WTO Public Forum 2013

Unleashing the potential of FDI and trade in developing countries: The case for a multilateral agreement on investment

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Speaking Points

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A. Message: FDI is gaining importance, particularly in the context of increasing demands for, and diminishing supply of development finance

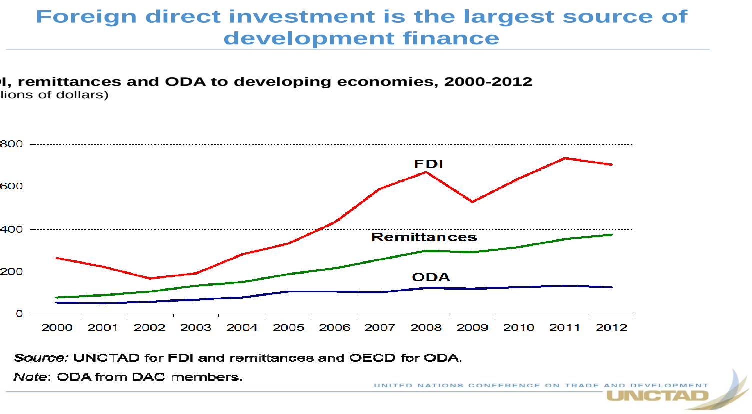
1. *The need exists to channel investment towards meeting the SDGs.*

Achieving the SDGs, in whatever final shape they will take, will require significant investment in areas such as agriculture, infrastructure and climate change adaptation and mitigation – well above current levels of such investment. For example:

- In *agriculture*, the FAO estimates that average *annual* net investment flows of US$83 billion are needed to meet projected demand for agricultural products in 2050 in 93 developing countries. Of this amount, Sub-Saharan Africa alone requires over US$10 billion per year.

- In *infrastructure*, the McKinsey Global Institute estimates that some $57 trillion total global infrastructure investment is required between 2013 and 2030, most of it in the developing world. For example, Africa's annual infrastructure needs are at least $93 billion a year, including in water, sanitation and irrigation.

2. *The existing investment backlog means the private sector will need to step in to fill the gap.*



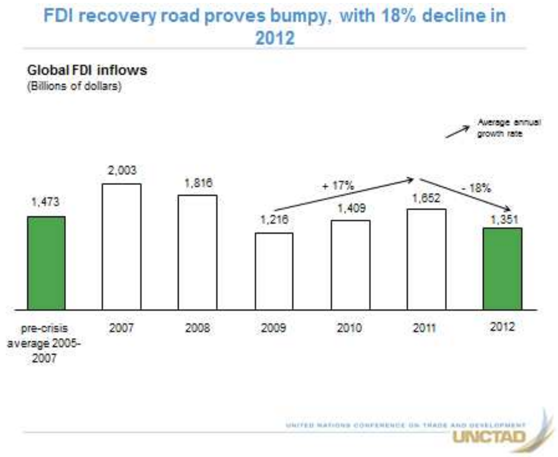
Public finances in developing countries are insufficient to meet current demands. At the same time domestic private sector investors are in many instances also insufficiently equipped to adequately meet investment backlogs.

- Private investment from other sources, notably foreign direct investment (FDI), will have to fill the gap.

- FDI to developing regions is already nearly six times higher than ODA ($703 billion compared with $126 billion in 2012), and in the current tight fiscal environment there is downward pressure on the latter.

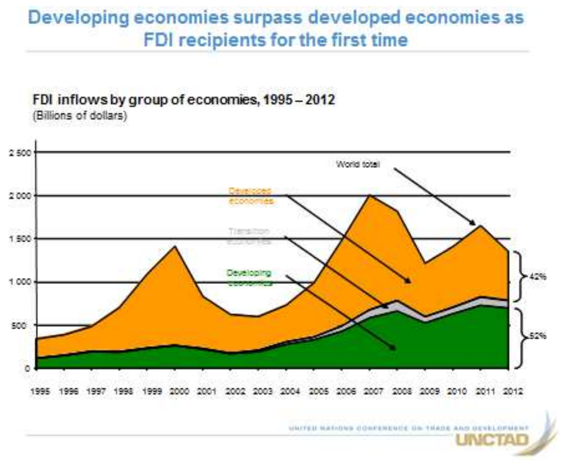
- FDI also exceeds other private capital flows such as remittances (at $375 billion in 2012); while the need also exists for the latter to be channelled more effectively towards sustainable development.

