CAPACITY BUILDING WORKSHOP:

CURRENT TRADE-RELATED ISSUES AND THEIR IMPLICATIONS FOR APTA

BY APTA SECRETARIAT

11 SEPTEMBER 2018 , SEOUL, REPUBLIC OF KOREA

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

APTA
ASIA PACIFIC TRADE AGREEMENT

CURRENT ISSUES ON INVESTMENT

INVESTMENT FACILITATION FOR APTA PARTICIPATING STATES

BY MARC PROKSCH, UNESCAP

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OVERVIEW OF PRESENTATION

- Rationale, goals and definition of investment facilitation
- International dimension of investment facilitation (voluntary commitments)
- International dimension of investment facilitation: legal commitments through IIAs
- Overview of FDI in APTA and commitments on investment facilitation

RATIONALE, GOALS AND DEFINITION OF INVESTMENT FACILITATION

TRADE AND INVESTMENT NEXUS

- Both exports and FDI are modalities to deliver a product or service in a foreign market
- Trade and investment can be complementary or substituting depending on the nature and extent of trade and investment barriers
- NTMs can be an obstacle or incentive to FDI while investment regulations can be an incentive for trade
- However, most trade is investment related (in particularly efficiency-seeking FDI, e.g. related to global value chains)
- About 1/3 of total global trade is intra-firm trade, but all TNC related trade is more than 2/3 of total global trade
- EPZs and SEZs are modalities to promote FDI for exports
- FDI can help domestic SMEs export through backward linkages
- Mode 3 of GATS is FDI (commercial presence)
- IPRs often rest with TNCs who are the agent engaging in FDI; lax IPRs are often an impediment to FDI
- IPR is covered in TRIPS, a multilateral agreement under WTO
- Both investment and IPR are increasingly covered in RTAs/FTAs/PTAs
- WTO also has TRIMS Agreement
- WTO has had a working group on trade and investment for a long time
- No formal negotiations on investment rules in WTO but small group is advocating discussions on investment facilitation

WHAT IS INVESTMENT FACILITATION?

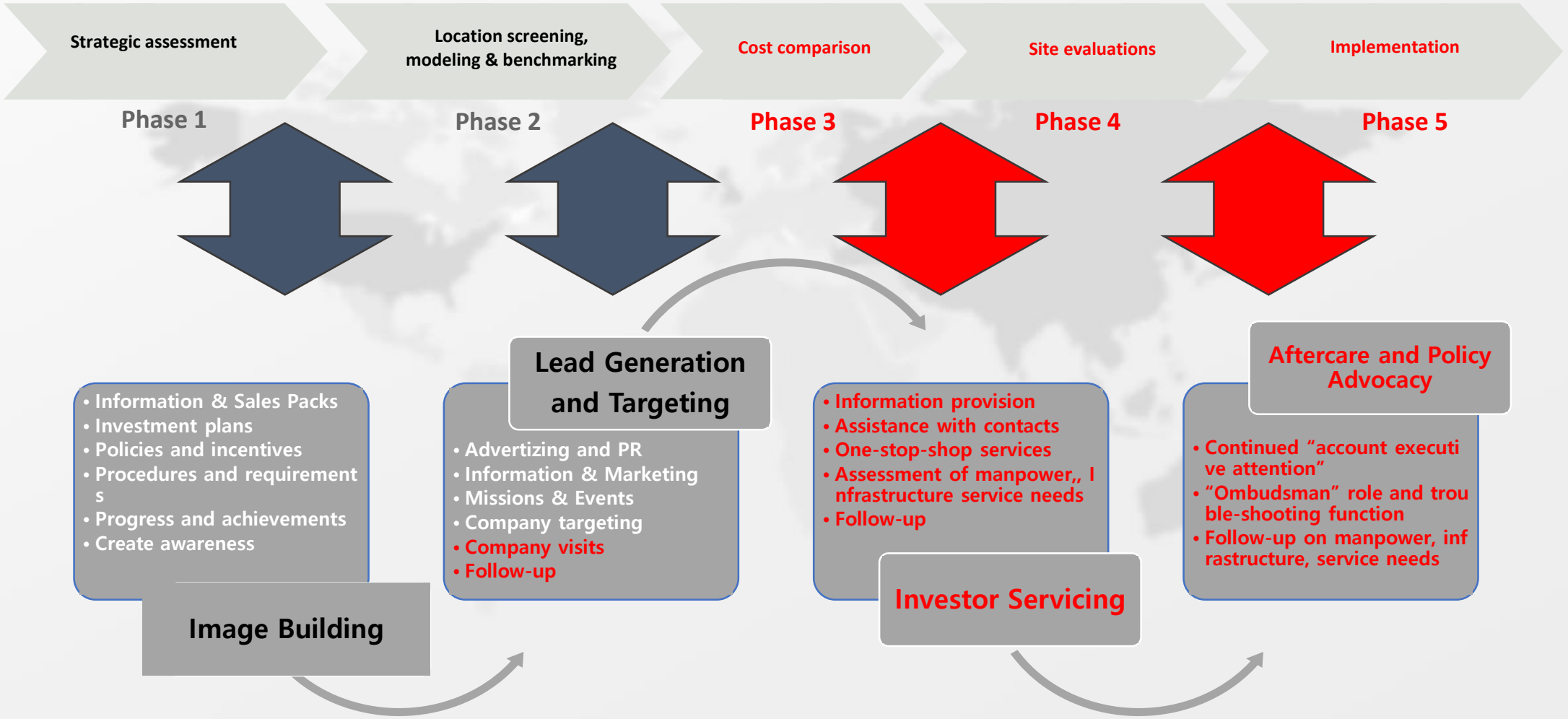
- **From an IPA perspective:**
  helping investors establish and realize their investment

