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INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT

UNITED NATIONS

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Preface

Towards a New Generation of Investment Policies

At a time of persistent crises and pressing social and environmental challenges, harnessing economic growth for sustainable and inclusive development is more important than ever. Investment is a primary driver of such growth. Mobilizing investment and ensuring that it contributes to sustainable development objectives is therefore a priority for all countries and for developing countries in particular.

Against this background, a new generation of investment policies is emerging, pursuing a broader and more intricate development policy agenda, while building or maintaining a generally favourable investment climate. "New generation" investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment. Although these concepts are not new in and by themselves, to date they have not been systematically integrated in mainstream investment policymaking. "New generation" investment policies aim to operationalize sustainable development in concrete measures and mechanisms at the national and international level, and at the level of policy making and implementation.

Broadly, "new generation" investment policies strive to:

- create synergies with wider economic development goals or industrial policies, and achieve seamless *integration in development strategies*;
- foster *responsible investor behavior* 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.

To help policymakers address the challenges posed by this new agenda, this report takes a fresh look at investment policymaking, and does so by taking a systemic approach, examining the universe of national and international policies through the lens of today's key investment policy challenges. It explicitly focuses on the development dimension, and presents a comprehensive Investment Policy Framework for Sustainable Development (IPFSD).

The IPFSD consists of a set of Core Principles for investment policymaking, guidelines for national investment policies, and guidance for policymakers on how to engage in the international investment policy regime, in the form of options for the design and use of international investment agreements (IIAs).

The IPFSD is built on the experience of UNCTAD and other organizations in designing investment policies for development, and it incorporates lessons learned on what policies and measures work well, or not so well, under what circumstances. It represents the best endeavour by the UNCTAD secretariat, in collaboration with numerous international experts and investment stakeholders. It is the result of collective wisdom.

It is hoped that the IPFSD may serve as a reference for policymakers in formulating national investment policies and in negotiating investment agreements or revising existing ones. It can also serve as the basis for capacity building on investment policy and for UNCTAD's technical assistance work. And it may come to act as a point of convergence for international cooperation on investment issues.

The IPFSD has been designed as a "living document". UNCTAD will continuously update its contents based on feedback from its numerous policy forums and from its work in the field, and it will provide a platform for "open sourcing" of best practice investment policies.

Acknowledgements

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The IPFSD benefited from review and discussion at several intergovernmental meetings, including the International Investment Agreements Conference and the Ministerial Round Table at the World Investment Forum 2012 (WIF2012) and UNCTAD XIII in Doha, Qatar.

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Introduction

Investment Policy Framework for Sustainable Development

The policy environment for cross-border investment is subject to constant change. At the national level, governments continue to adopt investment policy measures (at a rate of around 150 annually over the past decade according to UNCTAD's monitoring of such measures), not to speak of countless measures taken every year that influence the overall business environment for investors. At the international level, new investment agreements have been concluded at a rate of more than one per week for the past few years. At the level of "soft law", the universe of codes and standards that govern the behavior of corporate investors also continues to expand.

Over the last two decades, as more and more governments have come to realize the crucial role of private investment, including FDI, in fuelling economic growth and development, great strides have been made to improve both national and international investment policies. Very significant efforts have been made by governments in developing countries in particular, often aided by the international development community through policy frameworks, model treaties and technical assistance (such as UNCTAD's Investment Policy Reviews). A lot of experience has been gained and documented that now helps policymakers identify measures that work well, or less well, under what circumstances and in what context.

Despite the progress made, and despite the lessons learned, important questions remain unanswered for policymakers. Some perceived or acknowledged shortcomings in investment policy regimes are addressed only partially, or not at all, by existing models and frameworks intended to support policymakers.

This report takes a fresh look at investment policymaking – *focusing on direct private investment in productive assets* (i.e. excluding other capital flows which should be addressed by the financial system and policies) – by taking a systemic approach that examines the universe of national and international policies through the lens of today's key investment policy challenges. It also aims explicitly to strengthen the development dimension of investment policies, and presents a comprehensive *Investment Policy Framework for Sustainable Development* (IPFSD).

Encouragement to pick up this gauntlet comes from discussions with senior policymakers in numerous forums, including at UNCTAD's biennial World Investment Forum; at its Commission on Investment, Enterprise and Development; and at its regular intergovernmental expert group meetings on investment and enterprise. It also stems from discussions with academics and business advisors in UNCTAD's round tables on investment policy, and from UNCTAD's technical assistance work with developing countries. Further encouragement has emerged from other important policy platforms, most notably the G-20, which in its Seoul Declaration in 2010 and the accompanying Multi-Year Action Plan for Development specifically refers to the need to strengthen the sustainable development dimension of national and international investment policies.

The IPFSD also comes at a time when many other investment stakeholders are putting forward suggestions for the future of investment policymaking. At UNCTAD's 2012 World Investment Forum the International Chamber of Commerce (ICC) launched its contribution in the form of (revised) Guidelines for International Investment. The OECD has announced its intention to start work on an update of its policy framework for investment. The recently adopted European Union-United States Statement on Shared Principles for International Investment and the release of the new

United States' model BIT are also testimony of policy dynamism. These developments appear to signal a window of opportunity to strengthen the sustainable development dimension of investment policies.

The remainder of this report first details the drivers of change in the investment policy environment – introducing a "new generation" of investment policies – and the challenges that need to be addressed in a comprehensive IPFSD (chapter I). It then proposes a set of Core Principles for investment policymaking, which serve as "design criteria" for national and international investment policies (chapter II). Chapter III presents a framework for national investment policy. Chapter IV focuses on IIAs and translates the Core Principles into options for the formulation and negotiation of such instruments, with a particular focus on development-friendly options. The final chapter looks at the way forward, suggesting how policymakers and the international development community could make use of the IPFSD, and how it could be further improved.

I. A “New Generation” of Investment Policies

1. The changing investment policy environment

Investment policy is not made in a vacuum. It is made in a political and economic context that, at the global and regional levels, has been buffeted in recent years by a series of crises in the areas of finance, food security and the environment, and that faces persistent global imbalances and social challenges, especially with regard to poverty alleviation. These crises and challenges are having profound effects on the way policy is shaped at the global level. First, the economic and financial crisis has accentuated a longer-term shift in economic weight from developed countries to emerging markets. Global challenges such as food security and climate change, where developing country engagement is an indispensable prerequisite for any viable solution, have further added to a greater role for those countries in global policymaking. Second, the financial crisis in particular has boosted the role of governments in the economy, both in the developed and the developing world. Third, the nature of the challenges, which no country can address in isolation, makes better international coordination imperative. And fourth, the global political and economic context and the challenges that need to be addressed – with social and environmental concerns taking center stage – are leading policymakers to reflect on an emerging new development paradigm that places inclusive and sustainable development goals on the same footing as economic growth and development goals.

Trends in investment policy naturally mirror these developments.

There have been fundamental changes in the investment and investor landscape.

Developing countries and economies in transition are now primary FDI destinations, and their importance as FDI recipients continues to increase. In 2010, for the first time, developing countries received more than half of global FDI flows – in part as a result of the fall in investment in developed countries. This increases the opportunities, but also multiplies the stakes, for strategic investment targeting, promotion and protection policies in developing countries.

Emerging economies have not only become important recipients of FDI, they are increasingly large investors themselves, with their share in world outflows approaching 30 per cent. While these countries might previously have been more concerned with the pressure they faced to provide protection for investments made by others, they now also consider the security and treatment of their own investors’ interests abroad.

There are also new types of investors on the scene. State-owned enterprises (SOEs) are becoming important FDI players; UNCTAD counted some 650 multinational SOEs in 2010, operating about 8,500 foreign affiliates (*WIR11*). Although SOEs account for only 1 per cent of the total number of multinational enterprises, their overseas investments amount to roughly 11 per cent of global FDI flows. Sovereign wealth funds (SWFs), similarly, are gaining importance as FDI players. Their total FDI stock amounted to some $110 billion in 2011, and their overseas investments make up less than 1 per cent of global FDI flows. But with total assets under management of $4-5 trillion, the scope for further direct investment in productive assets is significant.

Clearly the patterns and types of investment of these new players (in terms of home and host countries and in terms of investors) are different, and so are their policy priorities. Furthermore, it is necessary to be vigilant concerning waning support for open investment climates in developed market economies in the face of competition from increasingly active developing-country investors.

Governments are playing a greater role in the economy and are giving more direction to investment policy.

Governments have become decidedly less reticent in *regulating* and *steering* the economy. More and more governments are moving away from the hands-off approach to economic growth and development that prevailed previously.[1] Industrial policies and industrial development strategies are proliferating in developing and developed countries alike (*WIR11*). These strategies often contain elements of targeted investment promotion or restriction, increasing the importance of integrated and coherent development and investment policies.

Governments are also becoming more active in their efforts to integrate domestic companies into global value chains (GVCs). They promote such integration through local capacity building, technological upgrading and investment promotion activities, such as matchmaking or the establishment of special economic zones. Expectations of governments' promotion efforts have become higher as they increasingly focus on the *quality* – and not only on the *quantity* – of investment.

Fears and, to some extent, evidence of a job-less (or job-poor) recovery in many regions are also adding pressure on governments to look for "*the right types*" of investment, and to adopt measures to maximize the job-creation impact of investment. In developed countries, such fears have at times sparked debate on whether and how to discourage domestic companies from investing abroad or to promote the repatriation of foreign investment back home. In developing countries, the same fears are fuelling the debate on whether investment is bringing enough jobs for the poor and is sufficiently inclusive.

A stronger role of the State also manifests itself with regard to other sustainability issues. New social and environmental regulations are being introduced or existing rules reinforced – all of which has implications for investment. In addition to regulatory activities, governments are increasing efforts to promote actively the move towards sustainable development, for example through the encouragement of low-carbon FDI. They are also placing more emphasis on corporate responsibility by promoting the adoption of private codes of corporate conduct.

The trend for policymakers to intervene more in the economy and, to an extent, to steer investment activity, is visible in the constantly increasing share of regulatory and restrictive policies in total investment policy measures over the last five years. This trend reflects, in part, a renewed realism about the economic and social costs of unregulated market forces but it also gives rise to concerns that an accumulation of regulatory activities may gradually increase the risk of over-regulation or investment protectionism that hinders inward and outward FDI (see box 1).

There is a greater need for global coordination on investment policy.

The need to address common sustainable development challenges and to respond effectively to global economic and financial turmoil to avoid future crises, has instigated calls for new models of global economic governance. In the area of investment, there are compelling reasons for such improved international coordination. It could help keep protectionist tendencies and discriminatory treatment of foreign investors in check. Further, in a world in which governments increasingly "compete" for their preferred types of investment it could help avoid a "race to the bottom" in regulatory standards or a 'race to the top' in incentives.

A number of specific investment issues accentuate the need for better global coordination on investment policy as, by their nature, they can be addressed effectively only in a cooperative manner. For one, better international coordination would help overcome coherence problems posed by the highly atomized system of IIAs, consisting of more than 3,100 core treaties (i.e. bilateral investment treaties (BITs) and other agreements with investment provisions). Another example where policymakers are increasingly engaged in international dialogue is international tax cooperation. Unsustainable levels of public deficits and sovereign debt have made governments far more sensitive to tax avoidance, manipulative transfer pricing, tax havens and similar options available to multinational firms to unduly reduce their tax obligations in host and home countries.

Other, non-financial, global challenges also require better coordination on investment, as witnessed by efforts to promote green investment in support of environmentally friendly growth, and international collaboration on investment in agriculture to help improve food security (*WIR09, WIR10*).

A new generation of investment policies is emerging.

As a result of the developments described above, a new generation of investment policies is emerging, pursuing a broader and more intricate development policy agenda within a framework that seeks to

Box 1. Defining Investment Protectionism

Despite the fact that international policy forums at the highest level (e.g. the G20[2]) frequently make reference to "investment protectionism", there is no universally agreed definition of the term. Different schools of thought take different approaches.

Broadly, protectionist measures related to investment would include: (1) measures directed at foreign investors that explicitly or "de facto" discriminate against them (i.e. treating them differently from domestic investors) and that are designed to prevent or discourage them from investing in, or staying in, the country. And (2) measures directed at domestic companies that require them to repatriate assets or operations to the home country or that discourage new investments abroad.[3] In this context, "measures" refer to national regulatory measures, but also include the application of *administrative procedures* or, even less tangible, *political pressure*.

The above reasoning ignores any possible *justification* of investment protectionism – i.e. measures may be motivated by legitimate policy concerns such as the protection of national security, public health or environmental objectives, or a desire to increase the contribution of FDI to economic development. It also does not refer to any assessment of *proportionality* of measures relative to such legitimate policy concerns. Nor does it attempt to assess the *legality* of relevant measures under any applicable international normative framework (whether investment-specific, i.e. international investment agreements; trade-related, e.g. WTO rules; or otherwise). Disregarding these considerations is analogous to the situation in trade, where a tariff may be applied to imports for legitimate policy reasons and may be legal under WTO rules, but is often still considered a protectionist measure.

From a development perspective this approach is clearly unsatisfactory: measures taken for legitimate public policy objectives, relevant and proportional to those objectives and taken in compliance with relevant international instruments, should not be considered protectionist. The challenge lies in defining the boundaries of legitimacy, relevance and proportionality, in order to distinguish between measures taken in good faith for the public good and measures with underlying discriminatory objectives.

For many policymakers the term "protectionism" has a negative connotation. The lack of a common language among policymakers and the investment community – one country's protectionism is another country's industrial policy – is not helpful to efforts to maintain an international investment policy environment that aims to balance openness and pursuit of the public good while minimizing potentially harmful distortionary effects on investment flows.

Source: UNCTAD.

maintain a generally favourable investment climate. This new generation of investment policies has been in the making for some time, and is reflected in the dichotomy in policy directions over the last few years – with simultaneous moves to further liberalize investment regimes and promote foreign investment, on the one hand, and to regulate investment in pursuit of public policy objectives on the other. It reflects the recognition that liberalization, if it is to generate sustainable development outcomes, has to be accompanied – if not preceded – by the establishment of proper regulatory and institutional frameworks. The key policy challenge is to strike the right balance between regulation and openness (Epilogue *WIR10*).

"New generation" investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment. Sustainable development issues – including environmental, social and poverty alleviation concerns – as well as investor responsibility in these areas, are not "new" in and by themselves. However, to date, the myriad of solutions and options developed over the years to address sustainable development concerns have not been part and parcel of mainstream investment policymaking, and the international consensus on sustainable development is not reflected in it. "New generation" investment policies aim to *systematically integrate* sustainable development and *operationalize* it in concrete measures and mechanisms at the national and international level, and at the level of policy making and implementation.

Broadly, "new generation" investment policies are characterized by (i) a recognition of the role of investment as a primary driver of economic growth and development and the consequent realization that investment policies are a *central part of development strategies*; and (ii) a desire to pursue sustainable development through *responsible investment*, placing social and environmental goals on the same footing as economic growth and development objectives. Furthermore, (iii) a shared recognition of the need to promote responsible investment as a cornerstone of economic growth and job creation is giving renewed impetus to efforts to resolve, in a comprehensive manner, long-standing issues and shortcomings of investment policy that may hamper *policy effectiveness* and risk causing uncertainty for investors. These three broad aspects of "new generation" investment policies translate into specific investment policy challenges at the national and international levels.

2. Key investment policy challenges

At the national level, key investment policy challenges are (table 1):

- To *connect the investment policy framework to an overall development strategy* or industrial development policy that works in the context of national economies, and to *ensure coherence with other policy areas*, including overall private sector or enterprise development, and policies in support of technological advancement, international trade and job creation. "New generation" investment policies increasingly incorporate targeted objectives to channel investment to areas key for economic or industrial development and for the build-up, maintenance and improvement of productive capacity and international competitiveness.
- To *ensure that investment supports sustainable development and inclusiveness* objectives. Investment policymaking will focus increasingly on *qualitative* aspects of investment. Because the behaviour of firms, including international investors, with respect to social and environmental issues is driven in part by corporate responsibility standards developed outside the traditional regulatory realm, one aspect of this challenge is finding the right balance between regulatory and private sector initiatives. A focus on sustainable development objectives also implies that investment policy puts increasing emphasis on the promotion of specific *types* of investment, e.g. 'green investments' and 'low-carbon investment' (*WIR10*).
- To *ensure continued investment policy relevance and effectiveness*, building stronger institutions to implement investment policy and to manage investment policy dynamically, especially by measuring the sustainable development impact of policies and responding to changes in the policy environment. With the greater role that governments are assuming in

Table 1. National investment policy challenges

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

steering investment to support sustainable development objectives, and with the selective departure from an open and liberal approach to investment, comes greater responsibility on the part of policymakers to ensure the effectiveness of their measures, especially where such measures imply restrictions on the freedom of economic actors or outlays of public funds (e.g. in the case of incentives or the establishment of special economic zones).

Similarly, *at the international level*, the changing investment policy environment is giving rise to three broad challenges (table 2):

- To *strengthen the development dimension* of the international investment policy regime. In the policy debate this development dimension principally encompasses two aspects:
  - Policymakers in some countries, especially those seeking to implement industrial development strategies and targeted investment measures, have found that IIAs can unduly constrain national economic development policymaking.
  - Many policymakers have observed that IIAs are focused almost exclusively on protecting investors and do not do enough to promote investment for development.
- To *adjust the balance between the rights and obligations of States and investors*, making it more even. IIAs currently do not set out any obligations on the part of investors in return for the protection rights they are granted. Negotiators could consider including obligations for investors to comply with national laws of the host country. In addition, and parallel to the debate at the level of national policies, corporate responsibility initiatives, standards and guidelines for the behaviour of international investors increasingly shape the investment policy landscape. Such standards could serve as an indirect way to add the sustainable development dimension to the international investment policy landscape, although there are concerns among developing countries that they may also act as barriers to investment and trade.
- To *resolve issues stemming from the increasing complexity of the international investment policy regime*. The current regime is a system of thousands of treaties (mostly bilateral investment treaties, free trade agreements with investment provisions, and regional agreements), many ongoing negotiations and multiple dispute-settlement mechanisms, which nevertheless offers protection to only two-thirds of global FDI stock, and which covers only one-fifth of bilateral investment relationships (*WIR 11*). Most governments continue to participate in

Table 2. International investment policy challenges

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)

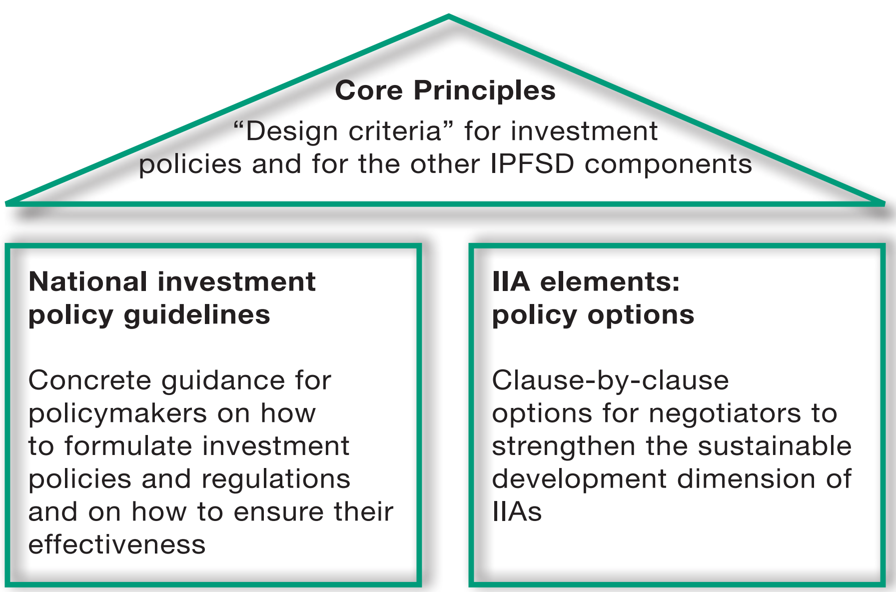
the process of adding ever more agreements to the system, despite the fact that many are not fully satisfied with its overall design. It has a number of systemic problems, including gaps, overlaps and inconsistencies in coverage and content; ambiguities in treaty interpretation by arbitral tribunals; onerous arbitration procedures and unpredictability of arbitration awards. Also, the "interconnect" between international investment policies and other policy areas such as trade, finance, competition or environmental (e.g. climate change) policies, is absent.

3. Addressing the challenges: UNCTAD's Investment Policy Framework for Sustainable Development

To address the challenges discussed in the previous section, UNCTAD proposes a comprehensive *Investment Policy Framework for Sustainable Development* (IPFSD), consisting of a set of Core Principles for investment policymaking, guidelines for national investment policies, and guidance for policymakers on how to engage in the international investment policy regime, in the form of options for the design and use of IIAs (figure 1 and box 2). These build on the experience and lessons learned of UNCTAD and other organizations in designing investment policies for development. By consolidating good practices, the IPFSD also attempts to establish a benchmark for assessing the quality of a country's policy environment for foreign investment – taking into account that one single policy framework cannot address the specific investment policy challenges of individual countries (see boxes 4, 6 and 7 on the need for custom-designed investment policy advice).

Although there are a number of existing international instruments that provide guidance to investment policymakers,[4] UNCTAD's IPFSD distinguishes itself in several ways. First, it is meant as a comprehensive instrument dealing with all aspects of national and international investment policymaking. Second, it puts a particular emphasis on the relationship between foreign investment and sustainable development, advocating a balanced approach between the pursuit of purely economic growth objectives by means of investment liberalization and promotion, on the one hand, and the need to protect people and the environment, on the other hand. Third, it underscores the interests of developing countries in investment policy making. Fourth, it is neither a legally binding text nor a voluntary undertaking between States, but expert guidance by an international organization, leaving national policymakers free to "adapt and adopt" as appropriate.

Figure 1. Structure and components of the IPFSD



Box 2. Scope of the IPFSD

This box addresses a number of key questions relating to the scope, coverage and target audience of the IPFSD:

What policies are covered by the IPFSD?
The IPFSD is meant to provide guidance on investment policies, with a particular focus on foreign direct investment (FDI). This includes policies with regard to the establishment, treatment and promotion of investment. In addition, a comprehensive IPFSD needs to look beyond investment policies per se and include investment-related aspects of other policy areas.

Does the IPFSD deal with national and international investment policies?
Investment policies and related policy areas covered by the IPFSD comprise national and international policies, as coherence between the two is fundamental.

Does the IPFSD cover domestic and foreign investment?
The IPFSD's focus on FDI is evident in sections on, for example, the entry and establishment of investment, the promotion of outward investment and the chapter on international investment policies. However, many of the guidelines in the chapter on national investment policies have relevance for domestic investment as well.

Does the IPFSD consider portfolio investment?
The IPFSD focuses on direct investment in productive assets. Portfolio investment is considered only where explicitly stated in the context of IIAs, which in many cases extend coverage beyond direct investment.

Is the IPFSD concerned with inward and outward investment?
The IPFSD primarily offers policy advice for countries where the investment – domestic or foreign – is made, as this is typically the principal concern of investment policies. However, the IPFSD does not ignore the fact that policies with regard to *outward* investment may also be part of a country's development strategy.

Is the IPFSD addressed to policymakers from developing and developed countries?
The addressees of the IPFSD are, in principle, both developing and developed countries. It has been designed with the particular objective to assist the former in the design of investment policies in support of sustainable development objectives, but is equally relevant for developed countries.

Does the IPFSD focus on the attraction of investment or on its impact?
The policy guidelines of the IPFSD serve a dual purpose. On the one hand, they intend to assist governments in improving the attractiveness of their countries as investment locations. To this end, they contain specific recommendations concerning the institutional set-up, the general business climate and the treatment of investors. On the other hand, they also provide guidance on how countries can maximize the sustainable development benefits from investment, in particular foreign investment.

Source: UNCTAD.

II. Core Principles for Investment Policymaking

1. Scope and objectives of the Core Principles

The Core Principles for investment policymaking aim to guide the development of national and international investment policies. To this end, they translate the challenges of investment policymaking into a set of "design criteria" for investment policies. Taking the challenges discussed in the previous chapter as the starting point, they call for integrating investment policy in overall development strategies, enhancing sustainable development as part of investment policies, balancing rights and obligations of States and investors in the context of investment protection and promotion, including CSR into investment policymaking, and encouraging international cooperation on investment-related challenges.

The Core Principles are not a set of rules per se. They are an integral part of the IPFSD, as set out in this report, which attempts to convert them, collectively and individually, into a concrete set of policy guidelines for national investment policymakers and for negotiators of IIAs (chapters III and IV). As such, they do not always follow the traditional "policy areas" of a national investment policy framework, nor the usual articles of IIAs.

The Core Principles are grouped as follows:

- Principle 1 states the overarching objective of investment policymaking.
- Principles 2, 3 and 4 relate to the general process of policy development and the policymaking environment as relevant for investment policies.
- Principles 5 through 10 address the specifics of investment policymaking.
- Principle 11 refers to cooperation in investment-related matters at the international level.

The design of the Core Principles has been inspired by various sources of international law and politics. Some of these instruments have importance for the entire set of the Core Principles as they relate – to various degrees – to sustainable development. Several other international instruments relate to individual Core Principles (see box 3).