3. *However, current global FDI flows have slumped and are therefore not responding to needs.*



- *Global FDI fell by 18 per cent to $1.35 trillion in 2012.* This sharp decline was in contrast with other key economic indicators such as GDP, international trade (2.6 per cent growth in 2012) and employment, which all registered positive growth at the global level. Economic fragility and policy uncertainty in a number of major economies reined in investor sentiment.

- Furthermore, many transnational corporations (TNCs) reorganised their investments overseas, including through restructuring of assets, divestment and relocation. The road to FDI recovery is thus proving bumpy and may take longer than expected.



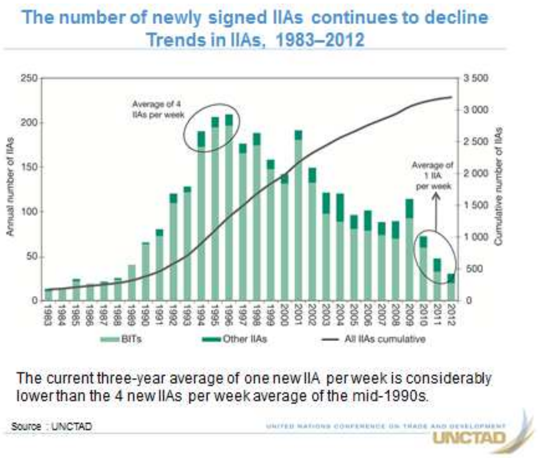
- *On the positive side, developing economies surpassed developed economies as FDI recipients for the first time in 2012.* FDI flows to developing economies proved to be more resilient than flows to developed countries, recording their second highest level at $703 billion in 2012. These flows accounted for a record 52 per cent of global FDI inflows, exceeding flows to developed economies for the first time ever, by $142 billion.

- In addition, developing economies' outward FDI reached $426 billion, a record 31 per cent of the world total. The global ranking of the largest FDI investors shows the continuing rise of developing and transition economies. Seven developing economies now rank among the 20 largest foreign investors in the world.

The key challenge is to channel investment into productive sectors and towards sustainable development objectives. In this context a sound and effective investment policy environment is more important than ever.

B. Message: International investment rule-making is at a crossroads and the current IIA regime is in transition

Unlike trade and finance, no multilateral system governs the global investment environment. The current international investment regime consists of a network of investment treaties, which at the end of 2012 counted 3,196 agreements (including 2,857 BITs and 339 "other IIAs").



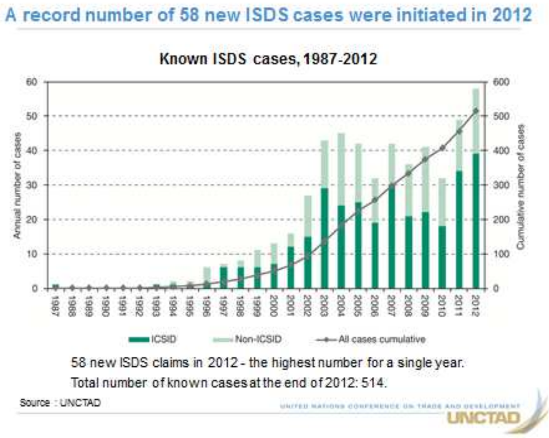
1. *International investment rule-making is shifting from the bilateral level to the regional level*

- *The number of newly-signed bilateral agreements continues to decline.* The 20 BITs signed in 2012 represent the lowest annual number of concluded treaties in a quarter century. From 2010 to 2012, on average one IIA was signed per week. This was a quarter of the frequency rate during the peak period in the 1990s when an average of four treaties was concluded per week.

- *At the same time, an increasing number of countries are joining regional investment-related agreements.* At least 110 countries are involved in 22 regional negotiations.

    - *Regionalism can provide an opportunity to rationalize the IIA regime* and create a more coherent and manageable set of investment policies. If parties to nine such negotiations (i.e. those where BITs-type provisions are on the agenda) opted to replace their respective BITs with an investment chapter in the regional agreement, this would consolidate today's global BIT network by more than 270 BITs, or close to 10 per cent.