- **From an investment policy perspective:**
  improving the overall business/investment climate

CORE PRINCIPLES OF INVESTMENT FACILITATION

- Transparency
- Simplicity
- Predictability
- Stability

THE IPA PERSPECTIVE: WHERE INVESTORS (CLIENTS) MEET GOVERNMENTS (IPAS



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TRADITIONAL VIEW: ESSENTIAL FUNCTIONS OF IPA

- Investment promotion (pre-establishment/planning)
- Investment generation (establishment/implementation)
- Investment facilitation (post-establishment/operations)

THERE IS OFTEN AN INVESTMENT REALIZATION GAP BECAUSE OF:

- Regulatory and procedural obstacles in getting permits
- Lack of sufficient infrastructural facilities
- Non- cooperation from local government
- Problems with land acquisition/site clearance
- Problems with labour
- Problems with financing
- Problems with import clearance
- Corruption
- Inefficient IPA, absence of aftercare
- Lack of capacity of domestic partners
- Lack of capacity of investor
- Chance events (natural disasters, conflict)

CURRENT VIEW:
THE GOALS OF INVESTMENT FACILITATION (IPA PERSPECTIVE)

- **Facilitate initial investment, retain that investment, and expansion of existing investment**
- **In other words, make it easy for investors to establish, operate and expand their existing investments**
- **Increase the satisfaction of investors (your "customers")**

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

POLICY PERSPECTIVE OF INVESTMENT FACILITATION: IMPROVING INVESTMENT CLIMATE (BEYOND THE IPA)

What is a good investment climate?

- **"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

IMPROVING INVESTMENT CLIMATE (WORLD BANK)

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

IMPROVING INVESTMENT CLIMATE BY (WORLD BANK)

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

THE INVESTMENT POLICY PERSPECTIVE: IMPROVING INVESTMENT CLIMATE (WTO)

- Improving regulatory transparency and predictability
- Improving efficiency: streamlining and speeding up administrative procedures
- Enhancing international cooperation and addressing the needs of developing members, including technical assistance and capacity building
- Other investment facilitation-related issues, including aftercare, CSR, etc.

