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The primary purpose of IIAs is investment protection, but a growing call has emerged to make IIAs sustainable development-oriented. As observed by UNCTAD, IIAs concluded in 2017 have shown a clear sustainable development orientation. These IIAs include many provisions explicitly referring to sustainable development issues, and many incorporate general exceptions. Making sustainable development-oriented IIAs essentially means that IIAs should not only serve the traditional purpose of investment protection, but should also play a facilitative and promoting role for the contracting states in pursuing sustainable development.

The Asian-Pacific region hosts over 60 countries of different developmental levels. The majority of them are developing countries, including over a dozen LDCs and LLDCs. These countries not only have a pressing need of importing FDI to boost economic development, but also face growing sustainable development challenges associated with foreign investments. A helpful way to confront such challenges is to make IIAs more sustainable development-oriented.

IIAs are different with regard to their levels of sustainable development-orientation. In assessing whether and to what extent an IIA is sustainable development-oriented, ESCAP commissioned a study to analyze the number, types and subtypes of SDPs contained in a sample of Asian-Pacific IIAs.

First, the analysis considered the number and distribution of SDPs incorporated in the IIAs. This decides the availability of SDPs in the IIAs, which further decides whether the IIAs are capable of addressing sustainable development concerns.

Second, the types of the SDPs were analyzed. Depending on the relevance of the SDPs and sustainable development, the SDPs are divided into 8 major types. The types of the SDPs decide what kind(s) of sustainable development concerns the IIA can address. They are general provisions (GEN), anti-corruption provisions (ATC), environmental provisions (ENV), labor or human rights provisions (LHR), substantive transparency provisions (TRL), procedural transparency provisions (TRA), national security provisions (NES) and responsible business practice provisions (RBP). As we can see, while some types of SDPs deal with environmental issues, many deal with social issues.

Third, the subtypes of the SDPs were analyzed. Depending mainly on the nature of the obligation imposed by the SDPs on the contracting states or foreign investors, the SDPs are further categorized into 17 subtypes. To a large extent, the subtypes of the SDPs decides the practical effectiveness of the IIA in addressing sustainable development concerns.

The study showed that there exists a substantial sustainability gap between the two groups of IIAs. Compared with the 20 selected IIAs, BITs of Asian-Pacific LDCs and LLDCs not only contain smaller number of SDPs, but these SDPs are also of less types and subtypes. This suggests that BITs of these Asian-Pacific countries in general are less sustainable development-oriented. Further, the study also suggests that, as BITs of Asian-Pacific LDCs and LLDCs contain less social SDPs and allow narrower access of non-state stakeholders to engage in investment governance. In this sense, these BITs appear less socialized and governance-oriented.

While recognizing that making sustainable development-oriented IIAs is a sensible policy option and an emerging trend for countries in confronting sustainable development challenges associated with FDI, it does not necessarily mean that an IIA with a high level of sustainable development-orientation is suitable for all countries, or that such an IIA can best serve the development goals of a country. Thus, in making sustainable development-oriented IIAs, national situation and policy purpose must be taken into consideration.

In this regard and in conclusion, it should be recognized that IIAs are primarily designed to protect investors and their investments and not to advance sustainable development of host countries. However, IIAs can be adapted to be aligned with national sustainable development policy goals. It is recognized that in traditional IIAs, certain clauses have been used, or perhaps abused, to the advantage of investors. Clearly defining the concept of investment in the context of sustainability and the concept of such standard clauses as fair and equitable treatment while improving transparency in ISDS would already go a long way towards addressing legitimate sustainability concerns of host countries. Other than that, countries could strengthen their national laws and regulations, in particular those related to environment and social issues, that would apply equally to both domestic and foreign investors. In this context, the need to align IIAs with national laws and regulations is well recognized. ESCAP is providing technical assistance to its member Countries to strengthen and improve national investment policies, laws and regulations and facilitation and is looking forward to working with partners, in particular UNCTAD, to continue this assistance.

Thank you.