    - However, *in reality the opposite is happening*. Regionalism is leading to a proliferation of the number of investment treaties, rather than consolidating the treaty network. Therefore regionalism leads to a multiplication of treaty layers, making the network of IIA obligations even more complex and prone to overlap and inconsistency.

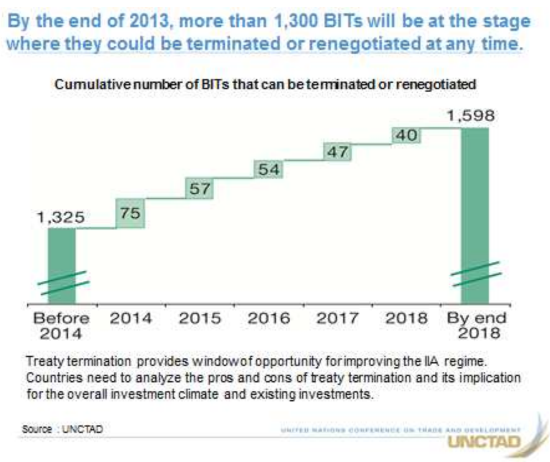


2. *Investor-State dispute settlement (ISDS) is under pressure with calls for reform.*

- *In 2012, 58 new known ISDS cases were initiated.* This brings the total number of known cases to 514 and the total number of countries that have responded to one or more cases to 95. The number of investment disputes in fact exceeds the number of trade disputes brought within the WTO dispute settlement structure. In 2012, 27 new complaints (requests for consultations) were initiated by WTO Members, bringing the overall number of WTO complaints to 454.

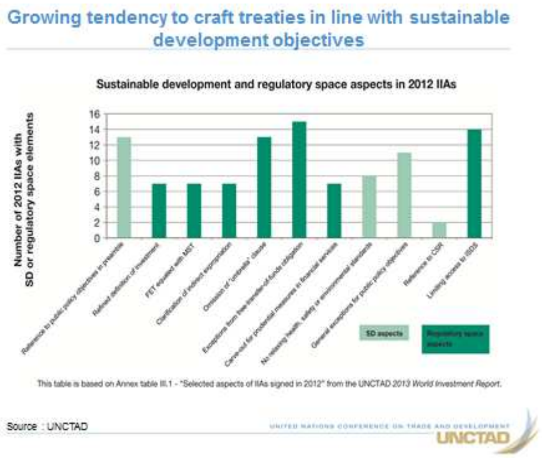
- It is worth noting that the 58 cases brought last year constitute the highest number of known ISDS claims ever filed in one year and confirm foreign investors' increased inclination to resort to investor-State arbitration. In light of the increasing number of ISDS cases, and persistent concerns about the ISDS system's deficiencies, the debate about the format of the ISDS mechanism has gained momentum, especially in those countries and regions where ISDS is on the agenda of IIA negotiations. As a response, UNCTAD, in WIR 2012, identified five potential reform paths for ISDS.

3. *An increasing number of countries review and revise their investment treaty models; the expiration of a huge number of treaties provides opportunities for renegotiation.*



- Many countries have reviewed or are in the process of reviewing their investment treaty models, to improve their response to countries' needs for investment. Review options include contracting States' right to clarify the meaning of treaty provisions (e.g. through authoritative interpretations), the revision of IIAs (e.g. through amendments), the replacement of older IIAs (e.g. through renegotiation), or the termination of IIAs (either unilaterally or by mutual consent).

- Treaty expiration can support several of the above options. By the end of 2013, more than 1,300 BITs will be at a stage where they may be terminated or renegotiated at any time, creating a window of opportunity to address inconsistencies and overlaps in the multi-faceted and multiple-layered IIA regime, and to strengthen its development dimension. In taking such actions, countries need to consider the pros and cons in the context of their investment climate and their overall development strategies.



4. *Investment policy-making at large is undergoing a paradigm shift.*

- Over the past number of years, investment policy-making has responded to a series of challenges (changing economic realities, multiple crises, and the increased emphasis on sustainable development needs), which has brought about a fundamental shift in approach to this type of policy-making.