Investment facilitation does NOT cover:

- Market access for investors/investment
- Investment protection
- Investor-State Dispute Settlement

INTERNATIONAL DIMENSIONS OF INVESTMENT FACILITATION: VOLUNTARY COMMITMENTS

INTERNATIONAL DIMENSION OF INVESTMENT FACILITATION

- Regulatory and procedural obstacles in getting permits
- Investment is a cross-border phenomenon and often linked to global value chains
- As a result, national level actions and policies for investment facilitation may not be sufficient to achieve desired results
- International commitments may be voluntary or binding
- Investment facilitation coverage in IIAs is increasing
- A global legal agreement on investment facilitation is controversial but perhaps desirable to complement trade facilitation
- Such an agreement can have commitments for both host and home countries and MNEs (in particular: RBC)

SELECTED REGIONAL AND GLOBAL VOLUNTARY INITIATIVES ON INVESTMENT FACILITATION

- **APEC Investment Facilitation Action Plan** (https://www.apec.org/Achievements/Group/Committee-on-Trade-and-Investment-2/Investment-Experts-Group-1)

- **BRICS Trade and Investment Facilitation Plan** (http://brics.itamaraty.gov.br/press-releases/2-sem-categoria/226-brics-trade-and-investment-facilitation-plan)

- **OECD Policy Framework for Investment** (https://www.oecd-ilibrary.org/finance-and-investment/policy-framework-for-investment-2015-edition_9789264208667-en)

- **G20 Guiding Principles for Global Investment Policymaking** (http://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf)

- **UNCTAD Global Action Menu for Investment Facilitation** (http://investmentpolicyhub.unctad.org/Publications/Details/148)

POTENTIAL ELEMENTS OF AN INTERNATIONAL FRAMEWORK FOR INVESTMENT FACILITATION (OECD)

- **Common principles**
  - Transparency
  - Predictability
  - Efficiency
- **Responsibilities / commitments**
  - Host countries: inward investment facilitation measures (tools, policies and processes)
    Home countries: outward investment facilitation measures
  - MNEs: responsible business conduct
  - International organizations: monitoring and evidence-based research
- **Governance / implementation**
  - "Investment Facilitation Principles" by the OECD and other international organizations (short term)
  - "Investment Facilitation Agreement" under the WTO (long term)
  - Specific support programme for developing countries

UNCTAD ACTION PLAN

- **Links investment facilitation with sustainable development (addressing investment gap)**
- **Actions at national and international level**
- **Ten action lines:**
  - Promote accessibility and transparency in the formulation of investment policies and regulations and procedures relevant to investors
  - Enhance predictability and consistency in the application of investment policies
  - Improve the efficiency of investment administrative procedures
  - Build constructive stakeholder relationships in investment policy practice
  - Designate a lead agency, focal point or investment facilitator with a mandate to act as investor services centre
  - Establish monitoring and review mechanisms for investment facilitation
  - Enhance international cooperation on investment facilitation
  - Provide technical assistance and undertake policy advocacy where needed
  - Capacity building in developing partners
  - Promote international cooperation, including through IIAs, and promote RBC

INTERNATIONAL DIMENSION OF INVESTMENT FACILITATION: LEGAL COMMITMENTS THROUGH IIAS

INVESTMENT FACILITATION IN WTO

- Goal is to promote international cooperation on investment and increase LDC participation
- To date, only discussions, no negotiations
- Does refer to national level actions, not market access, not investor protection issues, no ISDS
- Is WTO the right forum? What are the benefits?
- Investment already covered under TRIMS, GATS, GPA and TRIPS
- Investment was excluded from Singapore issues under the Doha agenda
- Issue of policy space and right to regulate, screen FDI
- WTO negotiations not always inclusive
- How would agreement on investment facilitation contribute to achieving SDGs?
- Establishment of focal point and implementation of legal commitments is difficult in federal states
- Perhaps need for multilateral agreement on investment that addresses obligations and rights of both investors, home and host countries. Investment facilitation agreement would not do that

CURRENT DISCUSSION ISSUES IN WTO

- **Improving regulatory transparency and predictability – such as publication/notification of investment-related measures, enquiry points/single window;**

- **Streamlining and speeding up administrative procedures – such as procedural aspects of investment applications, approval processes, licensing and qualifications, formalities and documentation requirements, one-stop shop/single window;**

- **Enhancing international cooperation and addressing the needs of developing members – such as exchange of information among competent authorities, technical assistance and capacity building for developing countries and LDCs;**

- **Other investment facilitation-related issues – such as government-investor cooperation, resolving investors' grievances/ombudsperson, and corporate social responsibility.**

