

# Investment Facilitation for Development

A toolkit for policymakers

Technical paper  
Second edition

Edited by:  
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## About this paper

Investment facilitation is key to a post-pandemic recovery and achieving the Sustainable Development Goals. This paper – updated since April 2020, when the first edition was published – combines insights and analytical expertise relevant to negotiating and implementing investment facilitation measures for development. It is intended to support the World Trade Organization (WTO) negotiations on this topic, as well as unilateral, bilateral and regional efforts to facilitate sustainable foreign direct investment flows.

The publication includes lessons from negotiating and implementing relevant WTO agreements, an updated inventory of investment facilitation measures, as well as the proceedings of some 40 stakeholder consultations conducted under the ITC-DIE project on investment facilitation for development. Particular emphasis has been placed on the development dimension of investment facilitation.

This paper has not been edited by ITC; the views expressed are the authors' own.

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This publication was compiled and edited by Axel Berger, Deputy Director (interim), German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE); Yardenne Kagan, Project Officer, International Trade Centre (ITC); and Karl P. Sauvant, Resident Senior Fellow, Columbia Center on Sustainable Investment (CCSI). It was produced within the framework of the ITC-DIE project on Investment Facilitation for Development, led by Quan Zhao, Trade Policy Adviser, ITC; Rajesh Aggarwal, Director (oic), Division for Market Development, ITC; Yardenne Kagan; Axel Berger; and Karl P. Sauvant.

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## About the project

The investment facilitation negotiations at the WTO aim to create a multilateral framework for a more transparent, efficient and investment-friendly business climate, to help advance development, as well as enhanced cooperation on investment matters. A successful outcome of these negotiations can help revitalize global investment by enhancing transparency, streamlining procedures, improving regulations, encouraging foreign direct investment (FDI) that directly contributes to development, and strengthening international cooperation.

To achieve this goal – thereby creating an enabling environment to boost FDI flows into productive activities of resilient and sustainable economies – the joint ITC-DIE project on Investment Facilitation for Development has worked to address the capacity-building needs of negotiators, policymakers and investment promotion agencies to strengthen their negotiation capacity and build knowledge on this important topic. The results of this project are also relevant for bilateral and regional negotiations dealing with investment facilitation, as well as for the efforts of individual countries seeking to attract sustainable FDI.

The project focuses on five complementary activities:

1. Convening a Commentary Group to provide practical insight into investment facilitation; the group comprises representatives from investment promotion agencies, investment service providers and the private sector, and is being co-organized with the World Economic Forum (WEF);
2. Convening an Expert Network of academic experts to explore legal, political and economic challenges to be addressed in the negotiations through a series of solution-oriented policy papers;
3. Preparing an inventory of measures that facilitate the flow of sustainable FDI, including measures focused on directly increasing the development impact of FDI, and containing specific language on how to reflect these measures in international agreements;
4. Delivering a series of capacity-building workshops and regional roundtables (with the WEF) for negotiators and policymakers to share ground-level perspectives and showcase best practices; these workshops and roundtables are complemented by a series of capacity-strengthening webinars for representatives in investment promotion agencies and government officials, co-organized with the World Association of Investment Promotion Agencies (WAIPA) and the WEF.
5. Organizing regular webinars to inform the public about the status of key issues of the negotiations, elicit expert insights and offer a platform for discussion.

The materials resulting from these activities are compiled in this publication. A list of the events implemented in the framework of the project is contained in Annex I. <sup>1</sup> For further information, see <https://www.intracen.org/itc/Investment-Facilitation-for-Development/> or contact Rajesh Aggarwal, Director (oic), Division for Market Development, ITC, or Quan Zhao, Trade Policy Adviser, Division for Market Development, ITC.

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<sup>1</sup> Members of the project team were also invited to speak in various forums on issues related to investment facilitation and the outcomes of the ITC-DIE project. For example, as part of the WTO Investment Facilitation for Development (IFD) negotiation meetings, Axel Berger spoke, on 31 May 2021, about “Possible options to give legal effect to the outcome of the negotiations on investment facilitation for development: Options to integrate an IFD Agreement into the WTO Rulebook”, and Karl P. Sauvant moderated, on June 2021, a panel on “Lessons learned from international organizations active in the implementation of investment facilitation reforms/measures” as part of a “Dedicated session on implementation, technical assistance and capacity building” organized by the WTO.

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## Acronyms

AC	Additional commitments
AEO	Authorized economic operator
BIT	Bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement between Canada and the EU
CFIA	Cooperation and Facilitation Investment Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRM	Customer relationship management
CSR	Corporate social responsibility
DIE	German Development Institute / Deutsches Institut für Entwicklungspolitik
DSU	Procedures Governing the Settlement of Disputes
ENT	Economic needs test
EU	European Union
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
FDI	Foreign direct investment
FET	Fair and equitable treatment
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
GIS	Geographic information systems
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICTST	International Centre for Trade and Sustainable Development
IDB	Inter-American Development Bank
IE	Indirect expropriation
IFD	Investment Facilitation for Development
IGM	Investment grievance mechanism
IIA	International investment agreement
ILO	International Labour Organization
IPAs	Investment promotion agencies
ISA	Investor-state arbitration
ISDS	Investor-state dispute settlement
ISO	International Organization for Standardization
ITC	International Trade Centre
JSI	Joint Statement Initiative
LDC	Least developed country
MA	Market access
M&E	Monitoring and evaluation
MIGA	Multilateral Investment Guarantee Agency
MFN	Most-favoured-nation treatment
MNEs	Multinational enterprise
MSMEs	Micro, small and medium-sized enterprises
NGOs	Non-governmental organizations
NT	National treatment
NTFC	National Trade Facilitation Committee