- Inclusive growth and sustainable development have emerged as key policy objectives. This is not only evident from the number of newly-concluded IIAs, but also from the evolvement of their content. In other words, the IIA regime is not only changing in numbers, but also in substance.

- Most importantly, new IIAs tend to include sustainable development-friendly provisions.

    - For example, IIAs concluded in 2012 tend to include sustainable development-oriented features, such as references to the protection of health and safety, labour rights and the environment.

    - These sustainable development features are supplemented by treaty elements that aim more broadly to preserve regulatory space for public policies or to minimize states' exposure to investment litigation in particular.

C. Message: There is a strong case to be made for multilateral cooperation in international investment rule-making; UNCTAD advocates a two-pronged approach

1. *There is a compelling need for a multilateral mechanism to deal with today's investment policy-making challenges.*

    - In response to changing economic realities and multiple crises, the approach to investment policy-making is changing. I have talked about the manner in which this change in approach reflects itself in newly-concluded treaties. Most importantly, inclusive growth and sustainable development have emerged as key objectives for international investment policy-making.

    - Moreover, the challenge of how to deal with the complexity of a fragmented treaty regime, characterized by overlaps and incoherence, suggests there is a compelling motivation for a multilateral mechanism that deals with today's investment policy-making challenges.

    - UNCTAD has long provided the mechanism for such exchange, with the institution recognized as the focal point of the United Nations system to deal with IIA-related issues. Over the past years, UNCTAD has taken a two-pronged approach:

        - Formulating comprehensive, expert-led guidance for investment policy-making; and

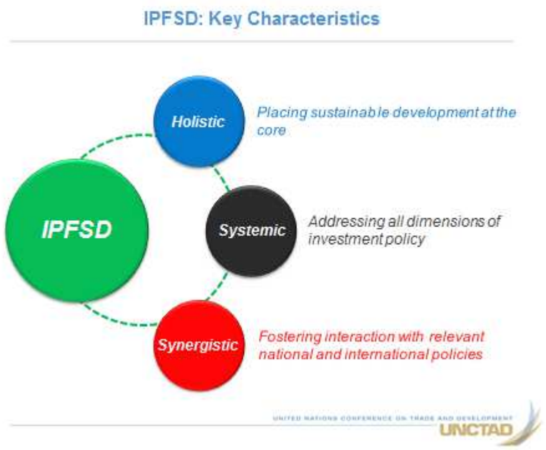
        - Facilitating a multilateral and multi-stakeholder forum for an inclusive dialogue to build consensus on investment and sustainable development issues.

2. *UNCTAD launched in 2012 its Investment Policy Framework for Sustainable Development (IPFSD).*

    - The Framework is a comprehensive embodiment of UNCTAD's experience in the area of investment policy-making developed in line with the objectives of inclusive growth and sustainable development and through a process that involved top experts and a wide range of stakeholders. It is designed to serve as a key point of reference for investment policy-makers and has also become the basis for UNCTAD's capacity-building and technical cooperation in this area.

    - The IPFSD is meant to provide guidance for policy-making in the investment field. It offers a "policy at a glance" for politicians (the Core Principles), a handbook for national policy-makers (the national investment policy guidelines), and a "checklist of options" for treaty negotiators (the policy options for IIAs). The Framework also serves as a tool for technical cooperation and capacity-building in the area of making investment work for development. It provides the framework for UNCTAD's Investment Policy Reviews (IPRs); it is the basis for updating national regulatory regimes; and it is used as a menu for training workshops and a handbook for general advisory services.

3. *Ultimately, this process should contribute to a broad multilateral understanding of key issues, and make the international investment regime more coherent and conducive to sustainable development.*



- There are significant benefits associated with multilateral consensus-building on investment policies. UNCTAD facilitates an inclusive, transparent and structured debate on key issues, for which the IPFSD and various UNCTAD processes, including our Investment Policy Hub, can provide the foundation. Through proper staging and sequencing, multilateral consensus-building can move from loose to closer forms of international cooperation, yielding practical outcomes along the way.

- In the longer term, the IPFSD could become a stepping stone for formulating common denominators for future multilateral investment rules.

- In the final analysis, while the current appetite is weak for negotiating a binding multilateral framework for investment, there is a compelling need to establish a multilateral mechanism through which parties can engage with investment policy-making challenges from a sustainable development perspective.