INVESTMENT FACILITATION IN RTAS: ACIA

- **Most RTAs/FTAs and IIAs emphasize investment protection rather than investment facilitation but there are exceptions**
- **ACIA: Article 1(c) Objective: improvement of transparency and predictability of investment rules, regulations and procedures conducive to increased investment among Member States**
- **Article 2(a) on guiding principles also refers**
- **Article 25 Facilitation of Investment: Member States shall endeavour to cooperate in the facilitation of investments into and within ASEAN through, among others:**

(a) creating the necessary environment for all forms of investments;
(b) streamlining and simplifying procedures for investment applications and approvals;
(c) promoting dissemination of investment information, including investment rules, regulations, policies and procedures;
(d) establishing one-stop investment centres;
(e) strengthening databases on all forms of investments for policy formulation to improve ASEAN's investment environment;
(f) undertaking consultation with the business community on investment matters; and
(g) providing advisory services to the business community of the other Member States.

CHINA–ASEAN INVESTMENT AGREEMENT

Article 2 (objectives) refers:

The objectives of this Agreement are to promote investment flows and to create a liberal, facilitative, transparent and competitive investment regime in China and ASEAN through the following:

(a) progressively liberalising the investment regimes of China and ASEAN;

(b) creating favourable conditions for the investment by the investor of a Party in the territory of another Party;

(c) promoting the cooperation between a Party and the investor who has investment in the territory of that Party on a mutually beneficial basis;

(d) encouraging and promoting the flow of investment among the Parties and cooperation among the Parties on investment-related matters;

(e) improving the transparency of investment rules conducive to increased investment flows among the Parties; and

(f) providing for the protection of investments in China and ASEAN

CHINA–ASEAN INVESTMENT AGREEMENT, CONT.

Other provisions:

- **Article 19: transparency**

- **Article 21: facilitation:**

Subject to their laws and regulations, the Parties shall cooperate to facilitate investments amongst China and ASEAN through, amongst others:

(a) creating the necessary environment for all forms of investment;

(b) simplifying procedures for investment applications and approvals;

(c) promoting dissemination of investment information, including investment rules, regulations, policies and procedures; and

(d) establishing one-stop investment centres in the respective host Parties to provide assistance and advisory services to the business sectors including facilitation of operating licences and permits.

ASEAN-ROK INVESTMENT AGREEMENT

- Preamble refers to investment facilitation
- Article 8: transparency and establishment of enquiry point
- No specific article on investment facilitation but commitment towards further liberalization
- Work programme (article 27) also makes no reference to investment facilitation

OTHER COMMON TEXTS IN TRADITIONAL BITS INVOLVING APTA PS (ARTICLE 2 OR 3: PROMOTION AND PROTECTION OF INVESTMENT)

- **Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Pany to make investments in its territory, and admit such investments in accordance with its laws and policy (Sri Lanka-China; Sri Lanka-India; Bangladesh-India). OR**

- **Each Contracting Party shall, subject to its rights to exercise powers conferred by its laws, encourage and create favourable conditions for nationals and companies of the other Contracting Party to make in its territory investments that are in line with its general economic policy (Sri Lanka-ROK). OR**

- **Each Contracting State shall encourage investors of the other Contracting State to make investments in its territory and admit such investments in accordance with its laws and regulations. 2. Each Contracting State shall grant assistance in and provide facilities for obtaining visas and work permits to nationals of the other Contracting State to or in the territory of the Former in connection with activities associated with such investments (China-Lao PDR)**