Box 3. The origins of the Core Principles in international law

The Core Principles can be traced back to a wide range of existing bodies of international law, treaties and declarations.

The UN Charter (Article 55) promotes, *inter alia*, the goal of economic and social progress and development. The UN Millennium Development Goals call for a Global Partnership for Development. In particular, its Goal 8 (Target 12) encourages the further development of an open, rule-based, predictable, non-discriminatory trading and financial system, which includes a commitment to good governance, development, and poverty reduction, both nationally and internationally – concepts that apply equally to the investment system. The "Monterrey Consensus" of the UN Conference on Financing for Development of 2002 acknowledges that countries need to continue their efforts to achieve a transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact. The UN Johannesburg Plan of Implementation of September 2002, following up on the "Rio Declaration", calls for the formulation and elaboration of national strategies for sustainable development, which integrate economic, social and environmental aspects. The 4th UN Conference on LDCs in May 2011 adopted the Istanbul Programme of Action for the LDCs 2011-2020 with a strong focus on productive capacity-building and structural transformation as core elements to achieve more robust, balanced, equitable, and sustainable growth and sustainable development. Finally, the 2012 UNCTAD XIII Conference – as well as previous UNCTAD Conferences – recognized the role of FDI in the development process and called on countries to design policies aimed at enhancing the impact of foreign investment on sustainable development and inclusive growth, while underlining the importance of stable, predictable and enabling investment climates.

Several other international instruments relate to individual Core Principles. They comprise, in particular, the Universal Declaration of Human Rights and the UN Guiding Principles on Business and Human Rights, the Convention on the Establishment of the Multilateral Investment Guarantee Agency, the World Bank Guidelines on the Treatment of Foreign Direct Investment, the UN Global Compact, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and several WTO-related agreements, including the GATS, the TRIMs Agreement and the Agreement on Government Procurement.

Source: UNCTAD.

2. Core Principles for investment policymaking for sustainable development

Area	Core Principles
1 **Investment for sustainable development**	• The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.
2 **Policy coherence**	• Investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level.
3 **Public governance and institutions**	• Investment policies should be developed involving all stakeholders, and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors.
4 **Dynamic policymaking**	• Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics.
5 **Balanced rights and obligations**	• Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all.
6 **Right to regulate**	• Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects.
7 **Openness to investment**	• In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment.
8 **Investment protection and treatment**	• Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory in nature.
9 **Investment promotion and facilitation**	• Policies for investment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment.
10 **Corporate governance and responsibility**	• Investment policies should promote and facilitate the adoption of and compliance with best international practices of corporate social responsibility and good corporate governance.
11 **International cooperation**	• The international community should cooperate to address shared investment-for-development policy challenges, particularly in least developed countries. Collective efforts should also be made to avoid investment protectionism.

3. Annotations to the Core Principles

Principle 1: Investment for sustainable development

This overarching principle defines the overall objective of the Investment Policy Framework for Sustainable Development. It recognizes the need to promote investment not only for economic growth as such, but for growth that benefits all, including the poorest. It also calls for the mainstreaming of sustainable development issues – i.e. development that meets the needs of the present without compromising the ability of future generations to meet theirs – in investment policymaking, both at the national and international levels.

Principle 2: Policy coherence

This principle recognizes that investment is a means to an end, and that investment policy should thus be integrated in an overarching development strategy. It also acknowledges that success in attracting and benefiting from investment depends not only on investment policy "stricto sensu" (i.e. entry and establishment rules, treatment and protection) but on a host of investment-related policy areas ranging from tax to trade to environmental and labour market policies. It recognizes that these policy areas interact with each other and that there is consequently a need for a coherent overall approach to make them conducive to sustainable development and to achieve synergies. The same considerations apply with respect to the interaction between national investment policies and international investment rulemaking. Successful experiences with investment for development often involved the establishment of special agencies with a specific mandate to coordinate the work of different ministries, government units and policy areas, including the negotiation of IIAs.

Principle 3: Public governance and institutions

The concept of good public governance refers to the efficiency and effectiveness of government services, including such aspects as accountability, predictability, clarity, transparency, fairness, rule of law, and the absence of corruption. This principle recognizes the importance of good public governance as a key factor in creating an environment conducive to attracting investment. It also stresses the significance of a participatory approach to policy development as a basic ingredient of investment policies aimed at inclusive growth and fairness for all. The element of transparency is especially important, as in and by itself it tends to facilitate dialogue between public and private sector stakeholders, including companies, organized labour and non-governmental organizations (NGOs).

Principle 4: Dynamic policymaking

This principle recognizes that national and international investment policies need flexibility to adapt to changing circumstances, while recognizing that a favourable investment climate requires stability and predictability. For one, different policies are needed at different development stages. New factors may emerge on the domestic policy scene, including government changes, social pressures or environmental degradation. International dynamics can have an impact on national investment policies as well, including through regional integration or through international competition for the attraction of specific types of foreign investment. The increasing role of emerging economies as outward investors and their corresponding desire better to protect their companies abroad drives change in investment policies as well.

The dynamics of investment policies also imply a need for countries continuously to assess the effectiveness of existing instruments. If these do not achieve the desired results in terms of economic and social development, or do so at too high a cost, they may need to be revised.

Principle 5: Balanced rights and obligations

Investment policies need to serve two potentially conflicting purposes. On the one hand, they have to create attractive conditions for foreign investors. To this end, investment policies include features of investment liberalization, protection, promotion and facilitation. On the other hand, the overall regulatory framework of the host country has to ensure that any negative social or environmental effects are minimized. More regulation may also be warranted to find appropriate responses to crises (e.g. financial crisis, food crisis, climate change).

Against this background, this core principle suggests that the investment climate and policies of a country should be "balanced" as regards the overall treatment of foreign investors. Where and how to strike this balance is basically an issue for the domestic law of host countries and therefore requires adequate local capacities. International policies vis-à-vis foreign investors likewise play a role and – if not carefully designed – might tilt the balance in favour of those investors. The principle does not mean that each individual investment-related regulation of a host country would have to be balanced.

Principle 6: Right to regulate

The right to regulate is an expression of a country's sovereignty. Regulation includes both the general legal and administrative framework of host countries as well as sector- or industry-specific rules. It also entails effective implementation of rules, including the enforcement of rights. Regulation is not only a State right, but also a necessity. Without an adequate regulatory framework, a country will not be attractive for foreign investors, because such investors seek clarity, stability and predictability of investment conditions in the host country.

The authority to regulate can, under certain circumstances, be ceded to an international body to make rules for groups of states. It can be subject to international obligations that countries undertake; with regard to the treatment of foreign investors this often takes place at the bilateral or regional level. International commitments thus reduce "policy space". This principle advocates that countries maintain sufficient policy space to regulate for the public good.

Principle 7: Openness to investment

This principle considers a welcoming investment climate, with transparent and predictable entry conditions and procedures, a precondition for attracting foreign investment conducive for sustainable development. The term "openness" is not limited to formal openness as expressed in a country's investment framework and, possibly, in entry rights granted in IIAs. Equally important is the absence of informal investment barriers, such as burdensome, unclear and non-transparent administrative procedures. At the same time, the principle recognizes that countries have legitimate reasons to limit openness to foreign investment, for instance in the context of their national development strategies or for national security reasons.

In addition, the issue of "openness" reaches beyond the establishment of an investment. Trade openness can be of crucial importance, too; in particular, when the investment significantly depends on imports or exports.

Principle 8: Investment protection

This principle acknowledges that investment protection, although only one among many determinants of foreign investment, can be an important policy tool for the attraction of investment. It therefore closely interacts with the principle on investment promotion and facilitation (Principle 9). It has a national and an international component. Core elements of protection at the national level include, inter alia, the rule of the law, the principle of freedom of contract and access to courts. Key components of investment protection frequently found in IIAs comprise the principle of non-discrimination (national treatment and most-favoured nation treatment), fair and equitable treatment, protection in case of expropriation, provisions on movement of capital, and effective dispute settlement.

Principle 9: Investment promotion and facilitation

Most countries have set up promotion schemes to attract and facilitate foreign investment. Promotion and facilitation measures often include the granting of fiscal or financial incentives, the establishment of special economic zones or "one-stop shops". Many countries have also set up special investment promotion agencies (IPAs) to target foreign investors, offer matchmaking services and provide aftercare.

The principle contains two key components. First, it stipulates that in their efforts to improve the investment climate, countries should not compromise sustainable development goals, for instance by lowering regulatory standards on social or environmental issues, or by offering incentives that annul a large part of the economic benefit of the investment for the host country. Second, the principle acknowledges that, as more and more countries seek to boost investment and target specific types of investment, the risk of harmful competition for investment increases; i.e. a race to the regulatory bottom or a race to the top of incentives (with negative social and environmental consequences or escalating commitments of public funds). Investment policies should be designed to minimize this risk. This underlines the importance of international coordination (see Principle 11 below).

Principle 10: Corporate governance and responsibility

This principle recognizes that corporate governance and CSR standards are increasingly shaping investment policy at the national and international levels. This development is reflected in the proliferation of standards, including several intergovernmental organization standards of the United Nations, the ILO, the IFC and the OECD, providing guidance on fundamental CSR issues;[5]

dozens of multi-stakeholder initiatives; hundreds of industry association codes; and thousands of individual company codes (*WIR11*). Most recently, the UN Human Rights Council adopted a resolution endorsing the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

CSR standards are voluntary in nature and so exist as a unique dimension of "soft law". The principle calls on governments to actively promote CSR standards and to monitor compliance with them. Promotion also includes the option to adopt existing CSR standards as part of regulatory initiatives, turning voluntary standards into mandatory requirements.

Principle 11: International cooperation

This principle considers that investment policies touch upon a number of issues that would benefit from more international cooperation. The principle also advocates that particular efforts should be made to encourage foreign investment in LDCs.

Home countries can support outward investment conducive to sustainable development. For a long time, developed countries have provided investment guarantees against certain political risks in the host country or offered loans to companies investing abroad. The Multilateral Investment Guarantee Agency (MIGA) provides investment insurance at the international level. The principle builds upon examples of countries that have started to condition the granting of investment guarantees on an assessment of social and environmental impacts.

The importance of international cooperation also grows as more and more countries make use of targeted investment promotion policies. Better international coordination is called for to avoid a global race to the bottom in regulatory standards, or a race to the top in incentives, and to avoid a return of protectionist tendencies.

More international coordination, in particular at the regional level, can also help to create synergies so as to realize investment projects that would be too complex and expensive for one country alone. Another policy area that would benefit from more international cooperation is investment in sensitive sectors. For example, recent concerns about possible land grabs and the crowding out of local farmers by foreign investors have resulted in the development by the FAO, UNCTAD, the World Bank and IFAD of Principles for Responsible Investment in Agriculture (PRAI).

* * *

Some Core Principles relate to a specific investment policy area (e.g. openness to investment, investment protection and promotion, corporate governance and social responsibility) and can therefore relatively easily be traced to specific guidelines and options in the national and international parts of the framework. Other Core Principles (e.g. on public governance and institutions, balanced rights and obligations, the right to regulate) are important for investment policymaking as a whole. As a consequence, they are reflected in guidelines dispersed across the entire range of relevant policy issues covered by the framework.

The Core Principles interact with each other. The individual principles and corresponding guidelines therefore must not be applied and interpreted in isolation. In particular, Principle 1 – as the overarching rule within the policy framework – has relevance for all subsequent principles. Integrating investment policies into sustainable development strategies requires a coherent policy framework. Good public governance is needed in its design and implementation. Sustainable development is an ongoing challenge, which underlines the importance of policymaking dynamics. And an IPFSD needs to comprise elements of investment regulation and corporate governance, on the one hand, and openness, protection and promotion, on the other hand, thereby contributing to an investment climate with balanced rights and obligations for investors.

III. National Investment Policy Guidelines

This chapter translates the Core Principles for investment policymaking into concrete guidelines at the national level, with a view to addressing the policy challenges discussed in chapter I. To address these policy challenges – ensuring that investment policy is coherent with other policy areas supporting a country's overall development strategy; enhancing the sustainable development impact of investment and promoting responsible investment; and improving policy effectiveness, while maintaining an attractive investment climate – this chapter, including the detailed policy guidelines it contains, argues for policy action at three levels:

1. At the *strategic* level, policymakers should ground investment policy in a broad road map for economic growth and sustainable development – such as those set out in formal economic or industrial development strategies in many countries.

2. At the *normative* level, through the setting of rules and regulations, on investment and in a range of other policy areas, policymakers can promote and regulate investment that is geared towards sustainable development goals.

3. At the *administrative* level, through appropriate implementation and institutional mechanisms, policymakers can ensure continued relevance and effectiveness of investment policies.

The following sections will look at each of these levels in turn.

1. Grounding investment policy in development strategy

Many countries have elaborated explicit development strategies that set out an action plan to achieve economic and social objectives and to strengthen international competitiveness. These strategies will vary by country, depending on their stage of development, their domestic endowments and individual preferences, and depending on the degree to which the political and economic system allows or requires the participation of the State in economic planning. Because investment is a key driver of economic growth, a prerequisite for the build-up of productive capacity and an enabler of industrial development and upgrading, investment policy must be an integrated part of such development strategies (see box 4).

Defining the role of public, private, domestic and foreign direct investment

Mobilizing investment for sustainable development remains a major challenge for developing countries, particularly for LDCs. Given the often huge development financing gaps in these countries, foreign investment can provide a necessary complement to domestic investment, and it can be particularly beneficial when it interacts in a synergetic way with domestic public and private investment. Agriculture, infrastructure and climate change-related investments, among others, hold significant potential for mutually beneficial interaction between foreign and domestic, and public and private investment. For example, public-private partnerships (PPPs) have become important avenues for infrastructure development in developing countries, although experience has shown that high-quality regulatory and institutional settings are critical to ensure the development benefits of such infrastructure PPPs (*WIR08*).

Given the specific development contributions that can be expected from investment – private and public, domestic and foreign – policymakers should consider carefully what role each type can play in the context of their development strategies. In particular the opportunities and needs for *foreign* investment – intended as direct investment in productive assets (i.e. excluding portfolio investment) – differ from country to country, as does the willingness to open sectors and industries to foreign investors. Examples include the improvement of infrastructure, investment in skills and education, investments to secure food supply, or investments in other specific industries that are of crucial importance for a country.

Even looking at the role of foreign investment per se policymakers should be aware of different types, each with distinct development impacts.

Box 4. Integrating Investment Policy in Development Strategy: UNCTAD's Investment Policy Reviews

UNCTAD's Investment Policy Review (IPR) program was launched in 1999 in response to growing demand from member States for advice on FDI policy. The IPRs aim to provide an independent and objective evaluation of the policy, regulatory and institutional environment for FDI and to propose customized recommendations to governments to attract and benefit from increased flows of FDI. To date IPRs have been undertaken for 34 countries, including 17 developing countries, 4 transition economies and 13 LDCs, of which 5 in post-conflict situations (box table 1).

Box table 1. Beneficiaries of the UNCTAD IPR program, 1999 – 2011

Categories	Countries
Developing countries	Algeria, Botswana, Colombia, Dominican Republic, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Kenya, Mauritius, Morocco, Mongolia, Nigeria, Peru, Sri Lanka, Viet Nam
Transition economies	Belarus, The FYR of Macedonia, Republic of Moldova, Uzbekistan
Least Developed Countries	Benin, Burkina Faso, Burundi, Ethiopia, Lesotho, Mauritania, Mozambique, Nepal, Rwanda, Sierra Leone, United Republic of Tanzania, Uganda, Zambia

UNCTAD coordinates its IPR activities with the work of other development partners (including other UN agencies such as the UNDP and UNIDO, the OECD, the World Bank, national and regional development banks, local development institutions and NGOs) in order to create synergies.

IPRs are carried out through a structured process, starting with (i) a formal request from the national government to UNCTAD expressing commitment to policy reforms; (ii) preparation of the IPR advisory report and its presentation at a national workshop where government and national stakeholders review findings; (iii) intergovernmental peer review and sharing of best practices in investment policy in Geneva; (iv) implementation and follow-up technical assistance and capacity building; and (v) preparation of an implementation assessment and additional follow-up actions.

Substantively, key areas of recommendations common to nearly all IPRs conducted to date include: (i) Defining the strategic role of investment (and in particular FDI) in countries' development strategies; (ii) Reforming investment laws and regulations; (iii) Designing policies and measures for attracting and benefitting from FDI; and (iv) Addressing institutional issues related to FDI promotion and facilitation.

A number of case-specific areas for recommendations or themes have included privatizations, the promotion of investment in target industries, promotion and facilitation of infrastructure investment, private sector development initiatives and business linkages, skill building and technology transfer, and regional cooperation initiatives.

Recently, the IPR approach has been strengthened further with the inclusion of sections on specific priority industries, containing a quantitative assessment of the potential for investment in those industries and the potential development impact of investment through such indicators as value added, employment generation, and export generation, with a view to helping governments attract and negotiate higher value added types of investment.

Source: UNCTAD; www.unctad.org/diae/ipr.

Greenfield investment has different impacts than investment driven by mergers and acquisitions (M&As). The former will generally imply a greater immediate contribution to productive capacity and job creation; the latter may bring benefits such as technology upgrading or access to international markets (or survival in case of troubled acquisition targets), but may also have negative effects (e.g. on employment in case of restructurings). Similarly, efficiency-seeking investments will have different development impacts than market-seeking investments, both with potential positive and negative contributions. And foreign investment also comes in different financial guises: FDI does not always imply an influx of physical capital (e.g. reinvested earnings), nor does it always translate into actual capital expenditures for the build-up of productive assets (e.g. retained earnings) and can sometimes behave in a manner not dissimilar to portfolio investment.

Furthermore, the role of foreign investors and multinational firms in an economy is not limited to FDI. They can also contribute to economic development through non-equity modes of international production (NEMs), such as contract manufacturing, services outsourcing, licensing, franchising or contract farming. Because this form of involvement is based on a contractual relation between the foreign company and domestic business partners, it requires that the host country has sufficiently qualified local entrepreneurs, which calls for coordinated policies on investment, enterprise development and human resource development (*WIR11*).

A key aspect in defining the role of investment in economic growth and development strategies is the need for calibrated policies to stimulate job creation and to maximize the job content of investment, both quantitatively and qualitatively. This has become especially urgent in light of the cumulative employment losses during the global financial crisis, and the relatively low job content of economic growth since, leading to a global employment deficit estimated at over 200 million workers.[6]

Harnessing investment for productive capacity building and enhancing international competitiveness

The potential contribution of foreign investment to building or reinforcing local productive capacities should guide investment policy and targeting efforts. This is particularly important where investment is intended to play a central role in industrial upgrading and structural transformation in developing economies. The most crucial aspects of productive capacity building include human resources and skills development, technology and know-how, infrastructure development, and enterprise development.

Human resources and skills. Human resources development is a crucial determinant of a country's long-term economic prospects. In addition, the availability of skilled, trainable and productive labour at competitive costs is a major magnet for efficiency-seeking foreign investors. As such, education and human resource development policy should be considered a key complement to investment policy. Particular care should be given to matching skills needs and skills development, including in terms of vocational and technical training. Vocational training that prepares trainees for jobs involving manual or practical activities related to a specific trade or occupation is a key policy tool, for instance, to enhance the capacity of local suppliers.

As economies develop, skills needs and job opportunities evolve, making a constant adaptation and upgrading of education and human development policies a necessity. The latter are essential not just to provide the necessary skills to investors, but more crucially to ensure that the population can gain access to decent work opportunities.

FDI – as well as NEMs – are particularly sensitive to the availability of local skills, which can frequently be a "make or break" factor in investment location decisions. Where local skills are partially lacking, foreign and national investors may wish to rely on expatriate workers to fill the gaps. Although particular care should be paid to promoting employment by nationals and to protecting national security, countries have a lot to gain from enabling investors to tap foreign skills readily and easily where needed. Well-crafted immigration and labour policies have had demonstrated benefits in countries that have allowed foreign skills to complement and fertilize those created locally. Knowledge spillovers also occur through international employees. An adequate degree of openness in granting work permits to skilled foreign workers is therefore important not only to facilitate investments that may otherwise not materialize for lack of skills, but also to support and complement the national human resource development policy through education.

Technology and know-how. An important policy task is to encourage the dissemination of technology. For example, governments can promote technology clusters that promote R&D in a particular industry and that can help upgrading industrial activities by bringing together technology firms, suppliers and research institutes. Disseminating and facilitating the acquisition of technology can also improve the involvement of domestic producers in GVCs (e.g. call centers, business processing operations or contract farming).

Appropriate protection of intellectual property rights is an important policy tool because it is often a precondition for international investors to disclose technology to licensees in developing countries, especially in areas involving easily imitable technologies (e.g. software, pharmaceuticals), and hence can affect chances of attracting equity investments (e.g. joint ventures) or non-equity modes of involvement (e.g. licensing). At the same time the level of protection should be commensurate with the level of a country's development and conducive to the development of its technological capacities. It can be a means of encouraging independent research activities by local companies, because businesses are more likely to invest resources in R&D and technological upgrading if their innovations are protected.

Infrastructure. The development of domestic infrastructure may necessitate investments of such magnitude that it is impossible for domestic companies to undertake them alone. Infrastructure development may also require certain technological skills and know-how, which domestic firms do not have (e.g. telecommunication, energy, exploration of natural resources in remote areas). Likewise, the move to a low-carbon economy will often necessitate bringing in the technological capacities of foreign investors.

Most developing countries, especially LDCs, continue to suffer from vast deficiencies in infrastructure, in particular electricity, water and transport, and to a lesser extent telecommunications. Following technological progress and changes in regulatory attitudes, many countries have succeeded in introducing private (foreign) investment and competition in what used to be public sector monopolies, e.g. mobile telecommunications or power generation.

Given the potential contribution of FDI to build high-quality infrastructure, countries should consider the extent to which certain sectors or sub-sectors could be opened to (foreign) private investment, and under what conditions – balancing considerations of public service provision, affordability and accessibility. National security-related concerns with regard to the liberalization of critical infrastructure can be taken care of by screening procedures. A clear vision of what is doable and desirable socially, technically and from a business perspective is essential given the dependence of economic growth on infrastructure development.

All too many developing countries have attempted to privatize infrastructure or public services only to fail or achieve less than optimal outcomes.[7] Governments need to develop not only a clear assessment of what can be achieved and at what costs, but also a comprehensive understanding of the complex technicalities involved in infrastructure investments and their long-term implications in terms of cost, quality, availability and affordability of services. A sound legal framework to guide concessions, management contracts and all forms of public-private partnerships is a key piece in the infrastructure development and investment strategies (*WIR08*).

Enterprise development. Domestic enterprise development is a key transfer mechanism for the development benefits of investment to materialize. At the same time, especially for foreign investors, the presence of viable local enterprise is a crucial determinant for further investment and for partnerships in NEMs. A comprehensive discussion of policy options to foster domestic entrepreneurial development – including in areas such as the regulatory environment, access to finance, education and training, and technological development – can be found in UNCTAD's Entrepreneurship Policy Framework (box 5).

Enterprise development policies aimed at enhancing the benefits from investment focus on building capacity to absorb and adapt technology and know-how, to cooperate with multinational firms, and to compete internationally.

Another important policy task is the promotion of linkages and spillover effects between foreign investment and domestic enterprises (*WIR01*). Policy coordination is needed to ensure that investment promotion is targeted to those industries that could have the biggest impact in terms of creating backward and forward linkages and contribute not just to direct, but also to indirect employment creation. At the same time, policymakers in developing countries need to address the risk of foreign investment impeding domestic enterprise development by crowding out local firms, especially SMEs. Industrial policies may

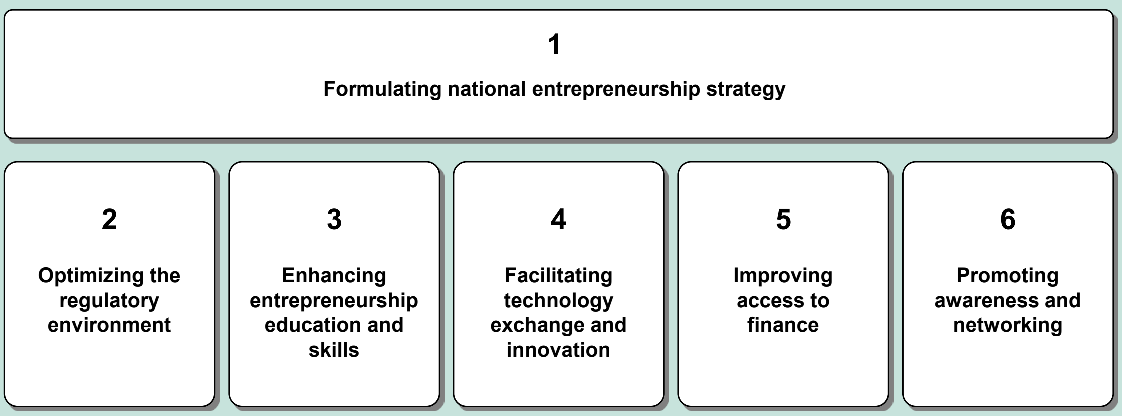
Box 5. UNCTAD's Entrepreneurship Policy Framework

Entrepreneurship is vital for economic growth and development. The creation of new business entities generates value added, fiscal revenues, employment and innovation, and is an essential ingredient for the development of a vibrant small- and medium-sized business sector. It has the potential to contribute to specific sustainable development objectives, such as the employment of women, young people or disadvantaged groups. Entrepreneurship development can also contribute to structural transformation and building new industries, including the development of eco-friendly economic activities.