OECD	Organisation for Economic Co-operation and Development
ODI	Official development assistance
OPA	Open plurilateral agreement
PDF	Portable document form
PPP	Public-private partnership
PTA	Preferential trade agreement
R&D	Research and development
RSI	Recognized sustainable investor
SDGs	Sustainable Development Goals
SMEs	Small and medium-sized enterprises
SOPs	Standard operating procedures
TBT	Agreement on Technical Barriers to Trade
TFA	Trade facilitation agreement
TRIPS	Trade-related aspects of intellectual property rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization
URL	Uniform resource locators
VSS	Voluntary sustainability standards
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WAIPA	World Association of Investment Promotion Agencies
WBG	World Bank Group
WCO	World Customs Organization
WEF	World Economic Forum
WTO	World Trade Organization

## Executive Summary

Since the previous version of this publication (September 2020),<sup>2</sup> WTO negotiations on Investment Facilitation for Development have made steady progress. The number of participating members has increased to over 110, and the consolidated draft negotiation text has been updated to reflect progress made regarding a number of provisions.

A number of investment facilitation measures that were highlighted in the first edition of this publication seem to have been included in the current WTO Investment Facilitation for Development (IFD) Agreement draft text, or are under consideration by Members. Among the measures that *indirectly* contribute to development by increasing FDI inflows, the following seem to be included: maintain a list of support measures offered to inward investors, through online portals and notification to the WTO; enable the payment of fees and charges online; use new technology to facilitate investment, e.g., digital single window; grant permits or licences automatically if no government action is taken within statutory time limits: ‘silence is consent’; provide for risk-based approvals as part of authorisation procedures; track complaints through an investment grievance mechanism or ‘early warning system’ to identify and address issues early before they worsen; make it easy to secure work permits for skilled expatriates by making available e-visas or ‘green channels’; make publicly available lists of support measures for outward investors through online portals; and publish information on requirements and procedures for outward investment, if any, to assist interested parties.

Furthermore, the ITC-DIE project called to facilitate not only more FDI, but also more sustainable FDI through the inclusion of facilitation measures aimed at *directly* increasing the development impact of FDI, to fully reflect the ‘for development’ purpose of the IFD Agreement. The first edition of this publication proposed the following direct investment facilitation measures that seem to have been included in the IFD Agreement draft text or are under consideration by negotiators: encourage foreign investors to incorporate internationally recognised principles, standards and guidelines of responsible business conduct; build and maintain a database of local enterprises to help investors identify potential subcontractors and local partners; and establish supplier-development programmes to increase the number and capacity of qualified local enterprises that can contract or partner with foreign affiliates.

The project also emphasised the importance of providing technical assistance to developing countries and least developed country (LDC) Members to enhance their ability to facilitate FDI and, specifically, sustainable FDI. The current IFD Agreement draft text includes a section on the provision of technical assistance and capacity building for developing countries and LDC Members.

In addition, the first edition of this publication included the recommendation to insulate the IFD Agreement from international investment agreements, and especially their dispute-settlement provisions, through appropriate treaty-interface clauses, to avoid the use of the IFD Agreement in investor-state dispute-settlement cases; the current IFD text contains an appropriate clause in this regard.

This updated version synthesises what has been learned from numerous capacity-building workshops and consultations with stakeholders (governments, international organisations, investment promotion agencies (IPAs), the private sector, civil society, academia) conducted in the framework of the ITC-DIE project on Investment Facilitation for Development (parts of the project are co-organised with other organisations<sup>3</sup>). For the reports and a chronology of the meetings undertaken in the framework of the ITC-DIE project, see Annex I.

### Additional investment facilitation measures

This section lists actionable investment facilitation measures emerging from the stakeholder consultations and projects in developing countries specifically intended to identify impactful measures. They are grouped into general investment facilitation measures and measures that directly increase the development contribution of FDI. A few of the measures that are included in this section may have been suggested during the IFD negotiations by delegations, but have not yet been included in the IFD Agreement draft text. Draft treaty text formulations for some of them are contained in the *Inventory* (Chapter 5).

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<sup>2</sup> See Axel Berger and Karl P. Sauvant, eds., *Investment Facilitation for Development: A Toolkit for Policymakers* (Geneva: ITC, 2021), available here: <https://www.intracen.org/publication/investment-facilitation-for-development-toolkit-policymakers/>.

<sup>3</sup> See the ‘Acknowledgements’ section of this volume for the full list of organisations.

### General investment facilitation measures

- Enable tracking the status of foreign investment applications online.
- Enable ‘lite processing’ for small and medium-size enterprises (SMEs) applications for establishing their investment projects.
- Build and maintain internal systems to manage relationships with potential and existing investors, such as standard operating procedures, investor information systems and investor relationship management systems built on customer relationship management software.
- Establish mechanisms for aftercare to facilitate the operation of investments.
- Allow fast-track approval processes for reinvestment that are in line with countries’ rules and regulations.
- Establish mechanisms for public-private dialogues, such as online portals, regular meetings and roundtables to discuss issues.
- Use online and social media platforms by host country agencies to identify foreign investors, arrange meetings and share investment opportunities with potential foreign investors.
- Establish a global IPA market platform where IPAs can look for benchmarking information and contacts and list bankable projects, as well as connect with each other and with investors.