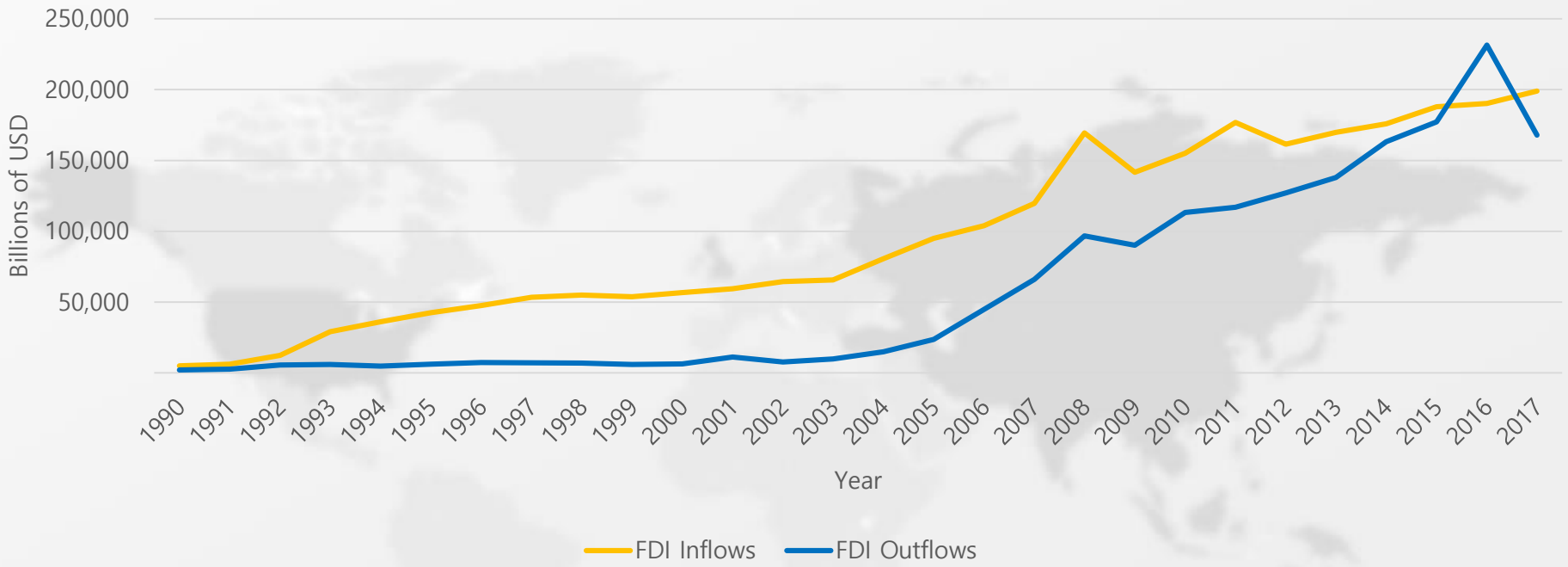
- **Each Contracting Party shall, having regard to its plans and policies, encourage and facilitate the investment of capital in its territory by the nationals and companies of the other Contracting Party (Bangladesh-ROK)**

NATIONAL INITIATIVES TO REFORM BITs

- **Withdrawal from standard BITs (incl. Indonesia, South Africa)**
- **Brazil's new model BIT: from investment protection to investment cooperation and facilitation (CFIA)**
  - Reduced scope of definition of investment (excl. portfolio investment)
  - Standard investment protection provisions remain (MFN, NT, expropriation but NOT indirect expropriation and no FET)
  - Ombudsman function to handle investor queries/problems
  - Joint Committee and SSDS for dispute solution but no ISDS
  - Agenda for Further Investment Cooperation and Facilitation
- **India's new model BIT: balancing investor protection with rights of the host country**
  - Restricted definition: no portfolio investment
  - No MFN, FET and other investor protection clauses
  - Exhaustion before starting dispute proceedings
  - Investor obligations, including obligations on social responsibility before dispute can be filed
  - Does not cover local government

OVERVIEW OF FDI IN APTA AND COMMITMENTS ON INVESTMENT FACILITATION

FDI FLOWS IN THE APTA REGION, 1990–2017



- **FDI flows to APTA have increased constantly since 1992. Their share in total Asia-Pacific FDI inflows fluctuated much, ranging between 28% and 52%.**
- **FDI outflows from APTA started to rise rapidly in 2005. Their share in total Asia-Pacific FDI outflows increased from 22% to 44% with fluctuations.**
- **China, India and ROK are the three biggest players leading the trend**