UNCTAD's Entrepreneurship Policy Framework (EPF) aims to support developing-country policymakers in the design of initiatives, measures and institutions to promote entrepreneurship. It sets out a structured framework of relevant policy areas, embedded in an overall entrepreneurship strategy, which helps guide policymakers through the process of creating an environment that facilitates the emergence of start-ups, as well as the growth and expansion of new enterprises.

The EPF recognizes that in designing entrepreneurship policy "one size does not fit all". Although the national economic and social context and the specific development challenges faced by a country will largely determine the overall approach to entrepreneurship development, UNCTAD has identified six priority areas that have a direct impact on entrepreneurial activity (box figure 1). In each area the EPF suggests policy options and recommended actions.

Box figure 1. Key components of UNCTAD's Entrepreneurship Policy Framework



The EPF further proposes checklists and numerous references in the form of good practices and case studies. The case studies are intended to equip policy makers with implementable options to create the most conducive and supportive environment for entrepreneurs. The EPF includes a user guide, a step-by-step approach to developing entrepreneurship policy, and contains a set of indicators that can measure progress. An on-line inventory of good practices in entrepreneurship development, available on UNCTAD's web-site, completes the EPF. This online inventory will provide an opportunity for all stakeholders to contribute cases, examples, comments and suggestions, as a basis for the inclusive development of future entrepreneurship policies.

Source: UNCTAD; www.unctad.org/diae/epf.

play a role in protecting infant industries or other sensitive industries with respect to which host countries see a need to limit foreign access.

In the long run, enterprise development is essential for host countries to improve international competitiveness. Promotion efforts should therefore not be limited to low value-added activities within international value chains, but gradually seek to move to higher-value added segments. This is crucial for remaining competitive once developing countries lose their low labour cost advantage. However, switching from labour-intensive low-value activities to more capital-intensive higher value production methods may raise unemployment in the transition phase and thus calls for vigilant labour market and social policies. This confirms the important dynamic dimension of investment and enterprise development strategies, calling for regular reviews and adaptation of policy instruments.

Ensuring coherence between investment policies and other policy areas geared towards overall development objectives

The interaction between investment policy and other elements of a country's overall economic development and growth strategy – including human resource development, infrastructure, technology, enterprise development, and others – is complex. It is critical that government authorities work coherently towards the common national objective of sustainable development and inclusive growth, and seek to create synergies. This requires coordination at the earliest stages of policy design, as well as the involvement of relevant stakeholders, including the investor community and civil society.

2. Designing policies for responsible investment and sustainable development

From a development perspective, FDI is more than a flow of capital that can stimulate economic growth. It comprises a package of assets that includes long-term capital, technology, market access, skills and know-how (*WIR99*). As such, it can contribute to sustainable development by providing financial resources where such resources are often scarce; generating employment (*WIR94*); strengthening export capacities (*WIR02*); transferring skills and disseminating technology; adding to GDP through investment and value added, both directly and indirectly; and generating fiscal revenues. In addition, FDI can support industrial diversification and upgrading, or the upgrading of agricultural productivity (*WIR09*) and the build up of productive capacity, including infrastructure (*WIR08*). Importantly, it can contribute to local enterprise development through linkages with suppliers (WIR01) and by providing access to GVCs (*WIR11*) – the growing importance of GVCs can have an important pro-poor dynamic to the extent that marginalized communities and small suppliers can integrate into global or regional value chains as producers, suppliers or providers of goods and services.

These positive development impacts of FDI do not always materialize automatically. And the effect of FDI can also be negative in each of the impact areas listed above. For example, it can lead to outflows of financial resources in the form of repatriated earnings or fees; it can, under certain circumstances, crowd out domestic investment and domestic enterprise (*WIR97*); it can at times reduce employment by introducing more efficient work practices or through restructurings (*WIR94*, *WIR00*), or jobs created may be unstable due to the footloose nature of some investment types; it can increase imports more than exports (or yield limited net export gains), e.g. in case of investment operations requiring intermediate inputs or for market-seeking investments (*WIR02*, *WIR11*); technology dissemination might not take place, or only at high cost (e.g. through licensing fees) (*WIR11*), and local technological development may be slowed down; skills transfers may be limited by the nature of jobs created; fiscal gains may be limited by tax avoidance schemes available to international investors, including transfer pricing; and so forth.

The balance of potential positive and negative development contributions of FDI is proof that investment policy matters in order to maximize the positive and minimize the negative impacts. Reaping the development benefits from investment requires not only an enabling policy framework that combines elements of investment promotion and regulation and that provides clear, unequivocal and transparent rules for the entry and operation of foreign investors (see box 6), it also requires adequate regulation to minimize any risks associated with investment.

The host of different impact types listed above indicates that such regulations need to cover a broad range of policy areas beyond investment policies per se, such as trade, taxation, intellectual property, competition, labour market regulation, environmental policies and access to land. The coverage of such a multitude of different policy areas confirms the need for consistency and coherence in policymaking across government.

Fostering sustainable development and inclusive growth through investment requires a balance of promotion and regulation. On the promotion side, attracting low-carbon investment, for example, may imply the need to set up new policy frameworks for a nascent renewable energy sector, which may also require government assistance in the start-up phase, be it through tax incentives or measures aimed at creating a market (*WIR10*). Encouraging investment in sectors that are crucial for the poor may imply building sound regulatory frameworks and facilitation of responsible investment in agriculture (including contract farming), as agriculture continues to be the main source of income in many developing countries (*WIR09*).

At the same time, on the regulatory side, sustainability considerations should be a key consideration when deciding on the granting of investment incentives. The short-term advantages of an investment need to be weighed against the potential long-term environmental effects. And the sensitive issue of access to land requires careful balancing of the rights and obligation of agricultural investors. For many developing countries, it is a

Box 6. Designing Sound Investment Rules and Procedures: UNCTAD's Investment Facilitation Compact

UNCTAD's Investment Facilitation Compact combines a number of programs aimed at assisting developing countries in strengthening their policy and institutional framework for attracting and retaining foreign investment, and in developing a regulatory climate in which investors can thrive.

The *UNCTAD-ICC Investment Guides* aim to provide accurate and up-to-date information on regulatory conditions in participating countries (as well as on the investment climate and emerging investment opportunities). They are prepared in collaboration with governments, national chambers of commerce and investors and are distributed by investment promotion agencies, foreign missions and other government departments, as well as by the International Chamber of Commerce.

The guides aim to provide a reliable source of third-party information for investors looking to invest in countries that are rarely covered by commercial publishers. They highlight often under-reported economic and investment policy reform efforts, including fiscal incentives, regional integration, easier access to land, establishment of alternative dispute settlement mechanisms, simplified border procedures, facilitation of permits and licenses and laws enabling private investment in power generation and infrastructure. Because the guides are produced through a collaborative process they also build capacities of governments to promote investment opportunities and understand investors' needs.

UNCTAD's *Business Facilitation* program aims to help developing countries build a regulatory and institutional environment that facilitates investment and business start-ups. It works through a methodology that first provides full transparency on existing rules and procedures for investors; it does so by offering online detailed, practical and up-to-date descriptions of the steps investors have to follow for procedures such as business or investment registration, license and permit issuance, payment of taxes, or obtaining work permits. Once full transparency has been created, the program helps governments simplify procedures by identifying unnecessary steps or developing alternatives.

The program promotes good governance by increasing the awareness of administrative rules and procedures, establishing the conditions for a balanced dialogue between the users of the public services, including investors, and civil servants. It also sets a basis for regional or international harmonization of rules by facilitating the exchange of good practices among countries.

Individual programs within the Investment Facilitation Compact have to date been undertaken in more than 35 countries and regions, with a strong focus on LDCs (box table 1).

Box table 1. Beneficiaries of selected programs of UNCTAD's Investment Facilitation Compact

Categories	Countries/regions
Investment Guides	Bangladesh, Benin, Bhutan, Burkina Faso, Cambodia, Comoros, East African Community, Ethiopia, Kenya, Lao PDR, Mali, Morocco, Oriental Region of Morocco, Mauritania, Mozambique, Nepal, Rwanda, Tanzania, Silk Road Region, Uganda, Uzbekistan, Zambia
Business Facilitation	Benin, Burkina Faso, Cape Verde, Cameroon, Colombia, Comoros, Costa Rica, El Salvador, Guatemala, Mali, Nicaragua, Togo, Russian Federation (City of Moscow), Rwanda, Viet Nam

Source: UNCTAD; www.unctad.org; www.theiguides.org; www.eregulations.org.

key challenge to strengthen such environmental and social protection while maintaining an attractive investment climate.

Sustainability issues should also be a main consideration in investment contracts between the host country and individual investors. Such contracts can be a means to commit investors to environmental or social standards beyond the level established by the host country's general legislation, taking into account international standards and best practices.

While laws and regulations are the basis of investor responsibility, voluntary CSR initiatives and standards have proliferated in recent years, and they are increasingly influencing corporate practices, behaviour and investment decisions. Governments can build on them to complement the regulatory framework and maximize the development benefits of investment (*WIR11*).

Because CSR initiatives and voluntary standards are a relatively new area that is developing quickly and in many directions, the management of their policy implications is a challenge for many developing countries. In particular, the potential interactions between soft law and hard law can be complex, and the value of standards difficult to extract for lack of monitoring capacity and limited comparability. A number of areas can benefit from the encouragement of CSR initiatives and the voluntary dissemination of standards; for example, they can be used to promote responsible investment and business behaviour (including the avoidance of corrupt business practices), and they can play an important role in promoting low-carbon and environmentally sound investment. Care needs to be taken to avoid these standards becoming undue barriers to trade and investment flows.

3. Implementation and institutional mechanisms for policy effectiveness

Investment policy and regulations must be adequately enforced by impartial, competent and efficient public institutions, which is as important for policy effectiveness as policy design itself. Policies to address implementation issues should be an integral part of the investment strategy and should strive to achieve both integrity across government and regulatory institutions and a service orientation where warranted. As a widely accepted best-practice principle, regulatory agencies should be free of political pressure and have significant independence, subject to clear reporting guidelines and accountability to elected officials or representatives. These principles are particularly relevant for investors in institutions including courts and judiciary systems; sectoral regulators (e.g. electricity, transport, telecommunications, banking); customs; tax administration or revenue authority; investment promotion agency; and licensing bodies.

As stated in the fourth Core Principle, managing investment policy dynamically is of fundamental importance to ensure the continued relevance and effectiveness of policy measures. Revisions in investment policy may be driven by changes in strategy – itself caused by adaptations in the overall development strategy – or by external factors and changing circumstances. Countries require different investment policies at different stages of development, policies may need to take into account those in neighbouring countries, and be cognizant of trade patterns or evolving relative shares of sectors and industry in the economy. Policy design and implementation is a continuous process of fine-tuning and adaptation to changing needs and circumstances.

Beyond such adaptations, investment policy may also need adjustment where individual measures, entire policy areas, or the overall investment policy regime is deemed not to achieve the intended objectives, or to do so at a cost higher than intended. Understanding when this is the case, understanding it in time for corrective action to be taken, and understanding the reasons for the failure of measures to have the desired effect, is the essence of measuring policy effectiveness.

A significant body of academic literature exists on methodologies for evaluating policy effectiveness. Specifically in the area of investment policy, there are three objective difficulties associated with the measurement of policy effectiveness:

- It is often difficult to assess the effectiveness of discrete investment policy measures, such as the provision of incentives, let alone the effectiveness of the overall investment policy framework. Many *exogenous factors* and investment determinants beyond policy drive the investment attraction performance of a country – e.g. market size and growth, the presence of natural resources, the quality of basic infrastructure, labour productivity, and many others (see UNCTAD's Investment Potential Index).

- Investment policy effectiveness measures should also provide an indication of the extent to which policies help realize the benefits from investment and maximize its development impact. However, it is often difficult to find solid evidence for the discrete impact on various dimensions of *investment*, let alone for the impact of the *policies* that led to that investment or that guide the behaviour of investors.
- Much of the impact of investment policies and thus their effectiveness depends on the way such policies are applied, and on the capabilities of institutions charged with *the implementation and enforcement of policies and measures*, rules and regulations.

Given these objective difficulties in measuring the effectiveness of investment policies, and to ensure that potentially important policy changes are not delayed by complex analyses of the impact of individual measures, policymakers may be guided by a few simplifying rules in evaluating the effectiveness of their policies:

- Investment policy should be based on a set of explicitly formulated policy objectives with clear priorities, a time frame for achieving them, and the principal measures intended to support the objectives. These objectives should be the principal yardstick for measuring policy effectiveness.
- The detailed quantitative (and therefore complex) measurement of the effectiveness of individual policy measures should focus principally on those measures that are most costly to implement, such as investment incentives.
- Assessment of progress in policy implementation and verification of the application of rules and regulations at all administrative levels is at least as important as the measurement of policy effectiveness. A review process should be put in place to ensure that policies are correctly implemented as a part of the assessment of policy effectiveness.

Goals and objectives for investment policy, as set out in a formal investment strategy in many countries, should be SMART:[8]

- *Specific:* they should break down objectives for investment attraction and impact for priority industries or activities as identified in the development strategy.
- *Measurable:* investment goals and objectives should identify a focused set of quantifiable indicators.
- *Attainable:* as part of investment policy development, policymakers should compare investment attraction and investment impact with peer countries to inform realistic target setting.
- *Relevant:* objectives (and relevant indicators) should relate to impacts that can be ascribed to investment (and by implication investment policy), to the greatest extent possible filtered for 'general development strategy' impacts.
- *Time-bound:* objectives should fall within a variety of time frames. Even though broad development and investment-related objectives are of a long-term nature (e.g. 10-20 years), intermediate and specific objectives should refer to managerially and politically relevant time frames, e.g. 3-4 years. In addition, short-term benchmarks should be set within shorter time periods (a few quarters or a year) to ensure effective progress and implementation.

Objectives of investment policy should ideally include a number of quantifiable goals for both the *attraction of investment* and the *impact of investment*. To measure policy effectiveness for the attraction of investment, UNCTAD's Investment Potential and Performance Matrix can be a useful tool. This matrix compares countries with their peers, plotting investment inflows against potential based on a standardized set of economic determinants, thereby providing a proxy for the effect of policy determinants.

Similarly, for the measurement of policy effectiveness in terms of impact, UNCTAD's Investment Contribution Index may be a starting point. Also important is the choice of impact indicators. Policymakers should use a focused set of key indicators that are the most direct expression of the core development contributions of private investments, including direct contributions to GDP growth through additional value added, capital formation and export generation; entrepreneurial development and development of the formal sector and tax base; and job creation. The indicators could also address labour, social, environmental and development sustainability aspects.

The impact indicator methodology developed for the G-20 Development Working Group by UNCTAD, in collaboration with other agencies, may provide guidance to policymakers on the choice of indicators of investment impact and, by extension, of investment policy effectiveness (see table 3). The indicator framework, which has been tested in a number of developing countries, is meant to serve as a tool that countries can adapt and adopt in accordance with their national economic development priorities and strategies. At early stages of development, pure GDP contribution and job creation impacts may be more relevant; at more advanced stages, quality of employment and technology contributions may gain relevance.

Table 3. Possible indicators for the definition of investment impact objectives and the measurement of policy effectiveness

Area	Indicators	Details and examples
Economic Value Added	1. Total value added	• Gross output (GDP contribution) of the new/additional economic activity resulting from the investment (direct and induced)
	2. Value of capital formation	• Contribution to GFCF
	3. Total and net export generation	• Total export generation; net export generation (net of imports) is also captured by the value added indicator
	4. Number of formal business entities	• Number of businesses in the value chain supported by the investment; this is a proxy for entrepreneurial development and expansion of the formal (tax-paying) economy
	5. Total fiscal revenues	• Total fiscal take from the economic activity resulting from the investment, through all forms of taxation
Job creation	6. Employment (number)	• Total number of jobs generated by the investment, both direct and induced (value chain view), dependent and self-employed
	7. Wages	• Total household income generated, direct and induced
	8. Typologies of employee skill levels	• Number of jobs generated, by ILO job-type, as a proxy for job quality and technology-levels (including technology transfer)
Sustainable development	9. Labour impact indicators	• Employment of women (and comparable pay) and of disadvantaged groups • Skills upgrading, training provided • Health and safety effects, occupational injuries
	10. Social impact indicators	• Number of families lifted out of poverty, wages above subsistence level • Expansion of goods and services offered, access to and affordability of basic goods and services
	11. Environmental impact indicators	• GHG emissions, carbon off-set/credits, carbon credit revenues • Energy and water consumption/efficiency hazardous materials • Enterprise development in eco-sectors
	12. Development impact indicators	• Development of local resources • Technology transfer

Source: "Indicators for measuring and maximizing economic value added and job creation arising from private sector investment in value chains", Report to the G20 Cannes Summit, November 2011; produced by an inter-agency working group coordinated by UNCTAD. UNCTAD has included this methodology in its technical assistance work on investment policy, see box 4.

4. The IPFSD's national policy guidelines

The national investment policy guidelines are organized in four sections, starting from the strategic level, which aims to ensure integration of investment policy in overall development strategy, moving to investment policy 'stricto sensu', to investment-related policy areas such as trade, taxation, labour and environmental regulations, and intellectual property policies, to conclude with a section on investment policy effectiveness (table 4).

While the national guidelines in the IPFSD are meant to establish a generally applicable setting for investment-related policymaking, it cannot provide a "one-size-fits-all" solution for all economies. Countries have different development strategies and any policy guide must acknowledge these divergences. Governments may have different perceptions about which industries to promote and in what manner, and what role foreign investors should play in this context. Social, cultural, geographical and historical differences play a role as well. Furthermore, the investment climate of each country has its individual strengths and weaknesses; therefore, policies aimed at building upon existing strengths and reducing perceived deficiencies will differ. Thus investment policies need to be fine-tuned based on specific economic contexts, sectoral investment priorities and development issues faced by individual countries. The IPFSD's national investment policy guidelines establish a basic framework. Other tools are available to complement the basic framework with customized best practice advice (box 7).

Table 4. Structure of the National Investment Policy Guidelines

Investment and sustainable development strategy	• Integrating investment policy in sustainable development strategy • Maximizing the contribution of investment to productive capacity building and international competitiveness
Investment regulation and promotion	• Designing investment-specific policies regarding: – Establishment and operations – Treatment and protection of investments – Investor responsibilities – Investment promotion and facilitation
Investment-related policy areas	• Ensuring coherence with other policy areas, including: trade, taxation, intellectual property, competition, labour market regulation, access to land, corporate responsibility and governance, environmental protection, and infrastructure and public-private partnerships
Investment policy effectiveness	• Building effective public institutions to implement investment policy • Measuring investment policy effectiveness and feeding back lessons learned into new rounds of policymaking

Box 7. Investment Policy advice to "adapt and adopt": UNCTAD's Series on Best Practices in Investment for Development

As with UNCTAD's IPR approach (see box 4), in which each IPR is custom-designed for relevance in the specific context of individual countries, the UNCTAD work program on Best Practices in Investment for Development acknowledges that *one size does not fit all*.

The program consists of a series of studies on investment policies tailored to:

- specific sectors of the economy (e.g. infrastructure, natural resources,…);
- specific development situations (e.g. small economies, post-conflict economies,…);
- specific development issues (e.g. capacity building, linkages,…).

The program aims to build an inventory of best policy practices in order to provide a reference framework for policy makers in developing countries through concrete examples that can be adapted to their national context. Each study therefore looks at one or two specific country case studies from which lessons can be drawn on good investment policy practices related to the theme of the study. The following studies are currently available:

- How to Utilize FDI to Improve Transport Infrastructure: Roads – Lessons from Australia and Peru;
- How to Utilize FDI to Improve Transport Infrastructure: Ports – Lessons from Nigeria;
- How to Utilize FDI to Improve Infrastructure: Electricity – Lessons from Chile and New Zealand;
- How to Attract and Benefit from FDI in Mining – Lessons from Canada and Chile;
- How to Attract and Benefit from FDI in Small Countries – Lessons from Estonia and Jamaica;
- How Post-Conflict Countries can Attract and Benefit from FDI – Lessons from Croatia and Mozambique;
- How to Integrate FDI and Skill Development – Lessons from Canada and Singapore;
- How to Create and Benefit from FDI-SME Linkages – Lessons from Malaysia and Singapore;
- How to Prevent and Manage Investor-State Disputes – Lessons from Peru.

Source: UNCTAD; www.unctad.org.

UNCTAD Investment Policy Framework for Sustainable Development

National investment policy guidelines

Sections	Sub-sections		Policy Guidelines
1 Investment and sustainable development strategy	1.1 **Strategic investment policy priorities**	1.1.1	Investment policy should be geared towards the realization of national sustainable development goals and grounded in a country's overall development strategy. It should set out strategic priorities, including: - Investment in specific economic activities, e.g. as an integral part of an industrial development strategy. - Areas for mutual reinforcement of public and private investment (including a framework for public-private partnerships). - Investment that makes a significant development contribution by creating decent work opportunities, enhancing sustainability, and/or by expanding and qualitatively improving productive capacity (see 1.2) and international competitiveness. Investment policy priorities should be based on a thorough analysis of the country's comparative advantages and development challenges and opportunities, and should address key bottlenecks for attracting FDI.
		1.1.2	Strategic investment policy priorities may be effectively formalized in a published document (e.g. investment strategy), making explicit the intended role of private and foreign investment in the country's sustainable development strategy and development priorities, and providing a clear signal to both investors and stakeholders involved in investment policymaking.
	1.2 **Investment policy coherence for productive capacity building**		
	Human resource development	1.2.1	The potential for job creation and skills transfer should be one of the criteria for determining investment priorities. Taking into account the mutually reinforcing link between human resource development (HRD) and investment, investment policy should inform HRD policy to prioritize skill building in areas crucial for development priorities, whether technical, vocational, managerial or entrepreneurial skills.
	Technology and know-how	1.2.2	The potential for the transfer of appropriate technologies and the dissemination of know-how should be one of the criteria for determining investment priorities, and should be promoted through adequate investment-related policies, including taxation and intellectual property.
	Infrastructure	1.2.3	The potential for infrastructure development through FDI, in particular under PPPs, should be an integral part of investment policy. Infrastructure development policies should give due consideration to basic infrastructure areas crucial for the building of productive capacities, including utilities, roads, sea- and airports or industrial parks, in line with investment priorities.
		1.2.4	A specific regulatory framework for PPPs should be in place to ensure that investor-State partnerships serve the public interest (see also section 3.9 below).
	Enterprise development	1.2.5	The potential for FDI to generate business linkages and to stimulate local enterprise development should be a key criterion in defining investment policy and priorities for FDI attraction. Enterprise development and business facilitation policies (including access to finance) should promote entrepreneurial activity where such activity yields particularly significant benefits through linkages and acts as a crucial locational determinant for targeted foreign investments.
2 Investment regulation and promotion	2.1 **Entry, establishment and operations of foreign investors**		
	Policy statement on FDI and degree of openness	2.1.1	Investment policy benefits from a clear message towards the international business community on FDI (e.g. in a country's investment strategy or law on foreign investment, where these exist). Attracting high levels of diverse and beneficial FDI calls for a general policy of openness and avoidance of investment protectionism, subject to qualifications and selective restrictions to address country-specific development needs and policy concerns, such as regarding the provision of public goods or the control over strategic industries and critical infrastructure.

Sections	Sub-sections		Policy Guidelines
Investment regulation and promotion (continued)	Screening and entry restrictions	2.1.2	Ownership restrictions or limitations on the entry of foreign investment, in full accordance with countries' right to regulate, should be justified by legitimate national policy objectives and should not be influenced by special interests. They are best limited to a few explicitly stated aims, including: - protecting the national interest, national security, control over natural resources, critical infrastructure, public health, the environment; or - promoting national development objectives in accordance with a published development strategy or investment strategy. Such restrictions need to be in conformity with international commitments.
		2.1.3	Restrictions on foreign ownership in specific industries or economic activities should be clearly specified; a list of specific industries where restrictions (e.g. prohibitions, limitations) apply has the advantage of achieving such clarity while preserving a policy of general openness to FDI.
		2.1.4	A periodic review should take place of any ownership restrictions and of the level of ownership caps to evaluate whether they remain the most appropriate and cost-effective method to ensure these objectives.
		2.1.5	Screening procedures for investment entry and establishment, where applicable, should be conducted following pre-established objective criteria.
	Property registration	2.1.6	Investors should be able to register ownership of or titles to land and other forms of property securely, effectively and timely, including in order to facilitate access to debt finance, bearing in mind specific development challenges in this regard (see also 3.6 below).
	Freedom of operations	2.1.7	Governments should avoid direct or indirect intrusions in business management and respect the freedom of operations of private companies, subject to compliance with domestic laws. This includes the freedom of investors to decide whether they want to invest at home or abroad.
	Performance requirements	2.1.8	Performance requirements and related operational constraints should be used sparingly and only to the extent that they are necessary to achieve legitimate public policy purposes. They need to be in compliance with international obligations and would typically be imposed principally as conditions for special privileges, including fiscal or financial incentives.
	2.2 **Treatment and protection of investors**		
	Treatment under the rule of law	2.2.1	Established investors and investments, foreign or domestic, should be granted treatment that is based on the rule of law.
	Core standards of treatment	2.2.2	As a general principle, foreign investors and investments should not be discriminated against vis-à-vis national investors in the post-establishment phase and in the conduct of their business operations. Where development objectives require policies that distinguish between foreign and domestic investment, these should be limited, transparent and periodically reviewed for efficacy against those objectives. They need to be in line with international commitments, including REIOs.
		2.2.3	While recognizing that countries have not only the *right* but the *duty* to regulate, regulatory changes should take into account the need to ensure stability and predictability of the investment climate.
	Transfer of funds	2.2.4	Where the level of development or macro-economic considerations warrant restrictions on the transfer of capital, countries should seek to treat FDI-related transactions differently from other (particularly short-term) capital account transactions. Countries should guarantee the freedom to transfer and repatriate capital related to investments in productive assets, subject to reporting requirements (including to fight money laundering) and prior compliance with tax obligations, and subject to potential temporary restrictions due to balance of payment crises and in compliance with international law. Controls should be periodically reviewed for efficacy.

