong></td>
<td><strong>Project assumptions</strong></td>
<td><strong>Input cost model</strong></td>
<td><strong>Resources for site visits</strong></td>
<td><strong>Define real estate objectives and accommodation needs</strong></td>
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<td><strong>Business requirements</strong></td>
<td><strong>Cost comparison</strong></td>
<td><strong>Set up cost model</strong></td>
<td><strong>Prepare site visits</strong></td>
<td><strong>Real estate transaction and acquisition support</strong></td>
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<td><strong>Project definition &amp; understanding of strategy</strong></td>
<td><strong>Analysis and comparison of locations</strong></td>
<td><strong>Cost differentials between locations</strong></td>
<td><strong>Prepare discussions with relevant governments and service providers</strong></td>
<td><strong>Real estate support</strong></td>
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<tr>
<td><strong>Determine geographic scope</strong></td>
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<td><strong>Sensitivity analysis</strong></td>
<td><strong>Incentive negotiations</strong></td>
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<td><strong>Selection of location factors</strong></td>
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<td><strong>Weighting location criteria</strong></td>
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### Strategic Assessment
- Business requirements
- Determine geographic scope
- Selection of location factors
- Weighting location criteria

### Location Screening, modeling & benchmarking
- Project assumptions
- Analysis and comparison of locations
- Data gathering
  - Build model for location analysis
  - Present rankings of locations
  - Sensitivity analysis
  - Exploration of incentives
- Comparison of costs

### Cost comparison
- Set up cost model
- Cost differentials between locations

### Community Evaluations
- Site visits
- Prepare site visits
- Prepare discussions with relevant governments and service providers
- Incentive negotiations

### Implementation
- Real estate support
- Real estate transaction and acquisition support
Incentives are generally not a major FDI determinant: at best they are “icing on the cake”

Incentives can’t turn a bad location into a good one but can tip the location decision to your favour

Link incentives to concrete sustainable development targets and conditions, especially regarding social and environmental targets and conditions

Undertake careful M&E of the use and effects of incentives
COMMON OBSTACLES TO SUCCESSFUL SEZ

- Poor strategic planning
- Lack of comparative advantage
- Poor site locations, entailing heavy capital expenditures
- Uncompetitive policies—reliance on tax holidays, rigid performance requirements, poor labour policies and practices
- Uncompetitive fiscal incentives
- Poor zone development practices—inappropriately designed or over-designed facilities, inadequate maintenance and promotion practices
- Subsidized rent and other services
- Cumbersome regulations and procedures and restrictive controls on zone activity;
- Inadequate administrative structures or too many bodies involved in zone administration; weak administrative bodies
- Lack of coordination between private developers and governments in infrastructure provision
- Exclusion of merchandise processed in zones from entry under bilateral and regional trade agreements
- No linkage with domestic economy
- Corruption
PURPOSE OF SEZ

- An SEZ is a trade and investment development instrument, with the goal to promote rapid economic growth by using tax and business incentives to attract foreign investment and technology.

- The goal is to artificially create a level playing field to ensure a globally competitive investment climate.

- Special regulations must be in place to avoid distorting effects to the existing domestic manufacturers and service providers.

- Especially in countries with an abundant and cost competitive labour force, SEZs have become a successful instrument to attract significant levels of FDI.
RECOMMENDATIONS FOR SEZs

- SEZs need to be competitive and prevent “enclave” syndrome.
- In particular, the focus of SEZs needs to shift from attracting labour-intensive to innovation-driven investment and conform to obligations under WTO and RTAs (i.e. AEC).
- There should be no discrimination between foreign and local companies in treatment.
- Zones should preferably have a multi-market orientation, not just for export and contain proper logistics and social facilities.
- New SEZs should focus on wielding stronger physical, strategic and financial links with the local economy.
- The provision of excellent infrastructure, reliable power and skilled labour is much more important than incentives.
RECOMMENDATIONS FOR SEZs, CONT.