### Measures that directly aim at increasing the development contribution of FDI

- Create a special category of ‘recognized sustainable investor’ (RSI) to incentivise investors to invest sustainably, following the precedent of the Authorized Operator in the Trade Facilitation Agreement; RSIs receive additional benefits if they meet certain clear-defined and publicly available criteria.
- Develop targeted strategies to facilitate sustainable FDI, e.g., ‘red carpet’ service for investments that have a significant positive sustainable development impact.
- Designate a responsible business conduct coordinator to facilitate investor relations with local communities, stakeholder associations and civil society.
- Assess the potential development impact of large FDI projects through *ex ante* impact assessments, to ensure they align with sustainable development goals.
- Encourage business partnerships between foreign affiliates and local suppliers in host countries to help upgrade the latter.
- Foster partnerships between foreign affiliates and local universities or other bodies to create centres of excellence for training or research and development.
- Encourage facilitation measures that develop quality employment, such as training programmes focused on youth employment and other groups that may require additional support, as well as worker safety.
- Facilitate green FDI that assists economies to become carbon neutral, including by facilitating the transfer and dissemination of environmental technologies, renewable energy and energy efficient investments.
- Encourage the facilitation of agendas with a view towards promoting gender-equal access to FDI, e.g., through the facilitation of business partnerships and the creation of information networks that foster gender-equal opportunities and participation in FDI flows.
- Facilitate sustainable FDI projects through partnerships between FDI-competent authorities in host and home economies, including to help investors find bankable projects, support knowledge transfer and experience sharing and facilitate two-way FDI flows.
- Establish clear criteria linking home-country support measures to the observation of internationally recognised standards of responsible business conduct.

## Negotiation process and implementation

- Provide opportunities for stakeholders (e.g., investors, trade unions, civil society, academia) to comment on the negotiations to ensure a high-quality IFD Agreement and help build consensus.
- Support the participation of delegates and experts from developing countries (especially LDCs) in the negotiations, to allow all WTO Members to actively contribute to the negotiations.
- Develop a self-assessment tool (including a template and a guide) to support gap analyses and need assessments to help Members determine the pace of implementation of the Agreement and technical assistance and capacity building needs. This tool should be developed with the involvement of the relevant intergovernmental organisations.
- Establish a sufficiently large technical assistance and capacity building programme and trust fund to assist developing countries (especially LDCs) in implementing the Agreement, which link the implementation of certain provisions to technical assistance and capacity building.
- Ensure that the WTO Investment Facilitation Committee becomes a knowledge hub for sharing best practices and policy learning among the Agreement's signatories, to support implementation and identify implementation bottlenecks, as well as a standing mechanism for stakeholder consultations, including investors, to ensure the Agreement achieves its intended goals.
- Agree on a built-in treaty-mandated future work programme to ensure that, among others, special attention is given to facilitating sustainable FDI and responsible business conduct. The initial future work programme can be drawn from Member proposals, while also allowing for additional areas of work.
- Establish national investment facilitation committees to help coordinate investment facilitation efforts by the domestic actors involved both at the national and sub-national levels and obtain stakeholder inputs.

## At a glance

This publication consolidates a number of technical papers and meeting reports produced under the ITC-DIE project on Investment Facilitation for Development. It can serve as a capacity-building tool for trade and investment negotiators, policymakers and IPAs on issues related to investment facilitation.

### **Investment Facilitation for Development – A WTO/GATS Perspective**

By extending to a policy area not subject to existing WTO disciplines, a prospective IFD Agreement would need to command a consensus among the WTO Membership. Moreover, by seeking to develop a generic set of investment disciplines straddling the WTO's goods-services divide, the negotiations inevitably overlap with provisions under the WTO General Agreement on Trade in Services (GATS), while introducing concepts used in merchandise trade under the WTO General Agreement on Tariffs and Trade (GATT). Any initiative aimed at establishing a comprehensive framework will thus have to overcome conceptual differences between the two agreements. Given such differences, questions remain over the nature and feasibility of a legally binding investment facilitation framework at WTO. This chapter assesses the investment facilitation negotiations from the WTO/GATS perspective.

### **Insulating the WTO Framework from International Investment Agreements**

This chapter observes that, as investment facilitation elements can be found in many IIAs, an IFD Agreement is likely to have certain subject-matter overlaps with IIAs. Thus, it is possible for obligations to be imported into an IIA through the application of such elements in ISDS proceedings. Because such importation could create profound uncertainty, the chapter proposes solutions to insulate the IFD Agreement from both IIAs and ISDS, such as by inserting proper treaty interface clauses. While several types of such clauses would be helpful, complete insulation also calls for reforms of IIAs and ISDS.

### **From Trade to Investment Facilitation: Parallels and Differences**

This chapter reflects on lessons from the experience of negotiating and implementing the TFA. It also examines the ramifications with respect to the ongoing negotiations by a large group of WTO Members launched at the end of 2020 to agree on an IFD Agreement. The author suggests that elements of what was done in the TFA can be applied in the IFD Agreement negotiations and notes differences between the two areas; these have implications for both ongoing negotiations and the design of potential provisions of an IFD Agreement.

### **Legal Options for Integrating a New Investment Facilitation Agreement into the WTO Structure**

This chapter reflects on the possibilities for integrating an IFD Agreement into the WTO rulebook. Its purpose is to briefly consider the legal aspects of this question, clarify options for such integration and consider the feasibility and desirability of each of them. Given the current stage in the process, such a discussion needs to be based on a set of working assumptions behind the negotiating initiative regarding the expected outcome. This chapter reviews these working assumptions, while addressing the options available according to current WTO rules.

### **What Foreign Investors Want: Findings from an Investor Survey of Investment Facilitation Measures in Latin America and the Caribbean**

This chapter presents the results of a survey that queried foreign investors active in the Latin America and Caribbean region on the importance they attach to a key set of investment facilitation measures. The results of the survey are put into perspective by highlighting consistencies and gaps in relation to the current state of the IFD negotiations and the actual level of adoption of investment facilitation measures at the national level. The survey yielded important insights that may contribute to the ongoing negotiations on an IFD Agreement at the WTO, as well as to other negotiations of international investment agreements that address issues of investment facilitation.