Sections	Sub-sections		Policy Guidelines
Investment regulation and promotion (continued)		2.2.5	Countries should guarantee the free convertibility of their currency for current account transactions, including FDI-related earnings and dividends, interests, royalties and others. Any restriction to convertibility for current account transactions should be in accordance with existing international obligations and flexibilities, in particular the IMF Articles of Agreement.
	Contract enforcement and dispute settlement	2.2.6	All investors should be entitled to equal treatment in the enforcement of contracts. Mechanisms and proceedings for the enforcement of contracts should be timely, efficient and effective, and available to all investors so as to duly operate under the rule of law.
	Investment contracts	2.2.7	States should honour their obligations deriving from investment contracts with investors, unless they can invoke a fundamental change of circumstances or other legitimate reasons in accordance with national and international law.
	Expropriation	2.2.8	When warranted for legitimate public policy purposes, expropriations or nationalization should be undertaken in a non-discriminatory manner and conform to the principle of due process of law, and compensation should be provided. Decisions should be open to recourse and reviews to avoid arbitrariness.
	International commitments	2.2.9	Government should assign explicit responsibility and accountability for the implementation and periodic review of measures to ensure effective compliance with commitments under IIAs. Strong alternative dispute resolution (ADR) mechanisms can be effective means to avoid international arbitration of disputes.
	2.3 **Investor obligations**		
	Responsible investment	2.3.1	Investors' first and foremost obligation is to comply with a host country's laws and regulations. This obligation should apply and be enforced indiscriminately to national and foreign investors, as should sanctions for non-compliance.
	Standards	2.3.2	Governments should encourage adherence to international standards of responsible investment and codes of conduct by foreign investors. Standards which may serve as reference include the ILO Tri-partite Declaration, the OECD Guidelines for Multinational Enterprises, the UNCTAD, FAO IFAD and World Bank Principles for Responsible Agricultural Investment, the UN Guiding Principles on Business and Human Rights and others. In addition, countries may wish to translate soft rules into national legislation.
	2.4 **Promotion and facilitation of investment**		
	Investment authority and investment promotion agency	2.4.1	Explicit responsibility and accountability should be assigned to an investment promotion agency (IPA) to encourage investment and to assist investors in complying with administrative and procedural requirements with a view towards facilitating their establishment, operation and development.
		2.4.2	The mission, objectives and structure of the IPA should be grounded in national investment policy objectives and regularly reviewed. The core functions of IPAs should include image building, targeting, facilitation, aftercare and advocacy.
		2.4.3	As the prime interface between Government and investors, IPAs should support efforts to improve the general business climate and eliminate red tape.
		2.4.4	Where screening or preliminary approval are imposed on foreign investors, responsibility and accountability for such procedures should be clearly separate from investment promotion and facilitation functions in order to avoid potential conflicts of interest.
		2.4.5	IPAs should be in a position to resolve cross-ministerial issues through its formal and informal channels of communication, and by reporting at a sufficiently high level of Government. Its governance should be ensured through an operational board that includes members from relevant ministries and from the private sector.
		2.4.6	The effectiveness of the IPA in attracting investment should be periodically reviewed against investment policy objectives. The efficiency of the IPA and its working methods should also be reviewed in light of international best practice.

Sections	Sub-sections		Policy Guidelines
Investment regulation and promotion (continued)		2.4.7	The work of national and sub-national IPAs, as well as that of authorities promoting investment in special economic zones, should be closely coordinated to ensure maximum efficiency and effectiveness.
		2.4.8	Being at the core of Government efforts to promote and facilitate investment, the IPA should establish close working relationships (including through secondment of staff) with regulatory agencies dealing directly with investors. It should seek to promote a client-oriented attitude in public administration. It may enlist the diplomatic service to strengthen overseas promotion efforts.
	Investment incentives and guarantees	2.4.9	Investment incentives, in whatever form (fiscal, financial or other), should be carefully assessed in terms of long-term costs and benefits prior to implementation, giving due consideration to potential distortion effects. The costs and benefits of incentives should be periodically reviewed and their effectiveness in achieving the desired objectives thoroughly evaluated.
		2.4.10	Where investment incentives are granted to support nascent industries, self-sustained viability (i.e. without the need for incentives) should be the ultimate goal so as to avoid subsidizing non-viable industries at the expense of the economy as a whole. A phase-out period built in the incentive structure is good practice, without precluding permanent tax measures to address positive or negative externalities.
		2.4.11	The rationale and justification for investment incentives should be directly and explicitly derived from the country's development strategy. Their effectiveness for achieving the objectives should be fully assessed before adoption, including through international comparability.
		2.4.12	The granting and administration of incentives should be the responsibility of an independent entity or ministry that does not have conflicting objectives or performance targets for investment attraction.
		2.4.13	Environmental, labour and other regulatory standards should not be lowered as a means to attract investment, or to compete for investment in a "regulatory race to the bottom".
		2.4.14	Investment incentives should be granted on the basis of a set of pre-determined, objective, clear and transparent criteria. They should be offered on a non-discriminatory basis to projects fulfilling these criteria. Compliance with the criteria (performance requirements) should be monitored on a regular basis as a condition to benefit from the incentives.
		2.4.15	Investment incentives over and above pre-defined incentives must be shown to make an exceptional contribution to development objectives, and additional requirements should be attached, including with a view to avoiding a "race to the top of incentives".
		2.4.16	Investment incentives offered by sub-national entities which have the discretion to grant incentives over and above the pre-defined limits, should be coordinated by a central investment authority to avoid investors "shopping around".
	Promotion of business linkages and spillovers	2.4.17	As business linkages between foreign investors and national companies do not always develop naturally, Governments and IPAs should actively nurture and facilitate them. Undue intrusion in business partnerships should be avoided as mutually beneficial and sustainable linkages cannot be mandated.
		2.4.18	Measures that Governments should consider to promote linkages include: (1) direct intermediation between national and foreign investors to close information gaps; (2) support (financial and other) to national companies for process or technology upgrading; (3) selective FDI targeting; (4) establishment of national norms and standards, along the lines of international ones (e.g ISO standards); and (5) incentives for foreign investors to assist in upgrading of local SMEs and promotion of entrepreneurship.
		2.4.19	Mandatory practices to promote linkages, such as joint-venture requirements, should be used sparingly and carefully considered to avoid unintended adverse effects.
		2.4.20	Explicit responsibility and accountability should be assigned to the investment authority or IPA to nurture and promote business linkages established by foreign investors as part of its aftercare mandate.
		2.4.21	Specific policies should encourage businesses to offer training to employees in skill areas deemed crucial in the country's policy on human resource development, including through performance requirements linked to investment incentives.

Sections	Sub-sections		Policy Guidelines
3 Investment-related policies	3.1 **Trade policy**		
	International trade agreements	3.1.1	Access to global markets is essential for resource- and efficiency-seeking foreign investors, and the size of local/regional markets is equally important for market-seeking investors. Active participation in international trade agreements (in particular the WTO) and enhanced integration at the regional level should be considered an integral part of development strategy and a key factor in promoting investment.
	Trade restriction and promotion	3.1.2	Trade policies, including tariffs and non-tariff barriers, and trade promotion/facilitation measures (e.g. export finance, import insurance schemes, support to obtain compliance with international standards and norms) can selectively promote or discourage investment in specific industries. They should be defined in line with (industrial) development objectives and investment policy.
	Customs and border procedures	3.1.3	Compliance costs and efficiency of border procedures should be periodically benchmarked against international best practice and should avoid as much as possible forming an obstacle to the attraction of export-oriented investment or investment that relies on imports of intermediate goods.
	3.2 **Tax policy**		
	Corporate taxation	3.2.1	A periodic review, including international benchmarking, of corporate taxation (and fiscal incentives) for effectiveness, costs and benefits should be an integral part of investment policy. Reviews should consider costs linked to the structure of the tax regime, including (1) administrative and compliance costs for investors, (2) administrative and monitoring costs for the tax authorities, and (3) forgone revenue linked to tax evasion and/or tax engineering.
		3.2.2	Undue complexity of income tax law and regulations should be avoided and they should be accompanied by clear guidelines, as transparency, predictability and impartiality of the tax regime are essential for all investors, foreign and national alike.
		3.2.3	The tax system should tend to neutrality in its treatment of domestic and foreign investors.
	Fiscal incentives	3.2.4	In line with a country's development strategy, incentives can be used for the encouragement of investment in specific industries or in order to achieve specific objectives (e.g. regional development, job creation, skills upgrading, technology dissemination). Fiscal incentives for investors should not by nature seek to compensate for an unattractive or inappropriate general tax regime.
		3.2.5	The general corporate income tax regime should be the norm and not the exception and proliferation of tax incentives should be avoided as they quickly lead to distortions, generate unintended tax avoidance opportunities, become difficult to monitor, create administrative costs and may end up protecting special interests at the expense of the general public.
	Transfer pricing and international cooperation	3.2.6	Well-established and clearly defined transfer pricing rules are essential to minimize tax engineering and tax evasion. Developing countries can build on international best practices. International cooperation between tax authorities is key to fight manipulative transfer pricing practices.
	Double taxation treaties	3.2.7	Double taxation treaties are an effective tool to promote inward and outward FDI. Developing countries should carefully negotiate such treaties to ensure that the principle of "taxation at the source" prevails.
		3.2.8	A country's international tax treaty network should focus on major countries of origin for the types of investment prioritized in its investment policy.
	3.3 **Intellectual property**		
		3.3.1	Laws and regulations for the protection of intellectual property rights and mechanisms for their enforcement should meet the need of prospective investors (especially where investment policy aims to attract investment in IP-sensitive industries) and encourage innovation and investment by domestic and foreign firms, while providing for sanctions against the abuse by IPR holders of IP rights (e.g. the exercise of IP rights in a manner that prevents the emergence of legitimate competing designs or technologies) and allowing for the pursuit of the public good. As national investors are frequently less aware of their IP rights they should be sensitized on the issue.

Sections	Sub-sections		Policy Guidelines
Investment-related policies (continued)		3.3.2	Developing countries are encouraged to integrate the flexibilities in IP protection granted under international treaties, including the WTO's TRIPS agreement, into national legislation and consider the extent to which these flexibilities can create opportunities for investment attraction (e.g. in the production of pharmaceuticals).
	3.4 **Competition policy**		
	Competition laws and regulations	3.4.1	Competition laws and regulations, covering practices in restraint of competition, abuse of market power and economic concentration together with effective monitoring and enforcement mechanisms, are essential to reap the benefits from investment and should provide fair rules and a level playing field for all investors, foreign and domestic.
	Coordination of investment and competition authorities	3.4.2	Investment policy makers should cooperate closely with competition authorities, with a view to addressing any anti-competitive practices by incumbent enterprises that may inhibit investment. Particular attention should be paid to priority industries and investment types.
		3.4.3	Where investment policy pursues objectives for sectors that may be considered to fall under a public services obligation or for regulated sectors (e.g. public transport, utilities, telecommunications), competition authorities should be actively involved in the shaping of relevant policies and measures, coordinating closely with sectoral regulators.
	M&As and privatizations	3.4.4	Competition laws and decisions related to M&As, as well as the policy framework for privatizations, should support development strategy and investment policy objectives, and should ensure continued attractiveness of the relevant sector for further investment by avoiding market exclusivity and preventing abuse of dominant market power.
		3.4.5	Close coordination between competition authorities in neighbouring countries should be pursued in case of cross-border M&As, particularly in small economies.
	3.5 **Labour market regulation**		
	Balancing labour market flexibility and protection of employees	3.5.1	Labour market regulations should support job creation objectives in investment policy, including through an appropriate degree of labour market flexibility. At the same time, employees should be protected from abusive labour practices.
	Core labour standards	3.5.2	Countries need to guarantee internationally recognized core labour standards, in particular regarding child labour, the right for collective representation and other core protections as guaranteed by the ILO conventions the country is a party to. Effective mechanisms to promote core labour standards should be put in place and applied equally to foreign and domestic firms.
	Adjustment costs of investment policy	3.5.3	Adjustment costs or friction caused by shifting productive capacity and employment to priority investment areas, industries or activities as per investment policy should be addressed both in labour market policies (e.g. re-training, social support) and in investment policy (e.g. encouraging investors to help ease transition costs).
	Hiring of international staff	3.5.4	Expatriate staff can at times be critical to the success of individual investment projects. Labour policy and/or immigration policy should avoid unduly restricting or delaying the employment of foreign personnel, including in skilled trades/artisan jobs, by investors in order not to hinder the build-up of productive capacity. At the same time, employment opportunities for nationals in jobs they can adequately fill should be promoted.
		3.5.5	Transfer of skills from expatriate staff to nationals should be actively encouraged, including through technical and vocational training requirements at the company level whenever expatriates are employed. The use of foreign employees in skilled trades/artisan jobs may be time-bound in order to encourage foreign invested firms to establish local linkages.

Sections	Sub-sections		Policy Guidelines
Investment-related policies (continued)	3.6 **Access to land**		
	Titles	3.6.1	More than the nature of land titles (full ownership, long-term lease, land-use rights or other), predictability and security are paramount for investors. Governments should aim to ease access to land titles, adequately register and protect them, and guarantee stability. Developing and properly administering a national cadastre system can be an effective tool to encourage investment.
		3.6.2	Full ownership of land or tradable land titles can help companies secure financing for investment, as land can be used as collateral. Transferable titles should be encouraged where specific country circumstances do not prevent this option.
	Agricultural land	3.6.3	Foreign ownership or user titles over agricultural land is particularly sensitive in most countries, in particular those with large rural populations and where food security is an issue. Governments should pay particular care in putting in place and enforcing regulations to protect the long-term national interest and not compromise it for short-term gains by special interest groups. Adherence to the UNCTAD, FAO, IFAD, and World Bank Principles for Responsible Agricultural Investment should be encouraged.
	Industrial land and industrial parks	3.6.4	The development of industrial, technology or services parks as public-private partnerships has worked well in a number of countries and can be an effective tool to facilitate access to fully-serviced land by (foreign) investors.
	3.7 **Corporate responsibility and governance**		
	CSR standards	3.7.1	Governments should encourage compliance with high standards of responsible investment and corporate behaviour, including through: (1) capacity building and technical assistance to local industry to improve their ability to access markets or work with investors that prefer or require certified products; (2) public procurement criteria; (3) incorporating existing standards into regulatory initiatives, and/or turning voluntary standards (soft law) into regulation (hard law).
	Corporate governance	3.7.2	Countries should aim to adopt international standards of corporate governance for large formal businesses under their company law or commercial code, in particular: (1) protection of minority shareholders; (2) transparency and disclosure on a timely, reliable and relevant basis; (3) external auditing of accounts; and (4) adoption of high standards and codes of good practices on corruption, health, environment, and safety issues. The OECD Principles of Corporate Governance and the UNCTAD Guidance on Good Practices in Corporate Governance Disclosure may serve as guidance.
	Reporting standards	3.7.3	Corporate reporting standards should provide for disclosure by foreign-controlled firms on local ownership and control structures, finances and operations, and health, safety, social and environmental impacts, following international best practice. Recommendations by the UNCTAD Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR) may serve as guidance.
	3.8 **Environmental policy**		
	Environmental impact of investment	3.8.1	Environmental impact assessments (EIA) should be part of investment policies; it is useful to classify projects based on a number of pre-defined criteria, including sector, nature, size and location to place more stringent or less stringent requirements on preliminary environmental impact assessments (or absence thereof).
		3.8.2	Environmental norms, including EIA requirements, should be transparent, non-discriminatory vis-à-vis foreign investors, predictable and stable; Governments should ensure that environmental licensing procedures are conducted without undue delay and in full technical objectivity.
	Environmental dumping	3.8.3	Foreign investors should be encouraged to adhere to international standards of environmental protection and committed not to engage in environmental dumping; in specific cases (e.g. mining or oil extraction), Governments may wish to legally require international best practices (including the use of technologies) to be strictly adhered to.

Sections	Sub-sections		Policy Guidelines
Investment-related policies (continued)	3.9 **Infrastructure, concessioning and PPP policies**		
	Opening infrastructure sectors to investors	3.9.1	Given the potential contribution of private investment to building high-quality infrastructure, countries should consider the extent to which basic infrastructure sectors can be opened to domestic and foreign private investment, and under what conditions.
		3.9.2	In sectors opened to private investment, careful efforts should go into identifying specific projects to be taken up by private investors. Shortlists of projects for concessioning are a useful tool, and Governments should initially focus on projects of moderate complexity, where commercial gains are easier to realize for investors, and where the socio-economic gains are clearly measurable.
	Concessioning rules and regulations	3.9.3	Following strategic decisions on which sectors to open to private investment, Governments should put in place a carefully crafted legal framework for concession contracts and public-private partnerships. Given the long-term nature of concession agreements in infrastructure, the legal framework should provide significant assurances to investors, including regarding contractual terms and their enforcement, and property rights.
		3.9.4	The legal framework for concession contracts needs to adequately protect the long-term national interest and consumers, ensuring adequate sharing of risks between the private and public partners.
	Competitive outcomes	3.9.5	Wherever possible, concessioning to private investors should aim to introduce competition so as not to replace a public monopoly with a private one. Placing natural monopolies under private concession should be limited to cases where it increases efficiency and the delivery of services. Putting in place appropriate competition and sectoral regulations should be considered a pre-requisite for the successful concessioning of infrastructure services.
	Institutional framework for concessioning and PPPs	3.9.6	Given the complexity of contractual terms involved in large infrastructure concessions, strong institutions need to be put in place first in order to achieve desirable outcomes; in addition to strengthening sectoral regulators, countries should consider the establishment of a dedicated PPP unit.
4 Investment policy effectiveness	4.1 **Public governance and institutions**		
	From framework to implementation	4.1.1	In the implementation of investment policies Governments should strive to achieve: (1) integrity and impartiality across Government and independence of regulatory institutions, subject to clear reporting lines and accountability to elected officials; (2) transparency and predictability for investors; (3) a service-orientation towards investors, where warranted.
	Inter-agency cooperation	4.1.2	Close cooperation and formal communication channels should be in place between institutions and agencies dealing with investors. The IPA should play a coordinating role given its comprehensive perspective on issues confronting investors.
	Anti-corruption efforts	4.1.3	Governments should adopt effective anti-corruption legislation and fight corruption with appropriate administrative, institutional and judicial means, for which international best practices should serve as guidance. Investors should be held to adhere to good corporate governance principles, which include refraining from paying bribes and denouncing corrupt practices.

Sections	Sub-sections		Policy Guidelines
Investment policy effectiveness (continued)	4.2 Dynamic policy development	4.2.1	Policy design and implementation is a continuous process of fine-tuning and adaptation to changing needs and circumstances. Periodic review (every 3-4 years) of performance against objectives should take place, with a view to: - verifying continued coherence of investment policy with overall development strategy - assessing investment policy effectiveness against objectives through a focused set of indicators - identifying and addressing underlying causes of underperformance - evaluating "return on investment" of the more costly investment policy measures (e.g. incentives).
	4.3 Measuring investment policy effectiveness	4.3.1	Objectives for investment policy should be the yard stick for measurement of policy effectiveness. (Where countries have a formal investment strategy it should set out such objectives, see 1.1 above.) They should break down objectives for investment attraction and development impact, and set clear priorities. Performance (especially in terms of investment attraction) should be benchmarked against peers.
		4.3.2	Indicators for objectives related to the *attraction of investment* may include: - investment inflows (total, by industry, activity,…), - investment flows as a share of gross output and capital formation (idem), - greenfield investment as a share of total investment, - positioning on UNCTAD's "*investment potential/performance matrix*".
		4.3.3	Indicators for objectives related to the *impact of investment* may include: - value added of investment activity, - value of capital formation, - export generation, - contribution to the creation of formal business entities, - fiscal revenues, - employment generation and wage contribution, - technology and skills contribution (e.g. as measured through the skill-types of jobs created), - social and environmental measures, - positioning on UNCTAD's "*investment contribution matrix*".

IV. Elements of International Investment Agreements: Policy Options

The guidance on international investment policies set out in this chapter aims to translate the Core Principles into concrete options for policymakers, with a view to addressing today's investment policy challenges. While national investment policymakers address these challenges through rules, regulations, institutions and initiatives, at the international level policy is translated through a complex web of treaties (including, principally, bilateral investment treaties, free trade agreements with investment provisions, economic partnership agreements and regional agreements).[9] As discussed in chapter I, the complexity of that web, which leads to gaps, overlaps and inconsistencies in the system of IIAs, is itself one of the challenges to be addressed. The other is the need to strengthen the development dimension of IIAs, balancing the rights and obligations of States and investors, ensuring sufficient policy space for sustainable development policies and making investment promotion provisions more concrete and aligned with sustainable development objectives.

International investment policy challenges must be addressed at three levels:

1. When formulating their *strategic approach to international engagement on investment*, policymakers need to embed international investment policymaking into their countries' development strategies. This involves managing the interaction between IIAs and national policies (e.g. ensuring that IIAs support industrial policies (*WIR11*)) and that between IIAs and other international policies or agreements (e.g. ensuring that IIAs do not contradict international environmental agreements (*WIR10*) or human rights obligations). The overall objective is to ensure coherence between IIAs and sustainable development needs.
2. *In the detailed design of provisions in investment agreements* between countries, policymakers need to incorporate sustainable development considerations, addressing concerns related to policy space (e.g., through reservations and exceptions), balanced rights and obligations of States and investors (e.g., through encouraging compliance with CSR standards), and effective investment promotion (e.g., through home-country measures).
3. *Multilateral consensus building on investment policy*, in turn, can help address some of the systemic challenges stemming from the multi-layered and multi-faceted nature of the IIA regime, including the gaps, overlaps and inconsistencies in the system, its multiple dispute resolution mechanisms, and its piecemeal and erratic expansion.

This chapter, therefore, first discusses how policymakers can strategically engage in the international investment regime at different levels and in different ways in the interest of sustainable development. It then provides a set of options for the detailed design of IIAs. The final chapter of this report (chapter V) will suggest an avenue for further consensus building and international cooperation on investment policy.

UNCTAD's proposed options for addressing the challenges described above come at a time when a multitude of investment stakeholders are putting forward suggestions for the future of IIA policymaking. With the recently adopted European Union-United States Statement on Shared Principles for International Investment, the revision of the International Chamber of Commerce (ICC) Guidelines for International Investment, and the release of the new United States model BIT, IIA policymaking is in one of its more dynamic evolutionary stages, providing a window of opportunity to strengthen the sustainable development dimension of IIAs.

1. Defining the role of IIAs in countries' development strategy and investment policy

International investment instruments are an integral part of investment policymaking that supports investment promotion objectives but that can also constrain investment and development policymaking. As a promotion tool, IIAs complement national rules and regulations by offering additional assurances to foreign investors concerning the protection of their investments and the stability, transparency and predictability of the national policy framework. As to the constraints, these could take many forms: they could limit options for developing countries in the formulation of development strategies that might call for differential treatment of investors, e.g. industrial policies (see *WIR11*); or they could hinder policymaking in general, including for sustainable development objectives, where investors could perceive new measures as unfavourable to their interests and resort to IIA-defined dispute settlement procedures outside the normal domestic legal process.

Given such potential constraints on policymaking, it is important to ensure the coherence of IIAs with other economic policies (e.g. trade, industrial, technology, infrastructure or enterprise policies that aim at building productive capacity and strengthening countries' competitiveness) as well as with non-economic policies (e.g. environmental, social, health or cultural policies).[10] Policymakers should carefully set out an agenda for international engagement and negotiation on investment (including the revision and renegotiation of existing agreements).

When considering the pros and cons of engaging in IIAs, policymakers should have a clear understanding of what IIAs can and cannot achieve.