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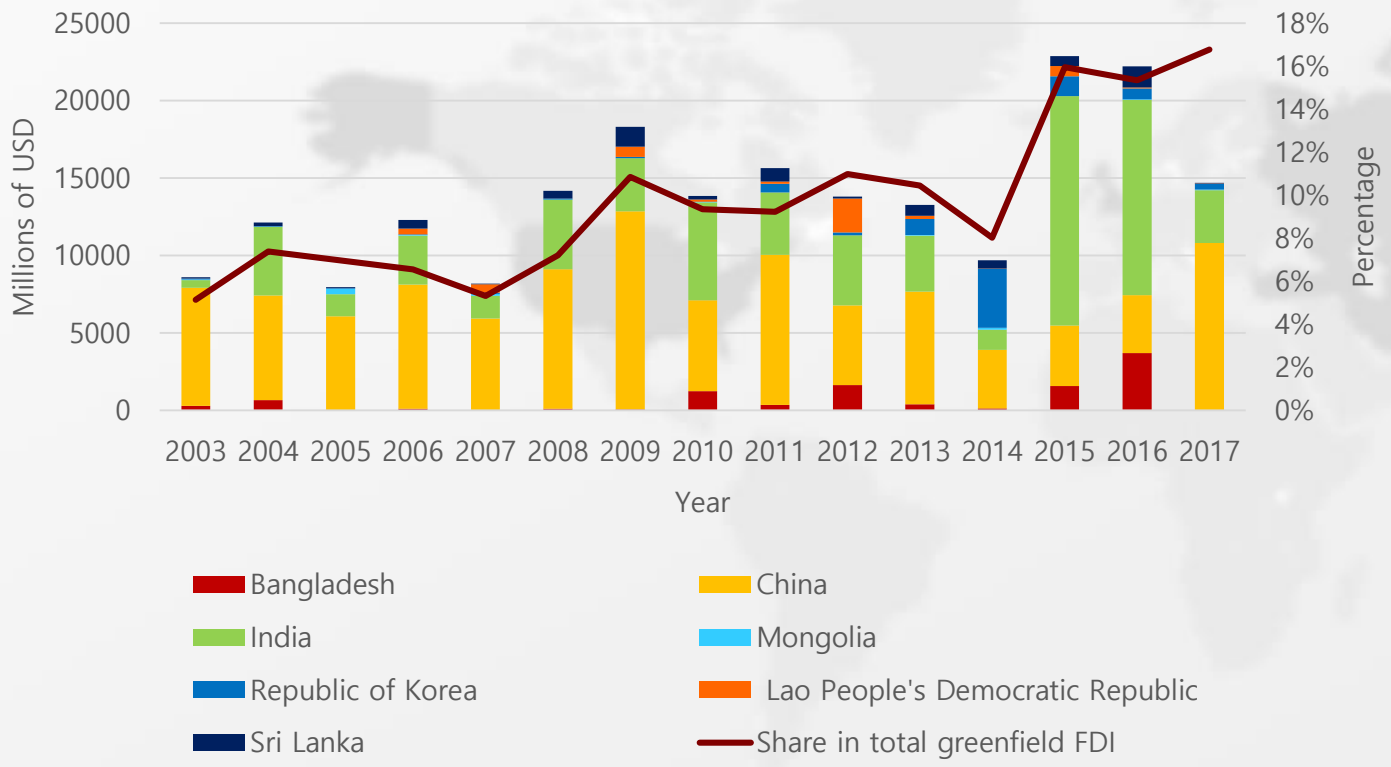
DESTINATIONS OF INTRAREGIONAL GREENFIELD FDI INFLOWS AND THEIR SHARE IN TOTAL GREENFIELD FDI INFLOWS, 2003–2017



- **Intra-APTA greenfield FDI flows increased gradually from 5% to 17% of total greenfield FDI inflows to APTA over the past decade.**

- **For most years, China is the biggest intraregional recipient**

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BITS IN FORCE IN APTA REGION

Countries	Bangladesh	China	India	Mongolia	Republic of Korea	Lao People's Democratic Republic	Sri Lanka
Bangladesh		√	√		√		
China	√		√ (t)	√	√	√	√
India	√	√ (t)		√	√	√	√
Mongolia		√	√		√	√	
Republic of Korea	√	√	√	√		√	√
Lao People's Democratic Republic		√	√	√	√		
Sri Lanka		√	√		√		

t = terminated

INVESTMENT FACILITATION IN APTA

- Framework Agreement on Investment refers
- No facilitation in the title (liberalization, promotion and protection only)
- But articles 2 (objectives), 3(a) (cooperation and facilitation) and 4 (transparency) cover investment facilitation
- Action plans need to be developed for implementation of article 3
- Schedule 1 has details

INVESTMENT FACILITATION IN APTA:

SCHEDULE I: COOPERATION AND FACILITATION PROGRAMME

1. Individual initiatives to:

   (a) increase transparency of the Participating State's investment rules, regulations, policies and procedures through the publication of such information on a regular basis and by making such information widely available;

   (b) simplify and expedite procedures for applications, approvals and implementation of investment projects at all levels; and

   (c) expand the number of bilateral agreements for the avoidance of double taxation among the Participating States.