### **An Inventory of Measures to Facilitate the Flow of Sustainable FDI, Second Edition**

This updated *Inventory* of measures is a tool to help participants engage in the IFD Agreement negotiations, as well as negotiators of other international investment agreements and individual IPAs seeking to facilitate sustainable FDI. It is an informal compilation of investment facilitation measures, their rationale and ways in which they can be implemented in practice. The *Inventory* does not include measures related to investment protection, ISDS or market access, nor does it address the conceptual distinction between investment promotion and investment facilitation measures; hence, some measures in the *Inventory* may be categorized by some as investment promotion measures.



## Chapter 1 Investment Facilitation for Development – A WTO/GATS Perspective

*Contributed by Rolf Adlung, Pierre Sauvé and Sherry Stephenson*

Investment is a precondition for economic growth and development. International investment flows help expand a country's resource base and are commonly regarded as a major source, and a powerful vector, of technical progress. In turn, such expectations have prompted a variety of policy initiatives since the mid-1990s aimed at harnessing the development promise of FDI at the bilateral, regional and multilateral levels.

Such expectations also explain participants' strong endorsement at the 11th WTO Ministerial Conference of a Joint Statement on Investment Facilitation for Development. The Statement has since been renewed and is today endorsed by more than 100 Members (counting the EU-27 Members individually). No other initiative has garnered as much support in the wake of this Conference.<sup>4</sup>

### Creation of a multilateral framework

Signatories of the Joint Statement envisage the creation of a multilateral framework aimed, among other things, at facilitating the greater participation of developing country and least-developed country Members in global investment flows. The discussions are intended to be 'Member-driven, transparent, inclusive and open to all WTO Members'.<sup>5</sup>

Yet, three items, widely considered as particularly contentious, were explicitly excluded from the outset: market access, investment protection, and ISDS. Accordingly, this chapter focuses on a range of procedural and organizational aspects of the ongoing talks, including possible improvements in transparency, predictability, efficiency and consistency of national investment regimes.

By aiming to develop a generic set of investment disciplines straddling the WTO goods-services divide, the initiative inevitably overlaps with provisions governing services trade under the General Agreement on Trade in Services (GATS). This is hardly surprising given that more than 60% of the world's FDI stock is in services and, thus, covered by GATS.

Accordingly, government measures affecting investment conditions in services, in whatever context, are subject to the most-favoured-nation treatment (MFN) clause found in Article II of GATS, apart from a limited range of exceptions, including for preferential trade agreements (PTAs). Yet, analysis of these exceptions and of Members' compliance with relevant GATS obligations is complicated by the reality of significant definitional and substantive variations between, and sometimes even within, the agreements concerned.

Interestingly, the national treatment (NT) obligation does not feature among the three items explicitly excluded from further consideration by the Joint Ministerial Statement. Indeed, it appears almost inconceivable that an agreement meant to facilitate investment for development would not, as a general principle, provide for the treatment of established foreign investors on a non-discriminatory basis.

Yet, the exclusion of investment protection from the scope of the negotiations, according to the Joint Ministerial Statement, is tantamount to eschewing NT, one of the key obligations in international investment agreements. It remains to be seen whether such a (perceived) gap will be addressed at a later stage.

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<sup>4</sup> Apart from ongoing talks on investment facilitation, plurilateral discussions proceed among WTO Members under three other Joint Statements agreed at the Buenos Aires Ministerial Conference, dealing with electronic commerce, domestic regulation in services and MSMEs.

<sup>5</sup> As of 9 October 2020, 105 WTO Members had signed the Joint Ministerial Statement on Investment Facilitation for Development, issued on 5 November 2019. (WTO Document WT/L/1072/Rev.1)

## Organization of processes

Another issue of key importance concerns the organization of the negotiation and implementation processes. The Joint Ministerial Statement envisages a multilateral framework on Investment Facilitation for Development. This rules out the creation of an exclusive (e.g. constrained reciprocity) plurilateral agreement modelled, for example, on the WTO Government Procurement Agreement.

## Importance of consensus

A multilateral framework is realistically conceivable only in the form of an agreement that is endorsed by the full WTO Membership, while binding only a critical mass of signatories that are ready to accept the policy constraints involved and willing to extend the agreement's benefits to all Members, including those not assuming reciprocal obligations.

Decisions taken on the basis of an explicit consensus may not be legally required in all instances for the adoption of an open plurilateral agreement that builds on and deepens existing obligations among groups of Members. However, this has been standard WTO procedure to date, in accordance with Article IX:1 of the WTO Agreement.<sup>6</sup>

Insofar as a prospective investment regime extends to policy areas not subject to existing WTO disciplines, i.e. foreign investment in non-service sectors, a consensus decision appears warranted in any event. The Nairobi Ministerial Declaration of 2015 explicitly confirmed that a decision to launch multilateral negotiations on new issues would need to be agreed by all Members.<sup>7</sup> Such a decision arguably does not appear within reach in the current circumstances.

## Further challenges

Behind these political/institutional impediments, partly attributable to WTO's state of affairs, lies a further challenge. As already indicated, any initiative aimed at establishing a comprehensive Investment Facilitation for Development (IFD) Agreement would have to overcome deeply enshrined gaps between the underlying legal regimes of GATS and GATT, even in pursuit of quite similar policy aims. For example, while essentially limited to cross-border trade, the subsidy- and regulation-related disciplines under GATT are significantly broader and deeper than those under its services counterpart.

Given such differences, questions remain over the nature of a consistent common framework. In the end, would negotiators need to compromise either on cross-sectoral consistency, and devise two separate regimes, or on legal enforceability, and focus on developing a comprehensive understanding on a best-efforts basis? These issues are taken up in the analysis that follows.

## Multilateral rules governing investment in services: GATS

It may be surprising, at first glance, to refer to a trade agreement in an investment context. Yet, the definitional scope of services trade under GATS is significantly broader than that of conventional agreements governing merchandise trade. It extends *inter alia* to services provided by foreign suppliers that are commercially established in a host-country market. Indeed, 'commercial presence' (Mode 3) is by far the most economically relevant mode of supply, accounting for close to 60% of total services trade covered by the Agreement.