- IIAs *can*, by adding an international dimension to investment protection and by fostering stability, predictability and transparency, reinforce investor confidence and thus promote investment. From an investor's perspective, IIAs essentially act as an insurance policy, especially important for investments in countries with unfavourable country-risk ratings.
- IIAs *can* promote investment in other ways beyond granting investor protection. Some IIAs include commitments on the part of home countries to promote outward investment or to engage in collaborative initiatives for this purpose (although this is currently a small minority of treaties).[11]
- IIAs *can* help to build and advertise a more attractive investment climate. By establishing international commitments, they can foster good governance and facilitate or support domestic reforms.
- On the other hand, IIAs alone *cannot* turn a bad domestic investment climate into a good one and they cannot guarantee the inflow of foreign investment. There is no mono-causal link between the conclusion of an IIA and FDI inflows; IIAs play a complementary role among many determinants that drive firms' investment decisions.[12] Most importantly, IIAs cannot be a substitute for domestic policies and a sound national regulatory framework for investment.

Host countries' engagement in the current IIA system may not be solely driven by a clear and explicit design that grounds their treaties in a solid development purpose, but rather influenced by the negotiation goals of their treaty partners or other non-economic considerations.[13] As such, there is a risk that IIAs, in number and substance, become largely a vehicle for the protection of interests of investors and home countries without giving due consideration to the development concerns of developing countries. Not surprisingly, a detailed analysis of the substance of model treaties of major outward investing countries shows that, on average, treaty provisions are heavily skewed towards providing a high level of protection, with limited concessions to development aspects that can be a trade-off against investor protection (i.e. leaving countries more policy space generally implies granting less protection to investors). This trade-off suggests that there may be an inherent development challenge in IIAs: developing countries with the most unfavourable risk ratings are most in need of the protecting qualities of IIAs to attract investment, but they are generally also the countries most in need of flexibility (or policy space) for specific development policies.

Moreover, not only low-income developing countries may experience IIAs as a straightjacket, but also higher income countries, and even developed market economies, are sometimes faced with unexpected consequences of their own treaties. As more and more countries with sound and credible domestic legal systems and stable investment climates continue to conclude IIAs granting high levels of investor protection, they risk being confronted themselves with investor-State dispute settlement (ISDS) rules originally intended to shield their investors abroad. This risk is exacerbated by the changing investor landscape, in which more and more developing countries, against whose policies the IIA protective shield was originally directed, are becoming important outward investors in their own right, turning the tables on the original developed country IIA *demandeurs*. Spelling out the underlying drivers and objectives of a country's approach to IIAs thus becomes important not only for developing countries, but also for developed ones.

In addition to taking into account the development purpose of IIAs, in defining their agenda for international engagement and negotiation on investment, IIA policymakers should:

- *Consider the type of agreements to prioritize*, and whether to go for dedicated agreements on investment or for investment provisions integrated in broader agreements, e.g. covering also trade, competition and/ or other policy areas. The latter option provides for comprehensive treatment of inter-related issues in different policy areas. It also recognizes the strong interaction between trade and investment and the blurring boundaries between the two (due to the phenomenon of non-equity modes of international production; see *WIR11*), as well as the FDI and trade inducing effect of enlarged markets.
- *Consider whether to pursue international engagement* on investment policy in the context of regional economic cooperation or integration or through bilateral agreements. For smaller developing countries, with limited potential to attract market-seeking investment in their own right, opportunities for regional integration and collaboration on investment policy, particularly when combined with potentially FDI-inducing regional *trade* integration (UNCTAD 2009), may well take priority over other types of investment agreements. The benefits of this approach may be largest when combined with technical assistance and efforts towards regulatory cooperation and institution building.
- *Set priorities – where countries pursue bilateral collaboration on investment – in terms of treaty partners* (i.e. prioritize the most important home countries of international investors in sectors that are key in the country's development strategy and where foreign involvement is desired).

Furthermore, international engagement on investment policy should recognize that international agreements interact with each other and with other bodies of international law. Policymakers should be aware, for example, that commitments made to some treaty partners may easily filter through to others through most-favoured nation (MFN) clauses, with possibly unintended consequences. Commitments may clash, or hard-won concessions in a negotiation (e.g. on policy space for performance requirements) may be undone through prior or subsequent treaties.

Finally, a particularly sensitive policy issue is whether to include liberalization commitments in IIAs by granting pre-establishment rights to foreign investors. Most IIAs grant protection to investments from the moment they are established in the host State; the host country thus retains discretion with respect to the admission of foreign investors to its market. However, in recent years an increasing number of IIAs include provisions that apply in the pre-establishment phase of investment, contributing to a more open environment for investment, at the cost of a lower degree of discretion in regulating entry matters domestically. When granting pre-establishment rights, managing the interaction between international and national policies is particularly crucial: policymakers can use IIAs to bind – at the international level – the degree of openness granted in domestic laws; or they can use IIA negotiations as a driving force for change, fostering greater openness at the national level (*WIR04*).[14] Granting pre-establishment rights also adds new complexities to the interaction between agreements. For example, a question may arise whether an unqualified MFN clause of a pre-establishment IIA could allow investors to enforce host countries' obligations under the WTO GATS agreement through ISDS.[15]

The following section, which discusses how today's investment policy challenges can be addressed in the content and detailed provisions of IIAs, covers both pre- and post-establishment issues. Policymakers have so far mostly opted for agreements limited to the post-establishment phase of investment; where they opt for pre-establishment coverage, numerous tools are available to calibrate obligations in line with their countries' specific needs.

2. Negotiating sustainable-development-friendly IIAs

Addressing sustainable development challenges through the detailed design of provisions in investment agreements principally implies four areas of evolution in treaty-making practice. Such change can be promoted either by including new elements and clauses into IIAs, or by taking a fresh approach to existing, traditional elements.

1. *Incorporating concrete commitments to promote and facilitate investment for sustainable development*: Currently, IIAs mostly promote foreign investment only indirectly through the granting of investment protection – i.e. obligations on the part of host countries – and do not contain commitments by home countries to promote responsible investment. Most treaties include hortatory language on encouraging investment in preambles or non-binding provisions on investment promotion. Options to improve the investment promotion aspect of treaties include concrete facilitation mechanisms (information sharing, investment promotion forums), outward investment promotion schemes (insurance and guarantees), technical assistance and capacity-building initiatives targeted at sustainable investment, supported by appropriate institutional arrangements for long-term cooperation.

2. *Balancing State commitments with investor obligations and promoting responsible investment*: Most IIAs currently provide for State obligations but do not specify investor obligations or responsibilities. Legally binding obligations on companies and individuals are stipulated by national law but are absent in international treaties, which traditionally do not apply to private parties directly.[16] However, there are examples where IIAs impose obligations on investors (e.g. COMESA Investment Agreement of 2007[17]) or where international conventions establish criminal responsibility of individuals (e.g. the Rome Statute of the International Criminal Court). These examples, together with the changes in the understanding of the nature and functions of international law, would suggest that international treaties can, in principle, impose obligations on private parties.[18] While stopping short of framing IIAs so as to impose outright obligations on investors, a few options may merit consideration.

   For example, IIAs could include a requirement for investors to comply with investment-related national laws of the host State when making and operating an investment, and even at the post-operations stage (e.g., environmental clean-up), provided that such laws conform to the host country's international obligations, including those in the IIA.[19] Such an investor obligation could be the basis for further stipulating in the IIA the consequences of an investor's failure to comply with domestic laws, such as the right of host States to make a counter-claim in ISDS proceedings with the investor.

   In addition, IIAs could refer to commonly recognized international standards (e.g. the UN Guidelines on Business and Human Rights). This would not only help balance State commitments with investor obligations but also support the spread of CSR standards – which are becoming an ever more important feature of the investment policy landscape (*WIR11*). Options for treaty language in this regard could range from commitments to promote best international CSR standards to ensuring that tribunals consider an investor's compliance with CSR standards when deciding an ISDS case.

3. *Ensuring an appropriate balance between protection commitments and regulatory space for development*: IIAs protect foreign investment by committing host country governments to grant certain

standards of treatment and protection to foreign investors; it is the very nature of an IIA's standards of protection, and the attendant stabilizing effect, to place limits on government regulatory freedom. For example, where host governments aim to differentiate between domestic and foreign investors, or require specific corporate behaviour, they would be constrained by IIA provisions on non-discrimination or on performance requirements. In addition, to the extent that foreign investors perceive domestic policy changes to negatively affect their expectations, they may challenge them under IIAs by starting arbitration proceedings against host States. Countries can safeguard some policy space by carefully crafting the structure of IIAs and by clarifying the scope and meaning of particularly vague treaty provisions such as the fair and equitable treatment standard and expropriation as well as by using specific flexibility mechanisms such as general or national security exceptions and reservations. More recent IIA models, such as the one adopted by the United States in 2004, offer examples in this regard. The right balance between protecting foreign investment and maintaining policy space for domestic regulation should flow from each country's development strategy, ensuring that flexibility mechanisms do not erode a principal objective of IIAs – their potentially investment enhancing effect.

4. *Shielding host countries from unjustified liabilities and high procedural costs*: Most IIAs reinforce their investment protection provisions by allowing investors directly to pursue relief through investor-State dispute settlement (ISDS). The strength of IIAs in granting protection to foreign investors has become increasingly evident through the number of ISDS cases brought over the last decade, most of which are directed at developing countries. Host countries have faced claims of up to $114 billion[20] and awards of up to $867 million.[21] Added to these financial liabilities are the costs of procedures, all together putting a significant burden on defending countries and exacerbating the concerns related to policy space. Host countries – both developed and developing – have experienced that the possibility of bringing ISDS claims can be used by foreign investors in unanticipated ways. A number of recent cases have challenged measures adopted in the public interest (e.g. measures to promote social equity, foster environmental protection or protect public health), and show that the borderline between protection from political risk and undue interference with legitimate domestic polices is becoming increasingly blurred. Shielding countries from unjustified liabilities and excessive procedural costs through treaty design thus involves looking at options both in ISDS provisions themselves and in the scope and application of substantive clauses (see below).

These areas of evolution are also relevant for "pre-establishment IIAs", i.e. agreements that – in addition to protecting established investors – contain binding rules regarding the establishment of new investments. While a growing number of countries opt for the pre-establishment approach, it is crucial to ensure that any market opening through IIAs is in line with host countries' development strategies. Relevant provisions opt for selective liberalization, containing numerous exceptions and reservations designed to protect a country from over-committing and/or ensuring flexibilities in the relevant treaty obligations (see box 8).

These four types of evolution in current treaty practice filter through to specific clauses in different ways. The following are examples of how this would work, focusing on some of the key provisions of current treaty practice – scope and definition, national treatment, most-favoured nation treatment, fair and equitable treatment, expropriation and ISDS. In addition to shaping specific clauses, sustainable development concerns can also be addressed individually, e.g. through special and differential treatment (SDT), a key aspect of the multilateral trading system but largely unknown in IIA practice (see box 9).

- *Scope and Definition*: An IIA's coverage determines the investments/investors that

Box 8. Pre-establishment commitments in IIAs

Pre-establishment IIAs signal that a country is generally committed to an open investment environment, although the fact that a country "only" concludes post-establishment IIAs does not necessarily mean that it follows a restrictive FDI policy. Also, pre-establishment commitments in IIAs do not necessarily have to mirror the actual degree of openness of an economy. Establishment rights in IIAs can remain below this level or go beyond it, i.e. IIAs can be used to open up hitherto closed industries to foreign investors.

Pre-establishment IIAs typically operate by extending national treatment and MFN treatment to the "establishment, acquisition and expansion" of investments. This prevents each contracting party from treating investors from the other contracting party less favourably than it treats its own investors and/or investors from other countries in these matters.

Properly defining the scope of pre-establishment commitments is key. The two main mechanisms are the positive and negative listing of sectors/industries. Under the latter, investors benefit from pre-establishment commitments in all industries except in those that are explicitly excluded. The negative-list approach is more demanding in terms of resources: it requires a thorough audit of existing domestic policies. In addition, under a negative-list approach and in the absence of specific reservations, a country commits to openness also in those sectors/activities, which, at the time the IIA is signed, may not yet exist in the country, or where regulatory frameworks are still evolving. In contrast, a positive-list approach offers selective liberalization by way of drawing up a list of industries in which investors will enjoy pre-establishment rights. Another, more limited method is to include a positive list of "committed" industries and complement it by a list of reservations preserving certain measures or aspects in those industries ("hybrid", or GATS-type approach).

Pre-establishment treaties display a range of options – typically through country-specific reservations – for preserving policy flexibility even in "committed" industries (see the IPFSD IIA-elements table, Part B, on pre-establishment options).

Source: UNCTAD.

benefit from the protection offered by the IIA. Past disputes have demonstrated the potential of IIAs to be interpreted broadly, so as to apply to types of transactions that were originally not envisaged to benefit from the IIA (such as government debt securities).[22] When negotiating an IIA with a stronger sustainable development dimension, it may thus be appropriate to safeguard policy space and exclude some types of financial transactions (e.g. portfolio investment or short-term, speculative financial flows) from a treaty's scope and to focus application of the treaty to those types of investment that the contracting parties wish to attract (e.g. direct investment in productive assets).

Whether IIAs should exclude portfolio investment is a policy choice that has been subject to intense debate. Portfolio investment can make a contribution to development by providing financial capital. However, the sometimes volatile nature of portfolio investment flows can be damaging. At the practical level, portfolio and direct investment are often difficult to differentiate, both in terms of identifying relevant financial flows of either type, and in terms of targeted policy instruments.

It may also be appropriate to exclude from a treaty's scope specific areas of public policy or specific (sensitive) economic sectors. Or, in order to limit liability and to avoid "treaty shopping" and "roundtrip investment", it may be appropriate to confine application to genuine investors from the contracting parties, excluding investments that are only channelled through legal entities based in the contracting parties.

- *National Treatment (NT):* National treatment protects foreign investors against discrimination vis-à-vis comparable domestic investors, with a view to ensuring a "level playing field". Non-discriminatory treatment is generally considered conducive to good governance and is, in principle, enshrined in many countries' domestic regulatory frameworks. Nevertheless, even if national treatment is provided under domestic legislation, countries may be reluctant to "lock in" all aspects of their domestic regulatory

Box 9. Special and differential treatment (SDT) and IIAs

A large number of IIAs are concluded between developed and developing countries. SDT gives legal expression to the special needs and concerns of developing countries and/or least developed countries in international (economic) agreements. It is based on the notion that treaty parties at different stages of development should not necessarily be bound by the same obligations.

Expression of the principle can be found in a multilateral context in over 145 provisions of WTO agreements[23] essentially i) granting less onerous obligations to developing countries – either permanently or temporarily; and/or ii) imposing special obligations on developed countries vis-à-vis developing countries.[24] Over time, SDT has found its way into other aspects of international relations, most prominently international environmental law, including the climate change framework.

Thus far, SDT has largely been absent from IIAs. Despite incorporating the general concepts of policy space and flexibility for development, IIAs – being mostly of a bilateral nature – are based on legal symmetry and reciprocity, meaning that the rights and obligations of the parties are generally the same. Moreover, IIAs typically do not deal with pre-establishment/market access issues, for which SDT considerations are particularly relevant.

Exceptionally, however, the COMESA Investment Agreement contains an SDT clarification with respect to the fair and equitable treatment standard: "*For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time.*"[25]

Reinvigorating SDT with a view to making IIAs work better for sustainable development could take a number of forms. For example, lower levels of obligations for developing countries could be achieved through i) development-focused exceptions from obligations/commitments; ii) best endeavour commitments for developing countries; iii) asymmetrically phased implementation timetables with longer time frames for developing countries; or iv) a development-oriented interpretation of treaty obligations by arbitral tribunals. Best endeavour commitments by more advanced countries could, for example, relate to: i) technical assistance and training (e.g. assisting in the handling of ISDS cases or when putting in place appropriate domestic regulatory systems to ensure compliance with obligations); ii) promotion of the transfer/dissemination of technology; iii) support and advice for companies from developing countries (e.g. to become outward investors or adopt CSR standards); iv) investment promotion (e.g. provide outward investment incentives such as investment guarantees, tax breaks).

While SDT remains largely absent from IIAs, negotiators could consider adding SDT elements, offering a further promising tool for making IIAs more sustainable-development-friendly, particularly for least-developed and low-income countries.

Source: UNCTAD.

framework at the international level (e.g. private sector development initiatives, including regulatory, financial or fiscal incentives) and, depending on their development strategy, States may wish to afford preferential treatment to national investors/investments as part of industrial development policies or for other reasons. In such cases, negotiators could circumscribe the scope of national treatment clauses and/or allow for derogations (e.g. through the lodging of reservations excluding sectors, policy areas or specific measures from its application (see *WIR11*)).

- *Most-Favoured-Nation (MFN) Treatment:* MFN clauses aim to prevent discrimination between comparable investors of different foreign nationality. The meaning of such treatment has been subject to diverging and unanticipated interpretations by tribunals. Several arbitral decisions interpreted MFN as allowing investors to invoke more investor-friendly language from treaties between the respondent State and a third country, thereby effectively sidelining the "base" treaty (i.e. the actual treaty between the investor's home and host country on the basis of which the case was brought). This practice can be seen in a positive light as "upward harmonization" of IIA standards or in a negative one as "cherry picking" best clauses from different treaties, endangering individual treaty bargains. MFN treatment needs to be carefully considered, particularly in light of countries' growing networks of IIAs with different obligations and agreements including pre-establishment issues. To avoid misinterpretation, IIAs have started explicitly to exclude dispute settlement issues as well as obligations undertaken in treaties with third States from the scope of the MFN obligation. Other options include limiting the clause's reach through country-specific reservations.

- *Fair and Equitable Treatment (FET):* The obligation to accord fair and equitable treatment to foreign investments appears in the great majority of IIAs. Investors (claimants) have frequently – and with considerable success – invoked it in ISDS. There is a great deal of uncertainty concerning the precise meaning of the concept, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions in international investment law and allow for a significant degree of subjective judgment. Some tribunals have read an extensive list of disciplines into the FET clause, which are taxing on any State, but especially on developing and least-developed countries; lack of clarity persists regarding the appropriate threshold of liability. The use of FET to protect investors' legitimate expectations can indirectly restrict countries' ability to change investment-related policies or to introduce new policies – including those for the public good – that may have a negative impact on individual foreign investors. Options to reduce uncertainty regarding States' liabilities and to preserve policy space include qualifying or clarifying the FET clause, including by way of an exhaustive list of State obligations under FET, or even considering omitting it.
- *Expropriation:* An expropriation provision protects foreign investors/investments against dispossession or confiscation of their property by the host country without compensation. As most IIAs also prohibit indirect expropriation (i.e. apply to regulatory takings), and as some arbitral tribunals have tended to interpret this broadly (i.e. including legitimate regulatory measures in the pursuit of the public interest), the expropriation clause has the potential to pose undue constraints on a State's regulatory capacity. To avoid this, policymakers could clarify the notion of indirect expropriation and introduce criteria to distinguish between indirect expropriation and legitimate regulation that does not require compensation.
- *Investor-State Dispute Settlement (ISDS):* Originally, the system of international investor-State arbitration was conceived as an effective tool to enforce foreign investors' rights. It offered direct access to international arbitration for investors to avoid national courts of host countries and to solve disputes in a neutral forum that was expected to be cheap, fast, and flexible. It was meant to provide finality and enforceability, and to depoliticise disputes. While some of these advantages remain valid, the ISDS system has more recently displayed serious shortcomings (e.g. inconsistent and unintended interpretations of clauses, unanticipated uses of the system by investors, challenges against policy measures taken in the public interest, costly and lengthy procedures, limited or no transparency), undermining its legitimacy. While some ISDS concerns can be addressed effectively only through a broader approach requiring international collaboration, negotiators can go some way to improving the institutional and procedural aspects of ISDS and to limiting liability and the risk of becoming embroiled in costly procedures. They can do so by qualifying the scope of consent given to ISDS, promoting the use of alternative dispute resolution (ADR) methods, increasing transparency of procedures, encouraging arbitral tribunals to take into account standards of investor behaviour when settling investor-State disputes, limiting resort to ISDS and increasing the role of domestic judicial systems, providing for the possibility of counterclaims by States, or even refraining from offering ISDS.[26]

3. IIA elements: policy options

The IPFSD table on IIA-elements (see page 47-62) contains a comprehensive compilation of policy options available to IIA negotiators, including options to operationalize sustainable development objectives (also see table 5). The options include both mainstream IIA provisions as well as more idiosyncratic treaty language used by fewer countries. In some instances, the IPFSD IIA-elements table contains new suggestions by UNCTAD.[27]

As a comprehensive set of policy options, the IPFSD IIA-elements table aims to represent two different approaches on the design of IIAs. At one side of the spectrum is the school of thought that prefers IIAs with straightforward provisions focusing on investment protection and limiting clarifications and qualifications to the minimum. At the other side, a comprehensive approach to investment policymaking adds a host of considerations – including on sustainable development – in the wording of IIA clauses.

The objective of the IPFSD IIA-elements table is to provide policymakers with an overview of options for designing an IIA. It offers a broad menu from which IIA negotiators can pick and choose. This table is not meant to identify preferred options for IIA negotiators or to go so far as to suggest a model IIA. However, the table briefly comments on the various drafting possibilities with regard to each IIA provision and highlights – where appropriate – their implications for sustainable development. It is hoped that these explanations will help IIA negotiators identify those drafting options that best suit their countries' needs, preferences and objectives.

The IPFSD IIA-elements table includes various options that could be particularly supportive of sustainable development. Examples are:

- Including a carefully crafted scope and definitions clause that excludes portfolio, short-term or speculative investments from treaty coverage.
- Formulating an FET clause as an exhaustive list of State obligations (e.g. not to (i) deny justice in judicial or administrative procedures, (ii) treat investors in a manifestly arbitrary manner, (iii) flagrantly violate due process, etc.).
- Clarifying – to the extent possible – the distinction between legitimate regulatory activity and regulatory takings (indirect expropriations) giving rise to compensation.
- Limiting the Full Protection and Security (FPS) provision to "physical" security and protection only and specifying that protection shall be commensurate with the country's level of development.
- Limiting the scope of a transfer of funds clause by providing an exhaustive list of covered payments/transfers; including exceptions in case of serious balance-of-payments difficulties; and conditioning the transfer right on the investor's compliance with its fiscal and other transfer-related obligations in the host country.
- Including carefully crafted exceptions to protect human rights, health, core labour standards and the environment, with well working checks and balances, so as to guarantee policy space while avoiding abuse.
- Considering, in light of the quality of the host country's administrative and judicial system, the option of "no ISDS" or of designing the dispute settlement clause to make ISDS the last resort (e.g. after exhaustion of local remedies and ADR).
- Establishing an institutional set-up that makes the IIA adaptable to changing development contexts and major unanticipated developments (e.g. ad hoc committees to assess the effectiveness of the agreement and to further improve its implementation through amendments or interpretations).

The IPFSD IIA-elements table recognizes that specific policy objectives can be pursued by different treaty elements, thereby inviting treaty drafters to choose their "best-fit" combination. For example, a country that wishes to preserve regulatory space for policies aimed at ensuring access to essential services can opt for (i) excluding investments in essential services from the scope of the treaty; (ii) excluding essential services policies from the scope of specific provisions (e.g. national treatment); (iii) scheduling reservations (for national treatment or the prohibition of performance requirements) for specific (existing and/or future) essential services policies; (iv) including access to essential services as a legitimate policy objective in the IIA's general exceptions; or (v) referring to the importance of ensuring access to essential services in the preamble of the agreement.

Table 5. Policy options to operationalize sustainable development objectives in IIAs

Options	Mechanisms	Examples
Adjusting existing/ common provisions to make them more sustainable-development-friendly through clauses that: • safeguard policy space • limit State liability	Hortatory language	- *Preamble*: stating that attracting responsible foreign investment that fosters sustainable development is one of the key objectives of the treaty.
	Clarifications	- *Expropriation*: specifying that non-discriminatory good faith regulations pursuing public policy objectives do not constitute indirect expropriation. - *FET*: including an exhaustive list of State obligations.
	Qualifications/ limitations	- *Scope and definition*: requiring covered investments to fulfill specific characteristics, e.g., positive development impact on the host country.
	Reservations/ carve-outs	- *Country-specific reservations* to NT, MFN or pre-establishment obligations, carving out policy measures (e.g. subsidies), policy areas (e.g. policies on minorities, indigenous communities) or sectors (e.g. social services).
	Exclusions from coverage/ exceptions	- *Scope and definition*: excluding portfolio, short-term or speculative investments from treaty coverage. - *General exception* for domestic regulatory measures that aim to pursue legitimate public policy objectives.
	Omissions	- Omit FET, umbrella clause.
Adding new provisions or new, stronger paragraphs within provisions for sustainable development purposes to: • balance investor rights and responsibilities • promote responsible investment • strengthen home-country support	Investor obligations and responsibilities	- Requirement that investors comply with host State laws at both the entry and the post-entry stage of an investment. - Encouragement to investors to comply with universal principles or to observe applicable CSR standards.
	Institutional set-up for sustainable development impact	- Institutional set-up under which State parties cooperate to e.g. review the functioning of the IIA or issue interpretations of IIA clauses. - Call for cooperation between the Parties to promote observance of applicable CSR standards.
	Home-country measures to promote responsible investment	- Encouragement to offer incentives for sustainable-development-friendly outward investment; investor compliance with applicable CSR standards may be an additional condition. - Technical assistance provisions to facilitate the implementation of the IIA and to maximize its sustainable development impact, including through capacity building on investment promotion and facilitation.
Introducing Special and Differential Treatment for the less developed Party – with effect on both existing and new provisions – to: • calibrate the level of obligations to the country's level of development	Lower levels of obligations	- Pre-establishment commitments that cover fewer economic activities.
	Development-focused exceptions from obligations/ commitments	- Reservations, carving out sensitive development related areas, issues or measures.
	Best endeavour commitments	- FET, NT commitments that are not legally binding.
	Asymmetric implementation timetables	- Phase-in of obligations, including pre-establishment, NT, MFN, performance requirements, transfer of funds and transparency.