2. Collective initiatives to:

   (a) establish a database for APTA Supporting Industries and APTA Technology suppliers;

   (b) establish a database to enhance the flow of APTA investment data and information on investment opportunities in APTA;

   (c) promote public-private sector linkages through regular dialogues with the APTA business community and other international organizations to identify investment impediments within and outside APTA and propose ways to improve the APTA investment environment;

   (d) identify target areas for technical cooperation, e.g. development of human resources, infrastructure, supporting industries, small and medium size enterprises, information technology, industrial technology, R & D and coordinate efforts within APTA with other international organizations involved in technical cooperation;

   (e) examine the possibility of an APTA Agreement for the avoidance of double taxation.

PROPOSED DRAFT ON FULL AGREEMENT ON INVESTMENT: SUBJECT TO NEGOTIATIONS

Article 3

Cooperation, Promotion and *encouragement* *(Secretariat suggestion: use the term **"facilitation"** instead)* **of investments**

1. The Participating States shall, to the extent feasible, cooperate in the promotion and facilitation of foreign investment into the other Participating State, in particular by its own investors. Such assistance shall be consistent with the development goals and priorities of the participating State in which the investment is to be made. Such assistance may include, *inter alia*: *(Secretariat comment: promotion and facilitation is not limited to "assistance" but also includes increasing awareness , exchanges of information, streamlining and simplifying procedures for investment applications and approvals, promotion of dissemination of investment information, establishing one-stop investment centres, etc.)*

   (a) Capacity building with respect to host state agencies and programs on investment promotion and facilitation;
   (b) Insurance programmes based on commercial or other principles;
   (c) Direct financial assistance in support of the investment or of feasibility studies prior to the investment being established;
   (d) Technical or financial support for environmental and social impact assessments of a potential investment;
   (e) Technology transfer;
   (f) Periodic trade missions, support for joint business councils and other cooperative efforts to promote sustainable investments; and
   (g) Technical and financial assistance relating to the implementation of Article 7 (Transparency).

2. Participating States shall exchange information with respect to the investment opportunities for foreign investors in their territories.

3. Each Participating State shall inform the other Participating State of the form and extent of available assistance as appropriate for the type and size of different investments.

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WAY FORWARD FOR APTA

- Strengthen investment facilitation provisions in the Investment Agreement
- Strengthen sustainability provisions in the investment agreement
- Ideally, APTA Investment Agreement should replace and consolidate but not add to the existing BITs among APTA PS
- Formulate action plans under schedule 1 by an agreed date
- Negotiators to review developments in new model BITs and assess relevance for the APTA investment agreement
- Discuss the need for and implications of multilateral legal commitments on investment facilitation (WTO discussions) and link with regional commitments

CONTACT DETAILS – UNESCAP

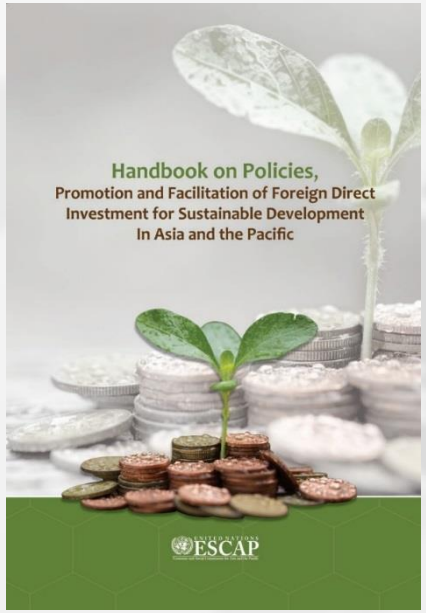
UNESCAP

The United Nations Building
Rajadamnern Nok Avenue
Bangkok 10200
Thailand

T: (66-2) 288-1234

F: (66-2) 288-1000

W: http://www.unescap.org/contact



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YOUR QUESTIONS PLEASE?