It is the mode of supplying services against which WTO Members have, to date, shown the highest propensity to schedule commercially meaningful commitments, a trend that reveals the economic benefits host members generally associate with larger FDI inflows in services markets as well as their continued ability (and policy preference) to exercise regulatory dominion over foreign-established firms.

The other modes of supply under GATS relate to cross-border trade (Mode 1), the consumption of services abroad (Mode 2) and the supply of services through natural persons in a host country (Mode 4). Access conditions on Mode 4 are also relevant in the current context as they extend not only to self-

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<sup>6</sup> The Article calls upon Members to continue 'the practice of decision-making by consensus followed under GATT 1947'. Relevant cases include the Information Technology Agreement, initiated in 1996, its extension in 2015, and the Fourth and Fifth Protocols to GATS on telecommunications and financial services, respectively. The negotiations on the two Protocols were concluded in 1997 (Fourth Protocol) and 1999.

<sup>7</sup> Nairobi Ministerial Declaration, WTO Document WT/MIN(15)/DEC, 21 December 2015. Last accessed on 10 March 2021 from [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/mindecision\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm)

employed professionals and to foreigners employed by foreign-owned service suppliers, but also to business visitors who enter a country to prepare for, or to carry out, transactions under other modes.

The ability to send key personnel abroad to establish and/or operate foreign affiliates is generally an important factor in a company's investment strategy. Yet, the Mode 4 commitments of virtually all WTO Members remain exceedingly shallow, although most prevalent in regard to intra-company transferees.<sup>8</sup>

### The MFN principle

As with GATT, a key element of GATS is the MFN principle, which applies to any government measure affecting services trade under whatever mode of supply.<sup>9</sup> Pursuant to GATS Article II, each Member is obliged to 'accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and suppliers of any other country.' This applies across the full policy range, apart from carve-outs for PTAs, recognition initiatives concerning standards, licences, etc., and measures individual Members had listed as MFN exemptions.<sup>10</sup>

In addition, like many other agreements, GATS features a range of general exceptions covering *inter alia* measures necessary to protect public morals, life and health, etc. (Article XIV), as well as various national security-related exceptions (Article XIV bis). Very few sectors or sector segments are excluded *per se* from the scope of the Agreement; these concern services directly related to the exercise of traffic rights, i.e. a key segment of air transport, and services supplied in the exercise of governmental authority.<sup>11</sup>

### Bilateral investment treaties

The relevance of bilateral investment treaties (BITs) to the WTO/GATS regime has been largely ignored. This is somewhat surprising since virtually all Members have concluded BITs, more than 100 in some cases, which generally contain provisions, in many variations, that are subject to the MFN obligation of GATS Article II (e.g. guarantees of national treatment post-establishment, fair and equitable treatment, transfers of funds, and compensation for expropriation).<sup>12</sup> The possibility to list MFN exemptions for such treaties has, however, been used by fewer than 20 WTO Members.

In discussing the GATS' policy impact in the current negotiating context, it is useful to distinguish between three different types of provisions:

1. Unconditional obligations that are universally applicable across all service sectors, including the principle of MFN treatment;
2. Specific commitments on market access (MA), NT and any additional commitments (ACs) that a Member might have inscribed in its services schedule;
3. Conditional obligations, in particular disciplines on regulatory conduct and content, which are triggered by the existence of specific commitments.

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<sup>8</sup> See WTO (2009). Presence of Natural Persons (Mode 4). *Background Note by the Secretariat*. WTO document S/C/W/30. Last accessed on 10 March 2021 from [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=108652](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=108652)

<sup>9</sup> Pursuant to GATS Article XXVIII(a), 'measure' refers to any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form.

<sup>10</sup> This possibility existed only at the time of the Agreement's entry into force or, in the case of new Members, at the date of accession.

<sup>11</sup> The latter category is defined, in Article I:3(c), to consist of services that are supplied neither on a commercial basis nor in competition with one or more suppliers.

<sup>12</sup> Brazil is one of the very few Members that have not ratified any BIT. However, it recently concluded several Agreements on Cooperation and Facilitation of Investments (CFI), which provide for information exchange and consultation mechanisms intended to defuse conflicts but, unlike conventional BITs, do not allow investors to initiate arbitration procedures against the State. Morosini, F., Perrone, N. M. and Sanchez-Badin, M. R. (2019), Strengthening multi-stakeholder cooperation in the international investment regime: The Brazilian model, *Columbia FDI Perspectives* No. 263. See also Adlung, R (2016). International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS. *The Journal of World Investment & Trade*, 17(1), 47-85.

## Additional commitments

Particularly interesting among the GATS provisions that are potentially relevant for the envisaged IFD Agreement are additional commitments under Article XVIII (Section D.2). The Article allows Members to schedule undertakings across a virtually open-ended range of regulatory measures. The respective provisions are without any equivalent in the GATS' merchandise trade precursor, GATT. The fact that they have played only a limited role, apart from the telecommunications sector, is attributable mostly to the WTO stalemate in recent years.

## Compatibility is important

Great care will be needed to ensure that the services-related provisions of a prospective IFD Agreement are compatible with existing definitions, obligations and commitments. There is already much confusion surrounding the existence of parallel patchworks of policy disciplines under BITs and the investment-related provisions in PTAs, with different sets of obligations, definitional variations, etc.

To ensure overall consistency, it is not sufficient that the same terms be used in different treaty settings. What ultimately matters are the underlying concepts. There are WTO Members, for instance, that are bound by three differing concepts of MFN and NT, one under GATS and two under various PTAs. It is by no means excluded that a fourth one could emerge from a future IFD Agreement.<sup>13</sup>

## Overview of GATS obligations and commitments

### Main elements

GATS requires each WTO Member to submit a schedule of services commitments. The schedule consists of four columns, with the first identifying the sector concerned, the second and third specifying any limitations on market access and national treatment, respectively, and the fourth allowing for the inscription of additional commitments. The latter may be undertaken with respect to any other measures affecting trade in services, including qualifications, standards and licensing matters (Article XVIII).