Source: UNCTAD.

The IPFSD IIA-elements table likewise reflects that negotiators can determine the normative intensity of IIA provisions: they can ensure the legally binding and enforceable nature of some obligations while at the same time resorting to hortatory, best endeavour language for others. These choices can help negotiators design a level of protection best suited to the specific circumstances of negotiating partners and in line with the need for proper balancing between investment protection and policy space for sustainable development.

The ultimate shape of an IIA is the result of a specific combination of options that exist in respect of each IIA provision. It is this blend that determines where on a spectrum between utmost investor protection and maximum policy flexibility a particular IIA is located. The same holds true for the IIA's impact on sustainable development. Combinations of and interactions between IIA provisions can take a number of forms:

- *Interaction between a treaty's scope/definitions and the obligations it establishes for the contracting parties*: An agreement's "protective strength" stems not only from the substantive and procedural standards of protection it offers to investors, but also from the breadth and variety of categories of investors and investments it covers (i.e. that benefit from the standards of protection offered by the IIA). Hence, when designing a particular IIA and calibrating the degree of protection it grants, negotiators can use different combinations of the two. For example, (i) a broad open-ended definition of investment could be combined with few substantive obligations, or with obligations formulated in a manner reducing their "bite"; or (ii) a narrow definition of investment (e.g. covering direct investments in a few priority sectors only) could be combined with more expansive protections such as an unqualified FET standard or the prohibition of numerous performance requirements.
- *Interaction between protection-oriented clauses*: Some IIAs combine narrowly drafted clauses in some areas with "broad" provisions in others. An example is the combination between a carefully circumscribed expropriation clause and an unqualified FET provision. Another option is to limit the impact of ISDS by either formulating substantive standards of protection as best endeavour (i.e. hortatory) clauses, or by precluding the use of ISDS in respect of particularly vague treaty articles, such as the FET standard.[28] Under such scenarios, protective standards may still have a good-governance-enhancing effect on host countries' regulatory framework, while reducing the risk to be drawn into ISDS. Consideration also has to be given to the interaction with the MFN provision: with the inclusion of a "broad" MFN clause, investors may be tempted to circumvent "weak" protection clauses by relying on more protective (i.e. "stronger") clauses in treaties with third parties.
- *Interaction between protection and exceptions*: Strong protection clauses and effective flexibilities for contracting parties are not mutually exclusive; rather, the combination of the two helps achieve a balanced agreement that meets the needs of different investment stakeholders. For example, an IIA can combine "strong" substantive protection (e.g. non-discrimination, capital transfer guarantees) with "strong" exceptions (e.g. national security exceptions or general exceptions to protect essential public policy objectives).[29]

The policy options presented in the IPFSD IIA-elements table are grounded in the Core Principles. For example, (i) the principle of investment protection directly manifests itself in IIA clauses on FET, non-discrimination, capital transfer, protection in case of expropriation or protection from strife; (ii) the principle of good governance is reflected, amongst others, in IIA clauses that aim at increasing host State's transparency regarding laws and regulations or in IIA clauses that foster transparency by the foreign investor vis-à-vis the host State; (iii) the right to regulate principle is reflected, amongst others, in IIA clauses stating that investments need to be in accordance with the host country's laws, allowing countries to lodge reservations (including for future policies); clarifying and circumscribing the content of indirect expropriation or general exceptions.

UNCTAD's Investment Policy Framework for Sustainable Development

Elements of International Investment Agreements: Policy Options
Summary of contents

Sections		Description
Part A. Post-establishment		
1	Preamble	… sets out objectives of the treaty and the intentions of the Contracting Parties
2	Treaty scope	… defines the investment and investors protected under the treaty and its temporal application
3	Admission	… governs entry of investments into the host State
4	Standards of treatment and protection	… prescribe the treatment, protection and rights which host States are required to accord foreign investors/investments
5	Public policy exceptions	... permit public policy measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances
6	Dispute settlement	… governs settlement of disputes between the Contracting Parties and those between foreign investors and host States
7	Investor obligations and responsibilities	… promote compliance by investors with domestic and/or international norms at the entry and operation stage
8	Relationship to other agreements	… establishes a hierarchy in case of competing international norms
9	Not lowering of standards clause	… discourages Contracting Parties from attracting investment through the relaxation of labour or environmental standards
10	Investment promotion	… aims to encourage foreign investment through additional means beyond investment protection provisions in IIAs
11	Institutional set-up	… establishes an institutional platform for collaboration between the Contracting Parties
12	Final provisions	… define the duration of the treaty, including its possible prolongation
Part B. Pre-establishment		
1	Pre-establishment obligations	… govern establishment of foreign investments in the host State
Part C. Special and Differential Treatment (SDT)		
1	Asymmetrical obligations	… enable imposition of less onerous obligations on a less developed Contracting Party
2	Additional tools	… encourage positive contributions by a more developed Contracting Party

UNCTAD's Investment Policy Framework for Sustainable Development

Policy options for IIAs
Part A. Post-establishment

The different sections of the table, starting with the preamble and closing with the final provisions, follow the order of articles as commonly found in IIAs. Where possible, the policy options are organized along a scale ranging from i) the most investor-friendly or most protective to ii) the options providing more flexibility to the State, balance and/or legal precision. In some sections, two or more policy options can be combined.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
1 Preamble … sets out objectives of the treaty and the intentions of the Contracting Parties	1.1.0 Refer to the objective of creating and maintaining favourable conditions for investment and intensifying economic cooperation between the Parties. 1.1.1 Clarify that the Parties conclude this IIA with a view to - attracting and fostering responsible inward and outward foreign investment that contributes to SD - promoting good governance . 1.1.2 Clarify that the investor protection objectives shall not override States' right to regulate in the public interest as well as with respect to certain important policy goals, such as: - SD - protection of human rights - maintenance of health, labour and/or environmental standards - corporate social responsibility and good corporate governance. 1.1.3 Indicate that the promotion and protection of investments should be pursued in compliance with the Parties' obligations under international law including in particular their obligations with respect to human rights, labour rights and protection of the environment.	The treaty preamble does not set out binding obligations but plays a significant role in interpreting substantive IIA provisions. When a preamble refers to the creation of "a stable framework for investments" or "favourable conditions for investments" as the sole aim of the treaty (i.e. if the IIA only refers to those objectives), tribunals will tend to resolve interpretive uncertainties in favour of investors. In contrast, where a preamble complements investment promotion and protection objectives with other objectives such as SD, the Millennium Development Goals (MDGs) or the Contracting Parties' right to regulate, this can lead to more balanced interpretations and foster coherence between different policy objectives/ bodies of law.
2 Treaty scope		
2.1 Definition of investment … sets out the types of investment covered by the treaty	2.1.0 Offer coverage of *any* tangible and intangible assets in the host State (through an illustrative/open-ended list), directly or indirectly owned/controlled by covered investors. 2.1.1 Compile an exhaustive list of covered investments and/or exclude specific types of assets from coverage, e.g.: - portfolio investment - sovereign debt instruments - commercial contracts for the sale of goods or services - assets for non-business purposes - intellectual property rights not protected under domestic law. 2.1.2 Require investments to fulfil specific characteristics, e.g. that the investment: - involves commitment of capital, expectation of profit and assumption of risk - involves assets acquired for the purpose of establishing lasting economic relations - must be made in "accordance with host country laws and regulations" - delivers a positive development impact on the host country (i.e. Parties could list specific criteria according to their needs and expectations).	A traditional open-ended definition of "investment" grants protection to all types of assets. It may have the strongest attraction effect but can end up covering economic transactions not contemplated by the Parties or investments/assets with questionable SD contribution. It may also expose States to unexpected liabilities. States may want to tailor their definition of investment to target assets conducive to SD by granting protection only to investments that bring concrete benefits to the host country, e.g. long-term capital commitment, employment generation etc. To that effect, the Parties may wish to develop criteria for development-friendly investments. A treaty may further specifically exclude certain types of assets from the definition of "investment" (e.g. portfolio investment – which can include short-term and speculative investments – intellectual property rights that are not protected under domestic legislation).

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
2.2 Definition of investor … sets out the types of investors protected under the treaty	2.2.0 Offer coverage of any natural and legal persons originating from the other Contracting Party. With respect to legal entities, cover all those established in the other Contracting Party. 2.2.1 Exclude certain categories of natural or legal persons from treaty coverage, e.g.: - investors with double nationality (of which one is the host country nationality) - permanent residents of the host country - legal entities that do not have their seat or any real economic activity in the home country. 2.2.2 Include a denial-of-benefits clause that enables the host State to deny treaty protection to: - legal entities that are owned/controlled by third-country nationals or host State nationals and that do not have real economic activity in the of the home Party ("mailbox" companies) - legal entities owned/controlled by investors from countries with which the host country does not have diplomatic relations or those countries that are subject to an economic embargo.	A broad definition of "investor" can result in unanticipated or unintended coverage of persons (natural or legal). For example, if a treaty determines the nationality of a legal entity solely on the basis of the place of incorporation, it creates opportunities for treaty shopping or free riding by investors not conceived to be beneficiaries (e.g. a third-country/host-country investor may channel its investment through a "mailbox" company established in the territory of a Party, in order to obtain treaty protection). A related set of issues arises with respect to dual nationals where one nationality is that of the host State. There are various options to narrow the range of covered persons. For example, to eliminate the risk of abuse and enhance legal predictability, a treaty may add a requirement that a company must have its seat in the home State and carry out real economic activities there. An alternative is to supplement the country-of-incorporation approach to determining nationality of a company with a denial-of-benefits clause.
2.3 Exclusions from the scope … carve out specific policy areas and/or industries from the scope of the treaty	2.3.0 No exclusions. 2.3.1 Exclude specific policy areas from treaty coverage, e.g.: - subsidies and grants - public procurement - taxation. 2.3.2 Exclude specific sectors and industries from treaty coverage, e.g.: - essential social services (e.g. health, education) - specific sensitive industries (e.g. cultural industries, fisheries, nuclear energy, defence industry, natural resources).	The broader a treaty's scope, the wider its protective effect and its potential contribution to the attraction of foreign investment. However, a broad treaty also reduces a host State's policy space and flexibility and ultimately heightens its exposure to investors' claims. States can tailor the scope of the agreement to meet the country's SD agenda. By carving out specific policy areas and sectors/industries from treaty coverage, States preserve flexibility to implement national policies, such as industrial policies (e.g. to grant preferential treatment to domestic investors or to impose performance requirements), or to ensure access to essential/ public services.
2.4 Temporal scope … determines whether the treaty applies to investments and/or measures pre-dating the treaty	2.4.0 Extend the treaty scope to investments established both before and after the treaty's entry into force. 2.4.1 Limit temporal scope to investments made after the conclusion/entry into force of the treaty. 2.4.2 Clarify that the treaty shall not allow IIA claims arising out of any State acts which ceased to exist prior to the IIA's entry into force, even though it may still have an ongoing effect on the investor. 2.4.3 Clarify that the treaty shall not allow IIA claims based on measures adopted prior to conclusion of the treaty.	The treaty's scope will be widest if its application is extended to all investments, regardless of the time of their establishment in the host State. Another approach is to exclude already "attracted" (i.e. pre-treaty) investments: it could be seen as preventing free-riding by "old" investors but at the same time would result in discrimination between "old" and "new" investments. Moreover, this can create uncertainty with respect to re-investments by "old" investors. Policymakers should consider the effect of the treaty on State acts, adopted prior to the treaty's entry into force, but with a lasting effect: «continuing» breaches (e.g. maintenance of an earlier legislative provision which comes into conflict with treaty obligations), individual acts whose effects continue over time (e.g. effect of a direct expropriation on the former owner of the asset) and "composite" acts, i.e. a series of actions or omissions which, taken together, are wrongful. It is useful to provide additional language to clarify whether the treaty would cover or exclude such lasting acts or effects.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
		An express provision that precludes application of the treaty to acts that ceased to exist before the treaty's entry into force would enhance legal certainty, especially with regard to the period between the date of the treaty's signature and its entry into force. This approach would nevertheless keep open to challenge those prior laws and regulations that come into contradiction with the new treaty once it enters into force. An alternative is to apply the treaty only to those measures that are adopted after the treaty's entry into force: this would automatically preclude all of the State's earlier non-conforming measures from being challenged (e.g., preferential treatment to domestic investors in a particular industry in violation of the National Treatment obligation), eliminating the need to identify and schedule such measures individually.
3 Admission … govern entry investments into the host State (see also "Part B: Pre-establisment")	3.1.0 Provide that investments are admitted in accordance with domestic laws of the host State. 3.1.1 No clause.	Most IIAs provide for admission of investments in accordance with the host State's national laws. Thus, unlike in the treaties that belong to the "pre-establishment" type, in this case States do not give any international guarantees of admission and can change relevant domestic laws as they deem appropriate. However, the promise to admit investments in accordance with domestic law still has a certain value as it affords protection to investors in case a host State refuses admission in contradiction or by disregarding its internal laws.
4 Standards of treatment and protection		
4.1 National treatment (NT) … protects foreign investors/ investments against discrimination vis-à-vis domestic investors	4.1.0 Prohibit less favourable treatment of covered foreign investors/investments vis-à-vis comparable domestic investors/investments, without restrictions or qualifications.	NT guarantees foreign investors a level-playing field vis-à-vis comparable domestic investors and is generally considered conducive to good governance.
	4.1.1 Circumscribe the scope of the NT clause (for both/all Contracting Parties), noting that it, e.g.: - subordinates the right of NT to a host country's domestic laws - reserves the right of each Party to derogate from NT - does not apply to certain policy areas (e.g. subsidies, government procurement).	Yet under some circumstances, and in accordance with their SD strategies, States may want to be able to accord preferential treatment to national investors/investments (e.g. through temporary grants or subsidies) without extending the same benefits to foreign-owned companies. In this case, NT provisions need to allow flexibility to regulate for SD goals.
	4.1.2 Include country-specific reservations to NT, e.g. carve-out: - certain policies/measures (e.g. subsidies and grants, government procurement, measures regarding government bonds) - specific sectors/industries where the host countries wish to preserve the right to favour domestic investors - certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities) - measures related to companies of a specific size (e.g. SMEs).	For example, countries with a nascent/emerging regulatory framework that are reluctant to rescind the right to discriminate in favour of domestic investors can make the NT obligation "subject to their domestic laws and regulations". This approach gives full flexibility to grant preferential (e.g. differentiated) treatment to domestic investors as long as this is in accordance with the country's legislation. However, such a significant limitation to the NT obligation may be perceived as a disincentive to foreign investors. Even more so, omitting the NT clause from the treaty may significantly undermine its protective value.
	4.1.3 Omit NT clause.	There can be a middle ground between full policy freedom, on the one hand, and a rigid guarantee of non-discrimination, on the other. For example, States may exempt specific policy areas or measures as well as sensitive or vital economic sectors/industries from the scope of the obligation in order to meet both current and future regulatory or public-policy needs such as addressing market failures (this can be done either as an exception applicable to both Contracting Parties or as a country-specific reservation).

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
4.2 Most-favoured nation (MFN) treatment … protects foreign investors/ investments against discrimination vis-à-vis other foreign investors	4.2.0 Prohibit less favourable treatment of covered investors/investments vis-à-vis comparable investors/investments of any third country. 4.2.1 Limit the application of the MFN clause, noting that MFN does not apply to more favourable treatment granted to third-country investors under, e.g.: - Economic integration agreements - Double taxation treaties - IIAs concluded prior to (and/or after) the conclusion of the IIA in question (e.g. if the latter contains rules that are less favourable to investors, as compared to earlier IIAs) - ISDS clauses / procedural rights. 4.2.2 Limit the application of the MFN clause to treatment accorded to foreign investors under domestic laws, regulations, administrative practices and de facto treatment. 4.2.3 Include country-specific reservations to MFN, e.g. carve out: - certain policies/measures (e.g. subsidies, etc.) - specific sectors/industries - certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities)	The MFN provision ensures a level-playing field between investors from the IIA home country and comparable investors from any third country. However, competing objectives and implications may come into play when designing an MFN clause. While an MFN clause may be used to ensure upward harmonization of IIA treaty standards, it can also result in the unanticipated incorporation of stronger investor rights from IIAs with third countries and complicate conscious treaty design. This is particularly the case if the MFN clause extends to pre-establishment issues or when the treaty includes carefully balanced provisions that could be rendered ineffective by an overly broad MFN clause. An example of the latter are recent arbitral decisions that have read the MFN obligation as allowing investors to invoke more investor-friendly provisions from third treaties, e.g. to incorporate standards not included in the base treaty, to benefit from higher protection standards compared to the ones found in the base treaty or to circumvent procedural (ISDS-related) requirements in the base treaty. Should a country wish to preclude the MFN clause from applying to any relevant international agreement, it can do so by excluding specific types of instruments from the scope of the MFN clause (see section 4.2.1) or, in a broader manner, by restricting the scope of the MFN clause to domestic treatment (see section 4.2.2). Carving out certain sectors/industries or policy measures through country-specific reservations, catering for both current and future regulatory needs, is an additional tool that allows managing the scope of the MFN clause in a manner targeted to the specific needs of individual IIA Parties.
4.3 Fair and equitable treatment (FET) ... protects foreign investors/ investments against, e.g. denial of justice, arbitrary and abusive treatment	4.3.0 Give an unqualified commitment to treat foreign investors/investments "fairly and equitably". 4.3.1 Qualify the FET standard by reference to: - minimum standard of treatment of aliens under customary international law (MST/CIL) - international law or principles of international law. 4.3.2 Include an exhaustive list of State obligations under FET, e.g. obligation not to - deny justice in judicial or administrative proceedings - treat investors in a manifestly arbitrary manner - flagrantly violate due process - engage in manifestly abusive treatment involving continuous, unjustified coercion or harassment - infringe investors' legitimate expectations based on investment-inducing representations or measures. 4.3.3 Clarify (with a view to giving interpretative guidance to arbitral tribunals) that: - the FET clause does not preclude States from adopting good faith regulatory or other measures that pursue legitimate policy objectives - the investor's conduct (including the observance of universally recognized standards, see section 7) is relevant in determining whether the FET standard has been breached - the country's level of development is relevant in determining whether the FET standard has been breached - a breach of another provision of the IIA or of another international agreement cannot establish a claim for breach of the clause. 4.3.4 Omit FET clause.	FET is a critical standard of treatment: while it is considered to help attract foreign investors and foster good governance in the host State, almost all claims brought to date by investors against States have included an allegation of the breach of this all-encompassing standard of protection. Through an *unqualified* promise to treat investors "fairly and equitably", a country provides maximum protection for investors but also risks posing limits on its policy space, raising its exposure to foreign investors' claims and resulting financial liabilities. Some of these implications stem from the fact that there is a great deal of uncertainty concerning the precise meaning of the concept, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions and are open to subjective interpretations. A particularly problematic issue concerns the use of the FET standard to protect investors "legitimate expectations", which may restrict the ability of countries to change policies or to introduce new policies that - while pursuing SD objectives - may have a negative impact on foreign investors. Several options exist to address the deficiencies of *unqualified* FET standard, each with its pros and cons. The reference to customary international law may raise the threshold of State liability and help to preserve States' ability to adapt public policies in light of changing objectives (except when these measures constitute manifestly arbitrary conduct that amounts to egregious mistreatment of foreign investors), but the exact contours of MST/CIL remain elusive. An omission of the FET clause would reduce States' exposure to investor claims, but foreign investors may perceive the country as not offering a sound and reliable investment climate. Another solution would be to replace the general FET clause with an exhaustive list of more specific obligations. While agreeing on such a list may turn out to be a challenging endeavour, its exhaustive nature would help avoid unanticipated and far-reaching interpretations by tribunals.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
4.4 Full protection and security (FPS) …requires host States to exercise due diligence in protecting foreign investments	4.4.0 Include a guarantee to provide investors/investments full protection and security. 4.4.1 Clarify the FPS clause by: - specifying that the standard refers to "physical" security and protection - linking it to customary international law (e.g. specifying that this obligation does not go beyond what is required by CIL) - providing that the expected level of police protection should be commensurate with the level of development of the country's police and security forces. 4.4.2 Omit FPS clause.	Most IIAs include a guarantee of full protection and security (FPS), which is generally regarded as codifying customary international law obligations to grant a certain level of police protection and physical security. However, some tribunals may interpret the FPS obligation so as to cover more than just police protection: if FPS is understood to include economic, legal and other protection and security, it can constrain government regulatory prerogatives, including for SD objectives. Policymakers may follow a recent trend to qualify the FPS standard by explicitly linking it to customary international law or including a definition of the standard clarifying that it is limited to "physical" security. This would provide predictability and prevent expansive interpretations that would constrain regulatory prerogatives.
4.5 Expropriation … protects foreign investors in case of dispossession of their investments by the host country	4.5.0 Provide that an expropriation must comply with/respect four conditions: public purpose, non-discrimination, due process and payment of compensation. 4.5.1 Limit protection in case of indirect expropriation (regulatory taking) by - establishing criteria that need to be met for indirect expropriation to be found - defining in general terms what measures do not constitute indirect expropriation (non-discriminatory good faith regulations relating to public health and safety, protection of the environment, etc.) - clarifying that certain specific measures do not constitute an indirect expropriation (e.g. compulsory licensing in compliance with WTO rules). 4.5.2 Specify the compensation to be paid in case of lawful expropriation: - appropriate, just or equitable compensation - prompt, adequate and effective compensation, i.e. full market value of the investment ("Hull formula"). 4.5.3 Clarify that only expropriations violating any of the three substantive conditions (public purpose, non-discrimination, due process), entail full reparation.	An expropriation provision is a fundamental element of an IIA. IIAs with expropriation clauses do not take away States' right to expropriate property, but protect investors against arbitrary or uncompensated expropriations, contributing to a stable and predictable legal framework, conducive to foreign investment. IIA provisions typically cover "indirect" expropriation, which refers to regulatory takings, creeping expropriation and acts "tantamount to" or "equivalent to" expropriation. Such provisions have been used to challenge general regulations with an alleged negative effect on the value of an investment. This raises the question of the proper borderline between expropriation and legitimate public policy making (e.g. environmental, social or health regulations). To avoid undue constraints on a State's prerogative to regulate in the public interest, an IIA may set out general criteria for State acts that may (or may not) be considered an indirect expropriation. While this does not exclude liability risks altogether, it allows for better balancing of investor and State interests. The standard of compensation for lawful expropriation is another important aspect. The use of terms such as "appropriate", "just" or "fair" in relation to compensation gives room for flexibility in the calculation of compensation. States may find it beneficial to provide further guidance to arbitrators on how to calculate compensation and clarify what factors should be taken into account.
4.6 Protection from strife … protects investors in case of losses incurred as a result of armed conflict or civil strife	4.6.0 Grant non-discriminatory (i.e. NT, MFN) treatment with respect to restitution/compensation in case of armed conflict or civil strife. 4.6.1 Guarantee – under certain circumstances – compensation in case of losses incurred as a result of armed conflict or civil strife as an absolute right (e.g. by requiring reasonable compensation). 4.6.2 Define civil strife as not including "acts of God", natural disasters or force majeure. 4.6.3 Omit protection-from-strife clause.	IIAs often contain a clause on compensation for losses incurred under specific circumstances, such as armed conflict or civil strife. Some countries have expanded the coverage of such a clause by including compensation in case of natural disasters or *force majeure* situations. Such a broad approach increases the risk for a State to face financial liabilities arising out of ISDS claims for events outside of the State's control. Most IIAs only confer a relative right to compensation on foreign investors, meaning that a host country undertakes to compensate covered investors in a manner at least equivalent to comparable host State nationals or investors from third countries. Some IIAs provide an absolute right to compensation obliging a State to restitute or pay for certain types of losses (e.g. those caused by the requisitioning of their property by government forces or authorities). The latter approach is more burdensome for host States but provides a higher level of protection to investors.