- SEZs should have a fully operational single window for all investment approvals and facilitation.
- Attractive on-site residential facilities (schools, shopping, R&R) should be available.
- In short, SEZs need to create a more attractive investment environment than in the rest of the country.
- SEZs should be located in strategic locations, i.e. close to population and urban centres with sophisticated infrastructure (ports, railroads, roads, etc.)
- SEZs should be demand-driven and be developed/managed by private sector.
- SEZs need independent regulatory bodies backed up by law. The regulatory authority may be different from the development agency.
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
- Macroeconomic 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.
FDI PROMOTION: THE NEED FOR SUSTAINABILITY
As clarified in the Rio+20 Outcome ("the Future we Want")
Sustainable development covers three dimensions:

- Economic
- Social
- Environmental
MEETING THE SDGs

1. No Poverty
2. Zero Hunger
3. Good Health and Well-Being
4. Gender Equality
5. Clean Water and Sanitation
6. Affordable and Clean Energy
7. Decent Work and Economic Growth
8. Industry, Innovation and Infrastructure
9. Reduced Inequalities
10. Sustainable Cities and Communities
11. Responsible Consumption and Production
12. Climate Action
13. Life Below Water
14. Life on Land
15. Peace, Justice and Strong Institutions
16. Partnerships for the Goals
Economic:
Contribution of FDI to GDP growth, net exports, employment, (gross) capital formation, net capital inflows, government revenue, extent of forging linkages with domestic SMEs, technology transfer and absorption, competition, infrastructure development, etc.

Social:
Contribution of FDI to skills development, community development, women and disadvantaged groups employment, health benefits and pension plans, minimum wage and level of labour conditions (e.g. conformity with ILO labour standards), extent of CSR programmes and their results, number of families lifted out of poverty, accessibility and affordability of goods and services produced.

Environmental:
Level of environmental pollution (air, water, ground), level of GHG emissions, level of energy efficiency and water consumption, level of discharge of waste and recycling, application and transfer of environmentally sound technologies, etc.
NET IMPACT OF FDI ON POVERTY REDUCTION: THROUGH (LABOUR-INTENSIVE) ECONOMIC/INCOME GROWTH

FDI impact on poverty only indirect, and depends on many factors, e.g.:
– Supporting host country policies other than on FDI
– Tax income from FDI spent on poverty reduction
– Quality of institutions
– Quality of domestic enterprises
– Labour market flexibility
– The quality of the investment project
– The regulatory framework (existence and implementation of necessary 
  laws and regulations, including competition policy)

Qualification: FDI inflows do not reduce income inequalities. It may 
actually increase inequalities

Reality check: Recently much economic growth is jobless growth
UNCTAD World Investment Report 2014:

- UNCTAD estimates that investment needs for SDGs amount to $5-7 trillion per year
- At current levels of investment, developing countries face an annual investment gap of $2.5 trillion
- The role of the public sector for investing in SDGs is pivotal
- Private sector contributions are indispensable, and can take two forms:
  • Good governance in business practices
  • Investment in sustainable development
- UNCTAD estimates LDCs need to double the growth rate of private investment, to ensure funds to complement public investment and ODA
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
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

- United Nations Global Compact principles: https://www.unglobalcompact.org
- ISO 26000 series on social responsibility: http://www.iso.org/iso/home/standards/iso26000.htm
Challenge: balancing public development goals with private sector profit
- Establish proper legal and regulatory framework and standards for sustainability
- Enhance private sector governance, commitment, responsibility, accountability and transparency
- Public-private partnerships and division of labour and responsibility: Government must matter in providing conducive investment climate and ensuring policy coherence
- Set SDG investment targets
- Reforming IPAs into SDG investment agencies
- SDG-oriented investment incentives and investor targeting
- Promote social and impact investment
- Regional SDG investment compacts (esp. cross-border infrastructure development, and green zones)
- Home and host country IPA partnerships, to promote SDG investment. A multi-agency TA consortium to help assist LDCs
- Launch of innovative financing mechanisms, e.g. dedicated SDG funds and seed financing
- Sustainable stock exchanges
LEGAL FRAMEWORK FOR FDI
Allowing FDI across (and in virtually all) sectors
Equal treatment of foreign and domestic investors
Simple and transparent establishment process
Easy and secure access to and use of land and efficient land acquisition procedures
Strong arbitration laws
Conformity to international principles and laws
Supportive court system and fair trials
Quality of legal services