A characteristic feature of GATS is its adaptability, which allows governments to tailor their commitments to their perceived policy needs or even avoid any access obligations in individual sectors or modes of supply. By the same token, WTO Members are bound by a framework of core disciplines, the conditional and unconditional obligations alluded to before, which must be accepted regardless of any country- or sector-specific considerations (see Box 1).

disciplines are mostly of an institutional/operational nature and apply from day one. There is little scope for the Agreement's differential implementation based, for instance, on the development levels of individual Members, as is available under the GATT-anchored TFA.<sup>14</sup>

Reflecting the high doses of regulatory precaution governing what for most original WTO Members was a complex and novel area of global rule-making, the schedules that emerged from the Uruguay Round (1988-1994) revealed a strong preference for modest policy bindings. The fact that GATS called for successive rounds of trade liberalizing negotiations (Article XIX:1) was not a motivating force either. As

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<sup>13</sup> While the GATS benchmark for MFN and national treatment is the absence of discrimination between like services and service suppliers, a number of PTAs refer to the absence of discrimination between services and service suppliers in like circumstances or situations. In turn, recent drafts of an investment-facilitating regime referred to non-discrimination between like investments and investors. For a comprehensive analysis of NT concepts from a trade-in-services perspective, see Diebold, N. F. (2010). *Non-discrimination in international trade in services: 'Likeness' in WTO/GATS*. Cambridge University Press, Cambridge. DOI:10.1017/CBO9780511675843

<sup>14</sup> TFA, which was adopted at the WTO 9th Ministerial Conference in 2013, distinguishes between three categories of disciplines that may be phased in at different stages; developing and least developed countries are entitled to self-designate these stages. See *infra*, note 17.

a result, the average number of services commitments per Member stands at little more than one-third of the 160 sub-sectors contained in the classification list used for scheduling purposes.<sup>15</sup>

### Box 1: Framework obligations under GATS

All service sectors:

- MFN treatment (Art. II:1), with possibility of exemptions
- Publication requirement of all measures covered by the Agreement (Art. III:1)
- Establishment of enquiry points to inform other Members upon request (Art. III:4)\*
- Establishment of contact points to facilitate access of service suppliers from developing countries to market-related information (Art. IV:2)\*\*
- Non-discriminatory and transparent use of recognition measures (Art. VII)

Scheduled sectors:

- Notification of new measures and legal changes that significantly affect trade (Art. III:3)
- Administration of generally applicable measures in a reasonable, objective and impartial manner (Art. VI:1)
- Timely treatment of requests for authorization (Art. VI:3)
- Adequate procedures to verify applications in professional services (Art. VI:6)
- Certain (rudimentary) disciplines governing the application of licensing and qualification requirements and technical standards (Art. VI:5)
- Access to and use of public telecommunications networks and services (Annex on Telecommunications)

\* The implementation period for individual developing countries may be extended beyond the generally applicable two-year period after the Agreement's entry into force.

\*\* Developing and least developed countries are expected to comply only to the extent possible. In implementing the obligation, special priority is to be given to least developed countries (Art. IV:3).

However, this average conceals significant differences between the commitments undertaken by original WTO Members and those of 36 countries that acceded to the world trade body since January 1995, as well as between the commitments undertaken by developed, developing and least developed countries, respectively.

Thus, while the Uruguay Round schedules of a few developing countries contained fewer than five sub-sectors, the commitments subsequently assumed by some transition economies cover more than 140 sub-sectors at high levels of liberalization, in some instances more so than those of OECD Member countries. Late accession, i.e., post-Uruguay Round, came at a price.

### Development-related flexibilities

The variation observed in the number of commitments between and within groups of Members is clearly indicative of the Agreement's flexibility. Such flexibility is further enhanced, as noted above, by the possibility of adding limitations or eschewing commitments in individual sectors and/or modes of supply.

Looking ahead, Article XIX:2 provides that, in pursuing the mandated liberalization process under the Agreement, there shall be 'appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and ... attaching conditions aimed at achieving the objectives referred to in Article IV.' (The latter Article deals with increasing the participation of developing countries in world trade.)

<sup>15</sup> The list is contained in WTO (1991). Services sectoral classification list. *Note by the Secretariat*. WTO document MTN.GNS/W/120. Last accessed on 10 March 2021 from [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=179576&CurrentCatalogueIdInd%20ex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=179576&CurrentCatalogueIdInd%20ex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)



However, once scheduled, a commitment applies regardless of a country's developmental status, and the same is true of the conditional obligations, including disciplines related to domestic regulation (tentative as they are) that are triggered by the scheduling of specific commitments. Thus, for example, the obligation concerning the reasonable, objective and impartial administration of measures of general application, as stipulated in GATS Article VI:1, is equally applicable across all Members in their scheduled service sectors.<sup>16</sup>

On the other hand, Members retain the freedom to go beyond what they are committed to do under WTO agreements. For example, they could extend Article VI:1-type domestic regulation disciplines to services that have not been subjected to commitments and, of course, to transactions beyond the scope of GATS.

To clarify this issue: while TFA may constitute a major source of inspiration to proponents of an IFD Agreement, its Section II contains far-reaching flexibilities for developing and least developed countries. These include the possibility to self-designate the regulatory disciplines they are ready to comply with at various stages of an individual implementation process.<sup>17</sup> Similar cross-cutting flexibilities may be envisaged for a future investment-facilitating regime. However, they must not extend to obligations that are applicable under current GATS provisions (see Box 1), although there might be calls to provide Members with additional leeway in the event, for example, of acute financial constraints.