Sections		Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
4.7 Transfer of funds … grants the right to free movement of investment-related financial flows into and out of the host country	4.7.0	Grant foreign investors the right to freely transfer any investment-related funds (e.g. open ended list) into and out of the host country.	IIAs virtually always contain a clause regarding investment-related transfers. The objective is to ensure that a foreign investor can make free use of invested capital, returns on investment and other payments related to the establishment, operation or disposal of an investment. However, an unqualified transfer-of-funds provision significantly reduces a host country's ability to deal with sudden and massive outflows or inflows of capital, balance-of-payments (BoP) difficulties and other macroeconomic problems. An exception increasingly found in recent IIAs allows States to impose restrictions on the free transfer of funds in specific circumstances, usually qualified by checks and balances (safeguards) to prevent misuse. Countries may also need to reserve their right to restrict transfers if this is required for the enforcement of the Party's laws (e.g. to prevent fraud on creditors etc.), again with checks and balances to prevent abuse.
	4.7.1	Provide an exhaustive list of types of qualifying transfers.	
	4.7.2	Include exceptions (e.g. temporary derogations): - in the event of serious balance-of-payments and external financial difficulties or threat thereof - where movements of funds cause or threaten to cause serious difficulties in macro-economic management, in particular, related to monetary and exchange rate policies. Condition these exceptions to prevent their abuse (e.g. application in line with IMF rules and respecting conditions of temporality, equity, non-discrimination, good faith and proportionality).	
	4.7.3	Reserve the right of host States to restrict an investor's transfer of funds in connection with the country's (equitable, non-discriminatory, and good faith application of its) laws, relating to, e.g.: - fiscal obligations of the investor/investment in the host country - reporting requirements in relation to currency transfers - bankruptcy, insolvency, or the protection of the rights of creditors - issuing, trading, or dealing in securities, futures, options, or derivatives - criminal or penal offences (e.g. imposing criminal penalties) - prevention of money laundering - compliance with orders or judgments in judicial or administrative proceedings.	
4.8 Transparency … fosters access to information	4.8.0	Require Contracting Parties to promptly publish documents which may affect covered investments, including e.g. - laws and regulations - procedures/administrative rulings of general application - IIAs.	Some IIAs include a clause requiring countries to promptly publish laws and regulations. Providing investors (prospective and established ones) with access to such information improves a country's investment climate. This might, however, also pose administrative difficulties for some countries that do not have the human resources and technological infrastructure required. The treaty may incorporate commitments to provide technical assistance to developing countries to support implementation. The administrative burden imposed by transparency obligations could be lessened by using phrases such as "to the extent possible". The few IIAs that contain so-called "prior-comment procedures" require an even higher level of action by governments and may expose States to lob-bying and pressure in the process of developing those laws. Transparency obligations are often excluded from the scope of ISDS (see 6.2.4). They can still be useful, given that any related problems can be dis-cussed on a State-State level and addressed through technical assistance. Transparency provisions generally do not include any reference to transpa-rency obligations applicable to investors. This contributes to the perception that IIAs lack i) corporate governance enhancing features; and ii) balance in the rights and obligations. IIAs could encourage States to strengthen domes-tic transparency requirements (e.g. including mechanisms for due diligence procedures).
	4.8.1	Require countries to grant investment-related information upon request.	
	4.8.2	Require countries to publish in advance measures that they propose to adopt regarding matters covered by the IIA and to provide a reasonable opportunity for affected stakeholders (investors) to comment (prior-comment procedures).	
	4.8.3	Explicitly reserve host States' rights and/or encourage State Parties - to implement policies placing transparency and disclosure requirements on investors - to seek information from a potential (or already established) investor or its home State - to make relevant information available to the public Qualify with an obligation upon the State to protect confidential information.	
	4.8.4	No clause.	

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4.9 Performance requirements … regulate the extent to which host States can impose certain operational conditions on foreign investors/ investments	4.9.0 Preclude Contracting Parties from placing trade-related performance requirements (e.g. local content requirements) on investments operating in the goods sector (in accordance with/incorporating the WTO TRIMs Agreement). 4.9.1 Preclude Contracting Parties from placing performance requirements on investments, beyond trade-related ones, e.g. requirements to transfer technology, to achieve a certain level of R&D operations or to employ a certain percentage of local personnel (TRIMs +). 4.9.2 Preclude Contracting Parties from imposing performance requirements unless they are linked to the granting of incentives (usually in combination with the above TRIMs + option). 4.9.3 Include country-specific reservations to the TRIMs+ obligation, e.g. carving out: - certain policies/measures (e.g. subsidies) - specific sectors/industries (e.g. banking, defence, fisheries, forestry, transport, infrastructure, social services) - certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities) - measures related to companies of a specific size (e.g. SMEs). 4.9.4 No clause prohibiting imposition of performance requirements	Performance requirements (PRs) refer to the imposition of conditions on businesses limiting their economic choices and managerial discretion (e.g. requirements to use locally produced inputs or to export a certain percentage of production). While PRs may be considered as creating economic inefficiencies, they can also be a potentially important tool for industrial or other economic development policies. From the transfer of technology to the employment of local workers, PRs can help materialize expected spill-over effects from foreign investment. Thus, to reap the full benefits of foreign investment and to align investment policy with SD objectives, policymakers need to carefully consider the need for policy flexibility when devising clauses on PRs. This is important, even if the IIA simply refers to the WTO TRIMs Agreement (because even though this does not add any new obligations on States who are also WTO members, the incorporation of TRIMs into an IIA gives investors the opportunity to directly challenge a TRIMs violation through ISDS). It is particularly important when considering the prohibition of an extensive list of PRs beyond TRIMs (e.g. requirements to transfer technology or employ local workers). The relevant exceptions and reservations should be considered from the point of view of both current and future regulatory needs. Finally, even if the IIA does not contain a clause explicitly ruling out PRs, the NT clause would prohibit the discriminatory imposition of PRs on foreign investors only.
4.10 «Umbrella» clause … establishes a commitment on the part of the host State to respect its obligations regarding specific investments (including in investment contracts)	4.10.0 Include a clause that requires each Party to observe any obligation (e.g. contractual) which it has assumed with respect to an investment of a covered investor. 4.10.1 Clarify that a breach of the "umbrella" clause may only result from an exercise of sovereign powers by a government (i.e. not an ordinary breach of contract by the State) and that disputes arising from such breaches shall be settled in the forum prescribed by the contract. 4.10.2 Introduce a "two-way" umbrella clause that requires both the State and the investor to observe their specific obligations related to the investment. 4.10.3 No "umbrella" clause.	An "umbrella" clause requires a host State to respect any obligation assumed by it with regard to a specific investment (for example, in an investment contract). The clause thus brings contractual and other individual obligations under the "umbrella" of the IIA, making them potentially enforceable through ISDS. By subjecting contractual vitolations to IIA arbitration an umbrella clause therefore makes it even more important for countries to have the technical capacity to carefully craft the respective contractual arrangements (e.g. when they enter into investment or concession contracts). The main difficulties with "umbrella" clauses are that they (1) effectively expand the scope of the IIA by incorporating non-treaty obligations of the host State into the treaty, which may increase the risk of being faced with costly legal proceedings, and (2) have given rise to conflicting interpretations by investor-State tribunals resulting in a high degree of unpredictability. One way of solving these problems – followed by many countries – would be to omit the "umbrella" clause from their IIAs. This means that an investor party to an investment contract would always have to show a breach of an IIA obligation, and not a breach of the contract. Alternatively, a country may clarify the scope of the umbrella clause and the competent dispute settlement forum to avoid conflicting interpretations. Finally, there is an option to make the umbrella clause work both ways, that is, to use it to incorporate into the IIA not only a State's obligations but also those of an investor, which would give States an opportunity to bring counterclaims against investors in the relevant ISDS proceedings.

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4.11 Personnel and staffing … facilitates the entry, sojourn and employment of foreign personnel	4.11.0 Provide for the facilitation of entry, sojourn and issuing of work permits for nationals of one Party (or individuals regardless of nationality) into the territory of the other Party for purposes relating to an investment, subject to national immigration and other laws, covering: - all personnel, including families - only senior management and key personnel. 4.11.1 Ensure the right of investors to make appointments to senior management positions without regard to nationality. 4.11.2 Include country-specific reservations to the senior-management obligation (section 4.11.1), e.g. carve out: - certain policies/measures - specific sectors/industries - certain policy areas (minorities, indigenous communities) - measures related to companies of a specific size. 4.11.3 No clause.	Facilitating the entry and sojourn of foreign employees and the right to hire expatriate personnel (including senior management and members of the board of directors) can help to attract foreign investment. At the same time these provisions interact with host State's immigration laws - a particularly sensitive area of policy making. It is important that host States retain control over their immigration policies or ensure coherence between relevant international and national regulations. Moreover, States may wish to encourage SD-related spill-overs such as employment for domestic or indigenous workers and trickle-down effects with respect to technological knowledge (e.g. by requiring foreign investments to employ indigenous personnel or by limiting the number of expatriate personnel working for the investor). Carefully choosing the right normative intensity (e.g. opting for a best-efforts approach), and other mechanisms for preserving flexibility (e.g. ensuring the priority of national laws) are key.
5 Public policy exceptions ... permit public policy measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances	5.1.0 No public policy exceptions. 5.1.1 Include exceptions for national security measures and/or measures related to the maintenance of international peace and security: - formulate the exception as not self-judging (can be subject to arbitral review) - formulate the exception as self-judging. 5.1.2 Broaden the exception by clarifying that national security may encompass economic security. 5.1.3 Limit the exception by specifying: - that the exception only relates to certain types of measures, e.g. those relating to trafficking in arms or nuclear non-proliferation; or taken in pursuance of States' obligations under the UN Charter for the maintenance of international peace and security - that it only applies in times of war or armed conflict or an emergency in international relations. 5.1.4 Include exceptions for domestic regulatory measures that aim to pursue legitimate public policy objectives, e.g. to: - protect human rights - protect public health - preserve the environment (e.g. biodiversity, climate change) - protect public morals or maintain public order - preserve cultural and/or linguistic diversity - ensure compliance with laws and regulations that are not inconsistent with the treaty - allow for prudential measures (e.g. to preserve the integrity and stability of the financial system) - ensure the provision of essential social services (e.g. health, education, water supply) - allow for broader safeguards, including on developmental grounds (to address host countries' trade, financial and developmental needs) - prevent tax evasion - protect national treasures of artistic, historic or archaeological value (or "cultural heritage").	To date few IIAs include public policy exceptions. However, more recent treaties increasingly reaffirm States' right to regulate in the public interest by introducing general exceptions. Such provisions make IIAs more conducive to SD goals, foster coherence between IIAs and other public policy objectives, and reduce States' exposure to claims arising from any conflict that may occur between the interests of a foreign investor and the promotion and protection of legitimate public-interest objectives. Exceptions allow for measures, otherwise prohibited by the agreement, to be taken under specified circumstances. General exceptions identify the policy areas for which flexibility is to be preserved. A number of features determine how easy or difficult it is for a State to use an exception. To avoid review of the relevant measure by a court or a tribunal, the general exception can be made self-judging (i.e. the necessity/ appropriateness of the measure is judged only by the invoking State itself). This approach gives a wide margin of discretion to States, reduces legal certainty for investors and potentially opens possibilities for abuse. In contrast, exceptions designed as not self-judging imply that in case of a dispute, a court or tribunal will be able to determine whether the measure in question is allowed by the exception. In order to facilitate the use of exceptions by States, the provision may adjust the required link between the measure and the alleged policy objective pursued by this measure. For example, instead of providing that the measure must be "necessary" to achieve the policy objective, the IIA could require that the measure be "related" to the policy objective. Finally, in order to prevent abuse of exceptions, it is useful to clarify that "exceptional" measures must be applied in a non-arbitrary manner and not as disguised investment protectionism.

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	5.1.5	Prevent abuse of the exceptions by host States: - provide that «exceptional» measures shall not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors, or a disguised restriction on international trade or investment - choose the appropriate threshold which an "exceptional" measure must meet, e.g. the measure must be "necessary" (indispensable) to achieve the alleged policy objective, or be "related" (making a contribution) to this policy objective.	
6 Dispute settlement			
6.1 State-State ... governs dispute settlement between the Contracting Parties	6.1.0	Establish that any unresolved IIA-related disputes can be submitted to State-State dispute settlement (arbitration).	To date, State-State arbitrations under IIAs have been very rare. This is a natural consequence of including ISDS into IIAs (and investors themselves taking host States to arbitration) to complement the system of diplomatic protection. However, if a question about the meaning of a specific IIA obligation arises, and the Contracting Parties fail to resolve the uncertainty through consultations, a State-State arbitration can be a useful mechanism to clarify it. In this sense, State-State procedures retain their "supportive" function for ISDS.
	6.1.1	Provide an option or require that the States engage in prior consultations and negotiations and/or resort to conciliation or mediation.	
6.2 Investor-State … provides foreign investors with access to international arbitration to resolve investment-related disputes with the host State	6.2.0	Grant investors the right to bring any investment-related dispute with the host country to international arbitration.	ISDS allows foreign investors to sue a host State if the latter violates its IIA obligations. Most IIAs allow investors to bypass domestic courts of host States and bring international arbitration proceedings (e.g. to constitute an *ad hoc* 3-person tribunal, most often at ICSID or under the UNCITRAL arbitration rules). The goal is to take the dispute out of the domestic sphere, to ensure independence and impartiality of the arbitrators, speed and effectiveness of the process and finality and enforceability of arbitral awards. As the number of ISDS cases increases, questions have arisen with regard to the effectiveness and the SD implications of ISDS. Many ISDS procedures are very expensive and often take several years to resolve. ISDS cases increasingly challenge domestic regulatory measures implemented for public policy objectives. Almost all ISDS cases lead to the break down of the relationship between the investor and the host State. Due to the lack of a single, unified mechanism, different tribunals have issued divergent interpretations of similarly worded treaty provisions, resulting in contradictory outcomes of cases involving identical/similar facts and/or treaty language. Many ISDS proceedings are conducted confidentially, which has raised concerns when tribunals address matters of public policy. A number of policy options are available to deal with these problems. If the Contracting Parties consider each other's judicial systems to be effective and efficient, ISDS can be omitted from their IIA altogether. The Parties may also choose to subject only the most fundamental IIA protections to ISDS (e.g. the protection against uncompensated expropriation), reserve the right to give consent to arbitration on a case-by-case basis or minimize States' exposure to ISDS by other means (e.g. by removing certain areas from its purview, introducing limitation periods). Parties may also consider promoting the use of alternative dispute resolution (ADR) methods, such as conciliation and mediation. If employed at the early stages of a dispute, ADR can help to prevent escalation of the conflict,
	6.2.1	Define the range of disputes that can be subject to ISDS: - any investment-related disputes (regardless of the legal basis for a claim, be it IIA, contract, domestic law or other) - disputes arising from specifically listed instruments (e.g. IIAs, contracts, investment authorisations/licenses) - disputes regarding IIA violations only - States' counterclaims.	
	6.2.2	Promote the use of alternative dispute resolution (ADR) methods - encourage resort to conciliation (e.g. ICSID or UNCITRAL conciliation rules) or mediation - agree to cooperate in developing dispute prevention mechanisms (including by creating investment ombudsmen or "ombuds" offices).	
	6.2.3	Clarify that investors can only resort to international arbitration - after local remedies have been exhausted or a manifest ineffectiveness/bias of domestic courts has been demonstrated - if the investor agrees not to bring ("fork-in-the-road"), or undertakes to discontinue ("no U-turn"), the same case in another forum - within a limitation period, in order to prevent claims resulting from «old» measures (e.g. claim has to be brought within three years) - with respect to claims that arose after the treaty's entry into force (see section 2.4).	
	6.2.4	Limit States' exposure to ISDS, e.g.: - clarify that certain treaty provisions and/or sensitive areas are excluded from ISDS, e.g. national security issues, including review of incoming investments; measures to protect the environment, health and human rights; prudential measures; measures relating to transfer of funds (or respective IIA provisions); tax measures that do not amount to expropriation; IIA provisions on transparency - specify only those issues/provisions to which ISDS should apply (e.g. only to the expropriation provision).	

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	6.2.5 Reserve State's consent to arbitration, so that it would be given separately for each specific dispute. 6.2.6 Omit investor-State arbitration (i.e. do not consent to investor-State arbitration in the treaty) and nominate host State's domestic courts as the appropriate forum.	preserve the investment relationship, and find a workable common-sense solution in a faster, cheaper and more flexible manner. As part of the IIA rebalancing, a treaty may refer to the possibility of States bringing counterclaims for investors' non-compliance with the host State's national laws (section 7.1.1) or breach of investor's specific obligations undertaken in relation to its investment (section 4.10.3).
6.3 ISDS institutions and procedures … propose improvements of an institutional and procedural nature	6.3.0 Improve the institutional set-up of ISDS, e.g.: - consider a system with permanent or quasi-permanent arbitrators and/or an appellate mechanism - foster accessibility of documents (e.g. information about the case, party submissions, decisions and other relevant documents) - foster public participation (e.g. amicus curiae and public hearings) - specify that disputes concerning certain sensitive policy areas, such as tax and/or prudential measures, shall be submitted to the competent authorities of the Parties for a preliminary joint determination of whether they are in breach of the treaty - consider cooperation on training and assistance for adequate State representation in investor-State disputes, including through establishing an investment advisory centre. 6.3.1 Add features that would improve the arbitral process, e.g.: - mechanism for prompt/simplified disposal of "frivolous" claims - mechanism for consolidation of claims - requirement to interpret the IIA in accordance with customary international law (as codified in the Vienna Convention on the Law of Treaties) - mechanism for joint interpretation of the treaty by the Parties in case of ambiguities - caps on arbitrator fees.	The institutional set-up of the ISDS system is the cause of numerous concerns including perceived lack of legitimacy, inconsistent decisions, secrecy or participatory challenges for developing countries. IIA policymakers can improve the institutional set-up of ISDS in the treaty. An appellate mechanism could contribute to more coherent interpretation and foster trust in the system. Enhanced transparency of ISDS claims could enable broader and informed public debate as well as a more adequate representation of stakeholder interests, prevent non-transparent deals and stimulate balanced and well-reasoned arbitral decisions. Procedural improvements such as simplified disposals of «frivolous» claims, consolidation of claims and caps on arbitrator fees, could help streamline the arbitral process and make it less expensive and more effective. A reference to customary international law as controlling interpretation of the IIA, coupled with a possibility for the State Parties to issue joint interpretations, would ensure a common interpretative framework and the ability of the contracting States to influence this process, thereby limiting the discretion of arbitrators.
6.4 Remedies and compensation … determines remedies available in case of treaty breach and gives guidance on compensation	6.4.0 No clause. 6.4.1 Limit available remedies to monetary compensation and restitution of property (or to compensation only). 6.4.2 Provide that the amount of compensation shall be equitable in light of circumstances of the case and set out specific rules on compensation for a treaty breach, e.g.: - exclude recoverability of punitive and/or moral damages - limit recoverability of lost profits (up to the date of award) - ensure that the amount is commensurate with the country's level of development.	Most IIAs are silent on the issue of remedies and compensation. In theory this permits arbitral tribunals to apply any remedy they deem appropriate, including, for example, an order to the country to modify or annul its law or regulation. Remedies of the latter type could unduly intrude into the sovereign sphere of a State and impede its policy-making powers; thus, Parties to an IIA may consider limiting available remedies to monetary compensation and restitution of property (or compensation only). As regards the amount of compensation for a treaty breach, international law requires compensation to be "full", which may include moral damages, loss of future profits and consequential damages. States may find it beneficial to provide guidance to arbitrators on applicable remedies and, similar to the case of expropriation above, on calculation of compensation. If the Contracting Parties believe that certain types of damages should not be recoverable by investors (e.g. punitive or moral damages), they can explicitly rule them out in their IIA. They can also restrict recoverability of future profits and provide that compensation should cover a claimant's direct losses and not exceed the capital invested plus interest. However, such rules may be seen as undermining the protective quality of the IIA.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
7 Investor obligations and res-ponsibilities … promote compliance by investors with domestic and/ or international norms at the entry and operation stage	7.1.0 No clause. 7.1.1 Require that investors comply with host State laws at both the entry and the post-entry stage of an investment. Establish sanctions for non-compliance: - deny treaty protection to investments *made in* violation of the host State law - deny treaty protection to investments *operating in* violation of those host State laws that reflect international legally binding obligations (e.g. core labour standards, anti-corruption, environment conventions) and other laws as identified by the Contracting Parties - provide for States' right to bring counterclaims in ISDS arising from investors' violations of host State law. 7.1.2 Encourage investors to comply with universally recognized standards such as the ILO Tripartite MNE Declaration and the UN Guiding Principles on Business and Human Rights, and to carry out corporate due diligence relating to economic development, social and environmental risks. Provide that non-compliance may be considered by a tribunal when interpreting and applying treaty protections (e.g. FET) or determining the amount of compensation due to the investor. 7.1.3 Encourage investors to observe applicable CSR standards: - without specifying the relevant CSR standards - by giving a list of relevant CSR standards (e.g. in an annex) - by spelling out the content of relevant CSR standards (e.g. as best endeavour clauses). Provide that non-observance may be considered by a tribunal when interpreting and applying treaty protections (e.g. FET) or determining the amount of compensation due to the investor. 7.1.4 Call for cooperation between the Parties to promote observance of applicable CSR standards, e.g. by - supporting the development of voluntary standards - building local industries' capacity for the uptake of voluntary standards - considering investors' adoption/compliance with voluntary standards when engaging in public procurement - conditioning the granting of incentives on the observance of CSR standards - promoting the uptake of CSR-related reporting (e.g. in the context of stock exchange listing rules). 7.1.5 Encourage home countries to condition the granting of outward investment promotion incentives on an investor's socially and environmentally sustainable behaviour (see also 10.1.1 on investment promotion).	Most IIAs only set out obligations for States. To correct this asymmetry, an IIA could also set out investor obligations/responsibilities. Noting the evolving views on the capacity of international law to impose obligations on private parties, IIA policymakers could consider a number of options, each with its advantages and disadvantages. These IPFSD options (i) condition treaty protection upon certain investor behaviour; (ii) raise the obligation to comply with domestic laws to the international level (increasing its relevance in arbitration); and (iii) take a best-endeavour approach to universally recognised standards or applicable CSR standards. A far-reaching option is to include an obligation for investors to comply with laws and regulations of the host State at both, the entry and post-entry stage. While investors' observance of domestic laws can generally be enforced through national courts, including this obligation in an IIA could further improve means to ensure compliance (e.g. by way of denying treaty protection to non-complying investors or giving States a right to bring counterclaims in ISDS proceedings). Challenges may arise from the fact that domestic laws are usually directed at local enterprises as opposed to those who own or control them and from the need to ensure that minor/technical violations should not lead to complete denial of treaty benefits. Also, the elevation to a treaty level of the obligation to comply with domestic law should not affect the general principle that domestic laws must not be contrary to a country's international obligations - this can be made explicit in option 7.1.1 (e.g. by specifying that relevant domestic laws must not be inconsistent with the IIA and international law). Another option is to promote responsible investment through IIA language that encourages investors to comply with relevant universal principles or with applicable CSR standards. Such a best-endeavour clause would be given additional weight if the treaty instructs tribunals to take into account investors' compliance with relevant principles and standards when deciding investors' ISDS claims. Given the multitude of existing CSR standards, it may be useful to refer to specific documents such as the UN Global Compact.
8 Relationship to other agreements … establishes a hierarchy in case of competing international norms	8.1.0 No clause. 8.1.1 Stipulate that if another international treaty, to which the contracting States are parties, provides for more favourable treatment of investors/investments, that other treaty shall prevail in the relevant part. 8.2.0 Stipulate that in case of a conflict between the IIA and a host State's international commitments, such conflicts should be resolved in accordance with customary international law, including with reference to the Vienna Convention on the Law of Treaties. 8.2.1 Stipulate that in case of a conflict between the IIA and a host State's international commitments under a multilateral agreement in another policy area, such as environment and public health, the latter shall prevail.	IIAs usually provide that more favourable treatment of investors granted under another international treaty (e.g. a multilateral treaty to which both IIAs signatories are Parties) would take precedence. It is much less usual to address a relationship between an IIA and a treaty that governs a different policy area (e.g. protection of environment, human rights, etc.). Addressing this issue would help arbitral tribunals to take into account these other international commitments in order to ensure, as much as possible, harmonious interpretation of IIA provisions and see them as part of general international law.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
9 Not lowering of standards clause … discourages Contracting Parties from attracting investment through the relaxation of labour or environmental standards	9.1.0 No clause. 9.1.1 Include environmental, human rights and labour clauses that - include a commitment to refrain from relaxing domestic environmental and labour legislation to encourage investment (expressed as a binding obligation or as a soft law clause) - reaffirm commitments under, e.g. international environmental agreements or with regard to international health standards, internationally recognized labour rights or human rights. 9.1.2 Encourage cooperation between treaty Parties to provide enhanced environmental, human rights and labour protection and hold expert consultations on such matters.	There is a concern that international competition for foreign investment may lead some countries to lower their environmental, human rights and labour standards and that this could lead to a "race to the bottom" in terms of regulatory standards. Some recent IIAs include language to address this concern. "Not lowering standards" provisions, for example, prohibit or discourage host States to compromise on environmental and labour protection for the purpose of attracting foreign investment. In doing so, the IIA goes beyond its traditional role of investment protection and pursues the goal of maintaining a regulatory framework that would be conducive to SD. While current IIAs often exclude "not lowering standards" clauses from ISDS or dispute settlement as such, it may be beneficial to foster consultations on this issue, including through institutional mechanisms, so as to ensure that the clause will effectively be implemented.
10 Investment promotion … aims to encourage foreign investment through additional means beyond investment protection provisions in IIAs	10.1.0 No clause. 10.1.1 Establish provisions encouraging investment flows, with a special emphasis on those which are most beneficial in light of a country's development strategy. Possible mechanisms include, e.g.: - encourage home countries to provide outward investment incentives, e.g. investment guarantees, possibly conditioned on the SD enhancing effect of the investment and investors' compliance with universal principles and applicable CSR standards - organise joint investment promotion activities such as exhibitions, conferences, seminars and outreach programmes - exchange information on investment opportunities - ensure regular consultations between investment promotion agencies - provide technical assistance programmes to developing host countries to facilitate FDI flows - strengthen promotion activities through IIAs' institutional set up (see 11.1.1 below). 10.1.2 Include a subrogation clause.	While host States conclude IIAs to attract development-enhancing investment, the investment enhancing effect of IIAs is mostly indirect (through the protection offered to foreign investors). Only a few IIAs include special promotional provisions to encourage investment flows and increase investors' awareness of investment opportunities (e.g. by exchanging information or joint investment-promotion activities). Creating a joint committee responsible for investment promotion may help to operationalize the relevant provisions. Through these committees, the Parties can set up an agenda, organize and monitor the agreed activities and take corrective measures if necessary. The "promotional" provisions are "soft" (unenforceable), and their ultimate usefulness largely depends on the will and action of the Parties. The mechanism of subrogation supports investment promotion by ensuring the effective functioning of investment insurance schemes maintained by home States, or their respective agencies, to support their outward FDI. If the insurer covers the losses suffered by an investor in the host State, it acquires the investor's right to bring a claim and may exercise it to the same extent as, previously, the investor. Subrogation makes it possible for the insurer to be a direct beneficiary of any compensation by the host State to which the investor would have been entitled.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
11 Institutional set-up …establishes an international platform collaboration between the Contracting Parties	11.1.0 No clause. 11.1.1 Set up an institutional framework under which the Parties (and, where relevant, other IIA stakeholders such as investors, local community representatives etc.) shall cooperate and hold meetings from time to time, to foster the implementation of the agreement with a view to maximising its contribution to SD. More specifically, this can include a commitment to: - issue interpretations of IIA clauses - review the functioning of the IIA - discuss and agree upon modification of commitments (in line with special procedures) and facilitate adaptation of IIAs to the evolving SD policies of State Parties, e.g. through renegotiation - organize and review investment promotion activities, including by involving investment promotion agencies, exchanging information on investment opportunities, organizing seminars on investment promotion - discuss the implementation of the agreement, including by addressing specific bottlenecks, informal barriers, red tape and resolution of investment disputes - regularly review Parties' compliance with the agreement's not-lowering standards clauses - provide technical assistance to developing Contracting Parties to enable them to engage in the institutionalized follow-up to the treaty - identify/update relevant CSR standards and organize activities to promote their observance.	While countries have concluded numerous IIAs, generally, there has been little follow-up to ensure that IIAs are properly implemented and kept up-to-date. Recent IIAs have started to include provisions for permanent institutional arrangements that perform a number of specific functions. For example, agreed interpretation can help ensure consistency in arbitral awards. Similarly, deliberations can ensure informed decision making on further investment liberalization, or prolonging or amending IIAs. All of this can help maximize the contribution of IIAs to SD, for example, by monitoring the development implications of IIAs and by engaging in dispute prevention activities and CSR promotion. A clear treaty mandate facilitates the implementation of the listed activities. Furthermore, it provides a forum to reach out to other relevant investment stakeholders including investors, local community representatives and academia.
12 Final provisions … define the duration of the treaty and its possible prolongation	12.1.0 Specify the temporal application of the treaty (e.g. 10 or 20 years) with quasi-automatic renewal (the treaty is renewed unless one of the Parties notifies the other(s) of its intention to terminate). 12.1.1 State a specific duration of the treaty but stipulate that renewal is based on a written agreement of both Parties on the basis of a (joint) informed review of the IIA. 12.1.2 Include a "survival" clause which guarantees that in case of unilateral termination of the treaty, it will remain in effect for a number of years after the termination of the treaty (e.g. for another 5, 10 or 15 years) with respect to investments, made prior to the termination. 12.1.3 Do not specify minimum initial temporal duration but allow for termination of the treaty at any time upon the notification of either Party.	There is an emerging concern about aging treaty networks that may eventually be unsuitable for changing economic realities, novel or emerging forms of investment and new regulatory challenges. This partly results from the fact that IIAs often provide for a fixed period of duration and quasi-automatic renewal (in an attempt to provide a stable investment regime). An alternative would be to provide for renewal if both Parties explicitly agree to it in writing after a joint review of the treaty and an assessment of its impact on FDI flows and any attendant development implications. This exercise would help to assess whether the treaty is still needed and whether any amendments are required. Another issue concerns the protection of investors after the IIA's termination. An IIA may include a "survival" clause, which effectively locks in treaty standards for a number of years after the treaty is terminated. While it provides longer-term legal security for investors, which may be necessary for investors with long-term projects involving substantial commitment of capital (e.g. in the extractive industries), it may limit States' ability to regulate their economies in accordance with new realities (especially if the treaty's provisions do not grant sufficient policy flexibility). Negotiators may opt for a balanced solution by ensuring that the "survival" clause is not overly long.