In addition (depending on type of FDI):
Non-restrictive labour laws
IPR protection
Easy repatriation of profits
FOREIGN INVESTMENT LAW

- FI Law is a law regulating investments made by foreigners or non-nationals in a specific country
- Why? To address issues related to national security, sovereignty, culture and development
- Definition of investment: assets, technology, knowledge, and any other form of capital that is brought into a country for business purposes
- FI Law specifies when, how, and to what extent foreigners may invest in a country
- FI Law normally regulates ownership and protection, repatriation of profits, rights and obligations of investors vs. right of the state, land and labour use, restrictions, performance requirements and incentives, dissolution and liquidation, FI approval and promotion, registration, arbitration
Do you need it?

Do you need to discriminate between foreign and domestic investment?

Consistency with other laws is very important

Insufficient by itself to establish proper legal regime for FDI
UZBEKISTAN’S INVESTMENT RELATED LAWS

- Law on Competition and Restrictions of Monopolistic Activity (2016)
- Law on Competition (2012, last revised 2015)
- Law on Foreign Investments (1998, last revised in 2014)
- Law on Guarantees and Measures on Protection of Foreign Investments (1998, last revised in 2014)
- Law on Guarantees of the Freedoms of Entrepreneurial Activity (2000, last revised in 2012)
- Law on Investment Activity (1998, last revised in 2013)
- Decrees, resolutions, instructions, specific guidelines etc.

Conformity with international norms is lacking. Transparency is also lacking and informal rule making at local level is often the norm.
INVESTMENT LAWS: TRADITIONAL CHALLENGES

- Implementation
- Transparency
- Role and mandate of the investment promotion agency
- Role of central and regional government in investment approval
- Investor protection not solid in practice
- No discrimination in theory but in practice it exists
- Provisions on interaction with other laws and international treaties
REQUIREMENTS FOR PROPER LEGAL FDI FRAMEWORK

- (Intellectual) property law and regulations
- Enterprise (company) or corporate law and regulations
- Contract law and regulations
- Land law and regulations: access/ownership of land (own or lease); land use rights
- Labour law and regulations
- Foreign exchange law and regulations
- Financial laws and regulations
- Insolvency and bankruptcy laws
- Tax laws: consumption, VAT, business, profit, income, etc.
- Trade law and import/export regulations
- Competition law and regulations
- Environmental laws and regulations
- Sectoral laws and regulations (agriculture, defense and security, mining and minerals, real estate and construction; services like telecommunications, transportation, utilities, media, finance, entertainment and tourism, health care, professional and retail; manufacturing sectors)
- Specific issue laws: franchising, SMEs, special economic zones (SEZs), licensing, technology transfer, privatization, M&As, insurance etc.
- Dispute settlement and law enforcement
- National vs. local laws and regulations
IPR PROTECTION: IS IT NECESSARY FOR FDI?

- Depends on host country and industry
- FDI to LDCs generally-speaking not motivated by IPR issues
- Stringent IPR protection is often a burden to LDCs which may result in net development costs
- However, IPR are necessary to develop national R&D and technology development capabilities, essential in strengthening national competitive advantage, which, in turn, attracts higher levels of FDI
- IPR is more important in countries with relatively high imitation capabilities (though licensing may substitute for FDI)
- IPR makes a difference in being able to attract “quality” FDI (i.e. knowledge-intensive, R&D oriented)
- BITs and multilateral obligations diminish IPR as a competitive advantage for attracting FDI
- Openness to trade and overall open economy more important for export-oriented FDI
NEED FOR INTERNATIONAL COMPLIANCE