Yet, it would have been feasible at the scheduling stage to phase in individual commitments, including commitments under Article XVIII (ACs, Section D.2) or to condition their entry into force on criteria linked to economic needs tests. The Agreement offers a lot of flexibility in this regard. Like any other commitments, ACs featuring GATS-plus regulatory disciplines could focus on certain groups of enterprises and/or take account of particular economic circumstances. Thus, it might be possible, for example, to introduce size-specific criteria with a view to exempting smaller companies or new entrants from disproportionate regulatory burdens.<sup>18</sup>

## Investment facilitation and GATS: Relevant provisions

When considering the impact of a regulatory regime, of whatever type, on investment decisions, a variety of factors warrant attention. These include the transparency, consistency and predictability of relevant measures, as well as the existence of impartial and effective approval and enforcement procedures. A number of GATS provisions might prove relevant and provide inspiration in this context, given that the Agreement applies to 60% of the world's FDI stock and has been tested over a 25-year span. As noted, there are no equivalent WTO provisions covering investments in non-service sectors.

The following discussion provides an overview of potentially relevant GATS disciplines that might be expected to promote investment for sustainable development and could readily be implemented as pursuant to GATS Article XVIII. The authors' intention is not to provide a ready-made 'cookbook' for negotiators but to point out ingredients that are or could be made available in the pursuit of governments' prevailing policy objectives. What matters in the end are not freely floating statements, but Members' commitment to creating a consistent and legally dependable framework.

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<sup>16</sup> Certainly, there is still the possibility for economically advanced countries to extend preferential access conditions under the Generalized System of Preferences and the LDC Services Waiver. See UNCTAD (2015). *Generalized System of Preferences*. UNCTAD website. Last accessed on 10 March 2021 from <https://unctad.org/topic/trade-agreements/generalized-system-of-preferences> and UN (2020). *Preferential market access for services and service suppliers – Services waiver*. UN LDCs' Portal. Last accessed on 10 March 2021 from <https://www.un.org/ldcportal/preferential-market-access-for-services-and-service-suppliers/>

<sup>17</sup> Article 14 of TFA distinguishes between three categories of provisions: those that are immediately applicable in developing countries and within one year in LDCs; those that a developing country or LDC designate for application after a transitional period following TFA's entry into force; and those that are designated for future application and require the provision of assistance and support for capacity building.

<sup>18</sup> See, for example, Adlung, R and Soprana, M (2013). SMEs in services trade – A GATS perspective. *Intereconomics*, 48(1), 41-50.

## Scope of existing disciplines

### Notification and information<sup>19</sup>

GATS Article III features various transparency-related requirements that are either generally applicable or confined to scheduled sectors (see Box 1). The latter include a notification requirement, under Article III:3, concerning any changes in laws, regulations, etc. that significantly affect trade in services covered by specific commitments.

Moreover, pursuant to Articles IV:2 and 3, developed countries and, to the extent possible, other Members are required to establish contact points to provide service suppliers from developing countries with information on their respective markets. Interestingly, this requirement not only relates to the provision of official information concerning registration, recognition and qualifications, but also extends to ‘commercial and technical aspects of the supply of services’ and ‘the availability of services technology’. However, the authors are not aware of any studies that would trace the impact, if any, of these obligations.

Experience shows that not all WTO Members have been able or willing to comply with existing notification requirements. While some 700 measures were notified since the Agreement’s entry into force in 1995, more than one in four notifications originated from two Members only: Albania and Switzerland. Many Members have notified no changes under these provisions.<sup>20</sup> Moreover, certain types of measures, including those relating to BITs, have consistently been ignored even as they clearly aim, by improving investment conditions, to affect services trade under Mode 3.

Members’ poor notification compliance may be attributable to various factors, including weak inter-agency coordination within governments and concerns about potentially adverse interpretations in the event of disputes. However, the negotiation of an IFD Agreement offers a fresh opportunity to confirm the existence of such obligations and promote greater compliance, possibly combined with the provision of technical assistance. The inter-agency coordination needs associated with the envisaged creation of a WTO Committee on Investment Facilitation might well provide additional tailwind.

### Regulatory content

GATS Article VI:4 mandates that Members negotiate any necessary disciplines to prevent measures relating to qualification requirements and procedures, technical standards and licensing requirements from constituting unnecessary barriers to services trade. Such requirements should be no more burdensome than necessary to ensure the quality of the service. Pending the entry into force of the long called-for disciplines, Article VI:5 provides for their provisional, and tightly circumscribed, application in scheduled sectors.

Negotiations under Article VI:4, and on three other GATS Articles (dealing respectively with subsidies, emergency safeguards, and government procurement) remain outstanding a quarter century after GATS’ entry into force. Prospects in these areas have hardly improved in recent years; quite the opposite.

Nevertheless, in preparation of the WTO’s 11th Ministerial Conference, some 30 delegations submitted a proposal calling for the development of (open plurilateral) disciplines on domestic regulation pursuant to the GATS Article VI.4 mandate,<sup>21</sup> with the stated aim of incorporating a reference paper with such disciplines into their services schedules by the 12th Ministerial Conference.

<sup>19</sup> A complete overview of notification requirements under the GATS is provided in a handbook by the WTO Secretariat. Last accessed on 10 March 2021 from [https://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_handbook\\_on\\_notifications\\_e.pdf](https://www.wto.org/english/tratop_e/serv_e/serv_handbook_on_notifications_e.pdf)

<sup>20</sup> An analysis of Members’ compliance rates with all WTO-related notification requirements between 1995 and 2014 points to enormous differences, ranging from well above 80% to below 20%. See Karlas, J. and Parizek, M. (2020). Supply of policy information in the World Trade Organization: Cross-national compliance with one-time and regular notification obligations, 1995-2014. *World Trade Review*, 19(1), 30-50.