UNCTAD's Investment Policy Framework for Sustainable Development

Policy options for IIAs
Part B. Pre-establishment

Policy options in Part B are supplementary to those in Part A and can be used by countries wishing to extend their IIA to pre-establishment matters. As in Part A, policy options are organized from most investor-friendly (i.e. highest level of liberalization) to the options providing fewer establishment rights and more flexibility to the prospective host State.

Sections		Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
1 **Pre-establishment obligations** … govern establishment of foreign investments in the host State	1.1.0	Grant the right of establishment, subject to restrictions on public policy grounds (EU Treaty approach).	Most IIAs grant protection to investors and their investments only after their establishment in the host State; the host country thus retains full regulatory freedom as regards the admission of foreign investors to its territory. For example, it can impose limits on foreign ownership of domestic companies or assets, apply screening procedures and block acquisitions for industrial or other policy reasons (e.g. national security). However, in recent years an increasing number of IIAs include provisions that apply at the pre-establishment phase of investment, with the aim of liberalizing access for investors from the other Party. This is usually achieved by (i) prohibiting countries to impose certain restrictions on market access (quotas, monopolies, exclusive rights and others), (ii) prohibiting countries to discriminate against covered investors at the stage of establishment and acquisition of investments, or (iii) using both approaches concurrently. It is an important policy choice to decide whether to extend the IIA to pre-establishment matters and, if so, to find a right balance between binding international commitments and domestic policy flexibility. The first step is to choose between the positive- and the negative-list approach to identifying industries in which the pre-establishment rights will be granted. The former offers selective liberalization by way of drawing up a "positive list" of industries in which investors will enjoy pre-establishment rights. Under the latter, investors benefit from pre-establishment commitments in all industries except in those that are explicitly excluded. The negative-list approach is more demanding in terms of resources: it requires a thorough audit of existing domestic policies. In addition, under a negative-list approach and in the absence of specific reservations, a country commits to openness also in those sectors/activities, which, at the time an IIA is signed, do not yet exist or where the regulatory frameworks are still evolving. Generally, when aiming to preserve regulatory space, making commitments on a positive-list basis is considered to be safer. Properly managing a negative-list approach requires countries to have i) a sophisticated domestic regulatory regime and ii) sufficient institutional capacity for properly designing and negotiating the scheduling of liberalization commitments. In either case most IIAs include a list of reservations preserving specific non-conforming measures ("hybrid" approach).
	1.1.1	Undertake to refrain from imposing specific restrictions, including of a non-discriminatory nature, on the establishment in the host State's market (GATS approach), such as: - limitations on the participation of foreign capital in terms of maximum percentage limits on foreign shareholding - limitations on the number of establishments (quotas, monopolies, exclusive rights) - limitations on the total value of transactions or assets.	
	1.1.2	Extend national treatment and/or MFN treatment to foreign investors with respect to "establishment, acquisition and expansion" of investments, i.e. prohibit discrimination *vis-à-vis* domestic investors and/or investors from third countries, subject to exceptions and reservations (sections 1.1.3 and 1.1.4 below).	
	1.1.3	Undertake pre-establishment commitments only with respect to sectors/industries specifically mentioned (*positive list*) or to all sectors/industries except those specifically excluded (*negative list*) or combining the two ("hybrid"). Country-specific reservations may carve out, as necessary, e.g.: - existing measures that provide preferential rights of establishment to domestic investors or investors from certain third countries (e.g. on the basis of preferential trade and investment agreements) - existing measures/laws that would otherwise be inconsistent with the newly concluded treaty (grandfathering) - sectors/industries where the Party wishes to retain full discretion on establishment, including future restrictive measures - specific procedures such as investment screening or an economic needs test (ENT).	
	1.1.4	Preserve additional policy flexibility on pre-establishment issues, with respect to "committed" (locked-in) sectors e.g.: - preserve the right of a Party to adopt new non-conforming measures in the future, as long as they do not "affect the overall level of commitments of that Party under the Agreement" - include a wide "catch-all" reservation into the schedule, e.g. that establishment is "subject to the requirement that no objection for reasons of national economy is made".	
	1.1.5	Reduce normative intensity of pre-establishment commitments e.g.: - postpone the entry into force of pre-establishment obligations until the date when the Parties agree on covered sectors/measures - agree to undertake negotiations on pre-establishment at a future date - exclude pre-establishment disciplines from dispute settlement provisions or subject them to State-State dispute settlement only - use "best efforts", as opposed to legally binding, language.	

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
	1.1.6 Preserve policy flexibility on pre-establishment issues by carefully crafting relevant general provisions of the IIA, e.g.: - specifying the scope and coverage of the treaty (see section 2.3 of Part A) - including general and national security exceptions (see section 5 of Part A). 1.1.7 Provide that admission of investments is in accordance with domestic laws of the host State.	The need for reservations and «safety valves» is arguably greatest if a country opts for the negative list. From a SD perspective, it may be prudent to consider excluding certain sub-industries or grandfathering specific non-conforming measures, reserving the right to change the country's commitments under specified conditions or choose the right level of the normative intensity of commitments.

UNCTAD's Investment Policy Framework for Sustainable Development

Policy options for IIAs

Part C. Special and Differential Treatment (SDT)

SDT provisions could be an option where Contracting Parties to an IIA have significantly different levels of development, especially when one of the Parties is a least-developed country. SDT presupposes that a treaty can be built asymmetrically, i.e. treaty obligations may differ between the Contracting Parties.

Sections		Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
1 Asymmetrical obligations … enable imposition of less onerous obligations on a less developed Party	1.1.0	**Delayed implementation of obligations** Introduce a timetable for implementation of IIA commitments with longer time-frames for a less developed Party. Could be used for, e.g.: - pre-establishment obligations - national treatment - transfer of funds - performance requirements - transparency - investor-State dispute settlement.	SDT provisions give expression to the special needs and concerns of developing and particularly least-developed countries (LDCs). Largely absent from existing IIAs, this principle is expressed in numerous provisions of the WTO agreements and has found its way into other aspects of international law such as the international climate change framework. SDT may be necessary in order to ensure that a less developed Party to a treaty does not undertake obligations that would be too burdensome to comply with or contrary to its development strategy. There are different ways to make an IIA asymmetrical and to reflect special needs of less developed Parties; moreover, several SDT options can be combined in the same treaty. For example, it can establish longer phase-in periods for pre-establishment obligations, country-specific carve-outs from the prohibition of performance requirements, best-endeavour obligations with respect to transparency, and account for the level of development in the FET provision.
	1.1.1	**Reduced normative intensity** Replace binding obligations with best-endeavour obligations for a less developed Party. Could be used for, e.g.: - pre-establishment obligations - national treatment - performance requirements - transparency.	
	1.1.2	**Reservations** Include country-specific reservations from general obligations, e.g. carving out sensitive sectors, policy areas or enterprises of specific size (e.g. SMEs). Could be used for, e.g.: - pre-establishment obligations - national treatment - MFN treatment - performance requirements - personnel and staffing (senior management).	
	1.1.3	**Development-friendly interpretation** Promote interpretation of protection standards that takes into account States' different level of development. Could be used for, e.g.: - fair and equitable treatment - full protection and security - amount of compensation awarded.	
2 Additional tools … encourage positive contributions by a more developed Party	2.1.0	**Technical assistance** Undertake a (best-endeavour) obligation to provide technical assistance to implement IIA obligations and facilitate FDI flows.	SDT can also manifest itself in special obligations for the more developed Contracting Party. These are meant to operationalize the IIA, so that it performs its FDI-promoting function and, if necessary, to help the less developed Party implement certain IIA obligations. Including such provisions in the treaty, even in a non-binding manner, would provide a mandate to the more developed partner to put in place relevant technical-assistance and promotion activities.
	2.1.1	**Investment promotion** Provide investment incentives to outward FDI such as investment guarantees.	

4. Implementation and institutional mechanisms for policy effectiveness

Implementation of IIAs at the national level entails:

- *Completing the ratification process.* This may vary from a few months to several years, depending on the countries involved and the concrete issues at stake. The distinction between the conclusion of an agreement and its entry into force is important, since the legal rights and obligations deriving from it do not become effective before the treaty has entered into force. The time lag between the conclusion of an IIA and its entry into force may therefore have implications, for both foreign investors and their respective host countries.
- *Bringing national laws and practices into conformity with treaty commitments.* As with any other international treaty, care needs to be taken that the international obligations arising from the IIA are properly translated into national laws and regulations, and depending on the scope of the IIA, e.g. with regard to transparency obligations, also into the administrative practices of the countries involved.
- *Disseminating information about IIA obligations.* Informing and training ministries, government agencies and local authorities on the implications of IIAs for their conduct in regulatory and administrative processes is important so as to avoid other arms of the government causing conflicts with treaty commitments and thus giving rise to investor grievances, which if unresolved could lead to arbitral disputes.
- *Preventing disputes*, including through ADR mechanisms. This may involve the establishment of adequate institutional mechanisms to prevent disputes from emerging and avoid the breach of contracts and treaties on the part of government agencies. This involves assuring that the State and various government agencies take account of the legal obligations made under investment agreements when enacting laws and implementing policy measures, and establishing a system to identify more easily potential areas where disputes with investors can arise, and to respond to the disputes where and when they emerge.
- *Managing disputes* that may arise under IIAs. If dispute prevention efforts fail, States need to be prepared to engage effectively and efficiently in managing the disputes from beginning to end. This involves setting up the required mechanisms to take action in case of the receipt of a notice of arbitration, to handle the case, and ultimately to bring it to a conclusion, including possibly through settlement.
- *Establishing a review mechanism* to verify periodically the extent to which the IIA contributes to achieving expected results in terms of investment attraction and enhancing sustainable development – while keeping in mind that there is no mono-causal link between concluding an IIA and investment flows.

Moreover, because national and international investment policy must be considered in an integrated manner, and both need to evolve with a country's changing circumstances, countries have to assess continuously the suitability of their policy choices with regard to key elements of investment protection and promotion, updating model treaties and renegotiating existing IIAs.

Undertaking these implementation and follow-up efforts effectively and efficiently can be burdensome for developing countries, especially the least developed, because they often lack the required institutional capabilities or financial and human resources. Similarly, they often face challenges when it comes to analyzing ex ante the scope of obligations into which they are entering when they conclude an IIA, and the economic and social implications of the commitments contained in IIAs.

This underlines the importance of capacity-building technical cooperation to help developing countries in assessing various policy options before entering into new agreements and subsequently to assist them in implementing their commitments. IIAs can include relevant provisions to this end, including setting up institutional frameworks under which the contracting parties (and, where appropriate and relevant, other IIA stakeholders such as investors or civil society) can review progress in the implementation of IIA commitments, with a view to maximizing their contribution to sustainable development. International organizations can also play an important capacity building role.

V. The Way Forward

A new generation of investment policies is emerging, pursuing a broader and more intricate development policy agenda within a framework that seeks to maintain a generally favourable investment climate. “New generation” investment policies recognize that investment is a primary driver of economic growth and development, and seek to give investment policy a more prominent place in development strategy. They recognize that investment must be responsible, as a prerequisite for inclusive and sustainable development. And in the design of “new generation” investment policies policymakers seek to address long-standing shortcomings of investment policy in a comprehensive manner in order to ensure policy effectiveness and build a stable investment climate.

This report has painted the contours of a new investment policy framework for sustainable development. The Core Principles set out the design criteria for investment policies. The national investment policy guidelines suggest how to ensure integration of investment policy with development strategy, how to ensure policy coherence and design investment policies in support of sustainable development, and how to improve policy effectiveness. The policy options for key elements of IIAs provide guidance to IIA negotiators for the drafting of sustainable-development-friendly agreements; they form the first comprehensive overview of the myriad of options available to them in this respect.

In developing the IPFSD, UNCTAD has had the benefit of a significant body of existing work and experience on the topic. UNCTAD itself has carried out more than 30 investment policy reviews (IPRs) in developing countries over the years (box 4), analyzed in detail investment regulations in numerous countries for the purpose of investment facilitation (box 6), and produced many publications on best practices in investment policy (box 7), including in the *WIR* series. Other agencies have a similar track record, notably the OECD and the World Bank, various regional organizations, and a number of NGOs. In defining an IPFSD, this report has attempted to harness the best of existing work on investment policies, investment policy frameworks, guidelines and models, and to build on experience in the field in their implementation.

The IPFSD is not a negotiated text or an undertaking between States. It is an initiative by the UNCTAD secretariat, representing expert guidance for policymakers by an international organization, leaving national policymakers free to “adapt and adopt” as appropriate.

It is hoped that the IPFSD may serve as a key point of reference for policymakers in formulating national investment policies and in negotiating or reviewing IIAs. It may also serve as a reference for policymakers in areas as diverse as trade, competition, industrial policy, environmental policy, or any other field where investment plays an important role. The IPFSD can also serve as the basis for capacity building on investment policy. And it may come to act as a point of convergence for international cooperation on investment issues.

In its current form the IPFSD has gone through numerous consultations, comprehensively and by individual parts, with expert academics and practitioners. It is UNCTAD’s intention to provide a platform for further consultation and discussion with all investment stakeholders, including policymakers, the international development community, investors, business associations, labour unions, and relevant NGOs and interest groups. To allow for further improvements resulting from such consultations, the IPFSD has been designed as a “living document”.

The dynamic nature of investment policymaking adds to the rationale for such an approach, in particular for the specific investment policy guidelines. The continuous need to respond to newly emerging challenges with regard to foreign investment makes it mandatory to review and, where necessary, modify these guidelines from time to time. Thus, from UNCTAD’s perspective, while the IPFSD will serve to inform the investment policy debate and to guide technical assistance work in the field, new insights from that work will feed back into it.

The IPFSD thus provides a point of reference and a common language for debate and cooperation on national and international investment policies. UNCTAD will add the infrastructure for such cooperation, not only through its numerous policy forums on investment, but also by providing a platform for "open sourcing" of best practice investment policies through its website, as a basis for the inclusive development of future investment policies with the participation of all.[30]

Notes

1 Many successful developing countries maintained a significant level of government influence over the direction of economic growth and development throughout; see *Development-led globalization: Towards sustainable and inclusive development paths*, Report of the Secretary-General of UNCTAD to UNCTAD XIII.

2 The G-20, in its 2010 Seoul declaration, asked international organizations (specifically, UNCTAD, WTO and OECD) to monitor the phenomenon of investment protectionism.

3 See Sauvant , K.P. (2009). "FDI Protectionism Is on the Rise." *World Bank Policy Research Working Paper 5052*.

4 For example, the World Bank's Guidelines on the Treatment of Foreign Direct Investment, the OECD's Policy Framework for Investment (PFI), and instruments developed by various regional organizations and NGOs.

5 These include, inter alia, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the IFC's Sustainability Framework and the OECD Guidelines for Multinational Enterprises.

6 See ILO Global Employment Trends 2012, available on www.ilo.org.

7 See, for example, "Promoting investment for development: Best practices in strengthening investment in basic infrastructure in developing countries," note by the UNCTAD secretariat to the Investment, Enterprise and Development Commission, May 2011, TD/B/C.II/14, www.unctad.org.

8 Based on Doran, G. T. (1981). "There's a S.M.A.R.T. way to write management's goals and objectives." *Management Review*, 70 (11 AMA FORUM); 35-36.

9 The universe of "core IIAs" principally consists of BITs and other agreements that contain provisions on investment, so-called "other IIAs". Examples of the latter include free trade agreements (FTAs) or economic partnership agreements (EPAs). As regards their substantive obligations, "other IIAs", usually fall into one of three categories: IIAs including obligations commonly found in BITs; agreements with limited investment-related provisions; and IIAs focusing on investment cooperation and/or providing for future negotiating mandate on investment. In addition to "core IIAs", there are numerous other legal instruments that matter for foreign investment, including double taxation treaties (DTTs).

10 Examples include the interaction between IIAs and other bodies of international law or policy in the field of public health (e.g. the World Health Organization Framework Convention on Tobacco Control, WHO FCTC), environment (e.g. the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes) or human rights (e.g. International Covenant on Economic, Social and Cultural Rights), to name a few. In the context of ensuring coherence between investment protection and climate change, *WIR10* suggested a "*multilateral declaration"* clarifying that IIAs do not constrain climate change measures enacted in good faith.

11 In some countries the existence of an IIA is a prerequisite for the granting of investment guarantees.

12 This impact is generally stronger in the case of preferential trade and investment agreements (PTIAs) than with regards to BITs. See "The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries," UNCTAD Series on International Investment Policies for Development, December 2009; www.unctad.org. For a full discussion of FDI determinants, see *WIR98*.

13 See also Skovgaard Poulsen, Lauge N. and Aisbett, Emma (2011) "When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning." *Crawford School Research Paper No. 5*.

14 As discussed in *WIR04*, interaction can be either autonomous-liberalization-led or IIA-driven, or anywhere in-between.

15 Related are questions of forum-choice, double incorporation, dual liability and re-litigation of issues, all of which call for a careful consideration of how to manage the overlaps between agreements. See also Babette Ancery (2011), "Applying Provisions of Outside Trade Agreements in Investor-State Arbitration through the MFN-clause." *TDB*, 8 (3).

16 This is in line with the traditional view of international law, as governing relations between its subjects, primarily between States. Accordingly, it is impossible for an international treaty to impose obligations on private actors (investors), which are not parties to the treaty (even though they are under the jurisdiction of the respective contracting parties).

[17] Article 13 "Investor Obligation" provides: "COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made."

[18] In fact, in the course of the past century, international law has been moving away from the traditional, strict view towards including, where appropriate, non-State actors into its sphere. See, e.g., A. Bianchi (ed.) (2009), "Non-State Actors and International Law." (Ashgate, Dartmouth).

[19] Also the 2012 Revision of the International Chamber of Commerce (ICC) Guidelines for International Investment refer to investors' obligations to comply with the laws and regulations of the host State at all times and, in particular, to their obligation to comply with national and international labour laws, even where these are not effectively enforced by the host State.

[20] The aggregate amount of compensation sought by the three claimants constituting the majority shareholders of former Yukos Oil Company in the ongoing arbitration proceedings against Russia. See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228.

[21] *Ceskoslovenska Obchodni Banka (CSOB) v. The Slovak Republic,* ICSID Case No. ARB/97/4, Final Award, 29 December 2004. The case was brought by CSOB on the basis of consent to arbitration contained in the 1992 BIT between the Czech Republic and the Slovak Republic. The findings on liability and damages were based on the underlying contract and Czech law. For more information on ISDS consult http://www.unctad.org/iia-dbcases/cases.aspx.

[22] For details, see UNCTAD (2011) "Sovereign Debt Restructuring and International Investment Agreements." *IIA Issues Note, No.2*, www.unctad.org, *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

[23] Nottage, Hunter (2003), Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment, Journal of International Economic Law, 6(1), p.28.

[24] Based on six categories as identified in WTO (2000) "Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions," Note by Secretariat, WT/COMTD/W/77, 25 October 2000, available at www.wto.org. More recently, also the Doha Ministerial Declaration (2001) reaffirmed SDT as an integral part of the multilateral trade regime.

[25] COMESA Investment Agreement (2007), Article 14(3).

[26] Any comprehensive effort to reform the ISDS regime would also have to go beyond IIA clauses, and address other rules, including those for conducting international arbitrations (e.g. ICSID or UNCITRAL).

[27] Experience with ISDS has revealed numerous instances of unclear or ambiguous clauses that risk being interpreted in an unanticipated and broad manner. Therefore the table includes options to clarify. However, these clarifications should not be used by arbitrators to interpret earlier clauses that lack clarifications in broad and open-ended manner.

[28] Absence of ISDS – and hence of the possibility to be subject to financial liabilities arising from ISDS – may make it easier for countries to agree to certain standards of protections.

[29] Similarly, one can combine far-reaching liberalization or protection clauses with a possibility to lodge reservations (e.g. for pre- and post-establishment clauses, and for existing and future measures). See "Preserving Flexibility in IIAs: The Use of Reservations", UNCTAD Series on International Investment Policies for Development, June 2006; www.unctad.org.

[30] Interested stakeholders and experts are invited to provide feedback and suggestions through the dedicated UNCTAD IPFSD website, at www.unctad.org/IPFSD.