- Multilateral agreements under WTO: GATS, TRIMS, TRIPS

- Regional and bilateral agreements: IIAs (BITs), RTAs
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

- 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 IIA\textsuperscript{s} 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
- Introduce 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)
SUMMARY OF POLICY PRINCIPLES FOR FDI

- Define objective: why do you want FDI? For what purpose?
- Adhere to SMART
- Investment policy needs to address the following questions: who can invest in the country/location, where, and under what conditions
- Investment policy before investment law
- Consult stakeholders!
- Proper monitoring and evaluation framework
- Proper coordination framework (single agency under head of state)
- Political and economic stability matter!
- Infrastructure and human resources matter!
SUMMARY OF POLICY PRINCIPLES FOR FDI, CONT.

- Improve ease of doing business and cut red tape
- Avoid incentives and reform tax regimes in accordance with the principles of simplicity, predictability and conformity to SDGs
- SEZs can be useful but need to be carefully planned
- Strengthen legal framework for land rights and access
- Improve institutional effectiveness (IPA)
- Keep institutions for investment policy, regulation and promotion separate
- Don’t neglect domestic investment
- Formalize the informal sector
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
QUESTIONS FOR DISCUSSION: POLICIES

• Why does your country attract FDI? In other words, what are the immediate and long-term objectives of attracting FDI?
• Has your country undertaken any economic, financial, trade, investment liberalization initiatives? How have these initiatives helped economic growth and attraction of FDI?
• Does or did your country have a privatization programme? What was the role of FDI in the implementation of this programme? Was it successful?
• How well is FDI integrated in your national development policies, plans and strategies?
• Does your country have a national innovation system? How would you rate the quality of that system? What role does it play in attracting quality FDI? What could you do to improve it and what role could FDI play in this regard?
• Does your country have a business linkage programme to help SMEs integrate into global and regional value chains? What role does the attraction of FDI play in this regard? How successful is this linkage programme and how could you improve it?
• How do you see the role of regional cooperation and integration for attracting FDI
QUESTIONS FOR DISCUSSION: LEGAL AND INSTITUTIONAL

- In light of this presentation, how do you view your national investment law?
- Does your country have a negative or positive list approach to allowed sectors?
- What land, property and investment ownership restrictions does your country have on foreign investment? Are these restrictions right, too strict or too flexible?
- How do you rate your overall rule of law in terms of (a) adequate legal protection for foreign investors; (b) due enforcement. Does your country have a national court and dispute settlement system that meets international standards and expectations?
- What other laws does your country have that affects or impacts foreign investors and their investments? For instance in mining, transport, telecommunications, tourism?
- Does your country have a proper IPR regime that fits its current development stage? Is it duly enforced? Is there scope for improvement or is this too premature?
- How many IIAs (in particular BITs) is your country a contracting party to? Do you think these IIAs have helped attract FDI? Do you agree with a broad or rather narrow definition of investment? Should your country agree to pre-establishment related MFN and NT clauses or should you retain your right to screen investment proposals?
- Do you think the current IIA and ISDS regime properly balances investor rights with the state’s duty and need for policy space to pursue sustainable development? How could the regime be improved in its contribution to achieving the SDGs?
- At what level do you think FDI should be best regulated: at national, bilateral, regional or global (multilateral) level?
- Do you think a Multilateral Framework on FDI and/or the establishment of a World Court on Investment would be necessary or desirable?
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HANDBOOK ON POLICIES, PROMOTION AND FACILITATION OF FDI FOR SUSTAINABLE DEVELOPMENT:
http://www.unescap.org/resources/handbook-policies-promotion-and-facilitation-foreign-direct-investment-sustainable-0
Presentation available at:
http://www.unescap.org/events/training-workshop-promotion-and-facilitation-
foreign-direct-investment-uzbekistan

Your questions please?