<sup>21</sup> See WTO (2017). Disciplines on Domestic Regulation. *Revision*. WTO document WT/GC/190/Rev.2; WT/MIN(17)/7/Rev.2. Last accessed on 10 March 2021 from [https://docs.wto.org/dol2fe/pages/fe\\_search/fe\\_s\\_s009-dp.aspx?language=e&catalogueidlist=240862](https://docs.wto.org/dol2fe/pages/fe_search/fe_s_s009-dp.aspx?language=e&catalogueidlist=240862)

A sector-specific precursor of the envisaged outcome already exists for accountancy services. The Accountancy Disciplines, adopted by the Council for Trade in Services in 1998, are meant to be integrated into GATS 'no later than the conclusion of the current services trade negotiations.'<sup>22</sup> Interestingly, these disciplines contain a 'necessity' test, which, although forming part of the negotiating mandate in Article VI:4(b), has proved particularly controversial.

Accordingly, Members with relevant commitments are required to eschew measures that are 'more trade-restrictive than necessary to fulfil a legitimate objective'. An openly defined list of such objectives follows, including 'the protection of consumers ... , the quality of the service, professional competence, and the integrity of the profession'. This listing certainly provides for more flexibility than the sole reference to the 'quality of the service' featured in Article VI:4.

Of course, further criteria, including sustainability-related considerations, could still be added. Yet, high expectations in this area do not, on the whole, appear justified. Indeed, a closer look at the latest generation of putatively 'frontier' PTAs suggests the need for caution. Necessity tests of various types feature in less than one-fifth of current agreements.<sup>23</sup>

Many Members' apparent aversion to codifying 'necessity' reflects a sense of unease about the potential impact of disciplines that are broadly applicable across all service sectors or at least across sectors subject to specific commitments. The fact that it was possible to integrate necessity-related criteria into the Accountancy Disciplines might owe not only to the more open and dynamic negotiating mindset prevailing in the early days of GATS, but also to a more narrowly defined and, thus, more predictable sectoral and policy context.

If so, it might be worth testing the readiness of interested Members to complement broadly applicable regulatory disciplines with more focused understandings, again MFN-based. In turn, these might include an obligation to render regulations no more restrictive than necessary to serve legitimate policy purposes, such as promoting sustainable development.

## **Subsidization**

Sustainable development goals have moved up the political agenda in recent years and inspired proposals to modify trade and investment rules. Investors are increasingly expected to address environmental concerns, meet specified employment targets, promote labour market outcomes, provide professional education and training, develop local economic links, respect certain working practices, promote greater inclusivity, etc.

The 'nudging' incentives involved are not necessarily financial in nature, but can include more streamlined approval procedures, less frequent controls of regulatory compliance, better access to certain public services, and so forth (see Box 2).

Nevertheless, such endeavours may be of limited economic significance when compared to the financial incentives bestowed under generally available subsidy programmes. The pressure to promote investment in order to create, maintain or reshore some of the jobs lost to foreign outsourcing will hardly abate in coming years. And the financial armouries of developed countries tend to be better filled than those of many less developed countries.

An IFD Agreement could thus seek to contain the extension of (excessive) financial incentives, given in particular that 'facilitating greater developing and least-developed Members' participation in global investment flows should constitute a core objective of the framework' (Joint Ministerial Statement of November 2019). However, just as mandated discussions on developing subsidy disciplines for services have revealed a sustained collective preference for inaction,<sup>24</sup> the readiness to address incentive-related issues in the current context should not be overrated.

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<sup>22</sup> See WTO (1998). *Disciplines on Domestic Regulation in the Accountancy Sector*. Document S/L/64. Last accessed on 10 March 2021 from <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/S/L/64.pdf>

<sup>23</sup> See WTO (2019). *World Trade Report 2019 - The future of services trade*. Geneva: Author. Last accessed on 10 March 2021 from [https://www.wto.org/english/res\\_e/booksp\\_e/00\\_wtr19\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/00_wtr19_e.pdf)

<sup>24</sup> For a more detailed discussion, see Sauvé, P and Soprana, M (2018). Disciplining service sector subsidies: Where do we stand and where can we (realistically) go?. *Journal of International Economic Law*, 21(3), 599-619.



**Box 2: Non-financial incentives to facilitate foreign investment for development<sup>1</sup>**

Potential host countries (→ Inward FDI)

- Measures to improve access to and use of business visas
- Creation of grievance mechanisms (including ombudspersons) for aggrieved investors
- Adoption of a 'Silent Yes' mechanism for administrative approvals
- Ensuring the transparency of investment incentives
- Fostering linkages with local suppliers, including through the creation of databases
- Creating mechanisms for effective policy coordination among agencies at all government levels
- Ensuring the proper functioning of the contact points for foreign service suppliers to be established under GATS Article IV:2

Home countries (→ Outward FDI)

- Providing project evaluation assistance
- Promoting compliance with basic labour, environmental and CSR standards

**Note Source:** These examples are mostly inspired by Sauvart, Karl P. and Stephenson, Matthew (2019), 'Concrete measures for a Framework on Investment Facilitation for Development: Report' (Contribution to an Expert Workshop at WTO). Investment protection might be added to this listing, *inter alia*, though it is explicitly excluded under the Joint Ministerial Statement (Section A.1).

Relevant WTO disciplines on subsidy-related matters differ significantly between goods and services trade. They are considerably stricter under GATT provisions, including under the Agreement on Subsidies and Countervailing Measures (ASCM) and the Agreement on Trade-Related Investment Measures than they are under GATS. In particular, the GATS does not contain any prohibitions comparable to the ASCM ban on export-promoting and import-substituting subsidies.

Similarly, governments are not prevented *per se* from supporting domestic producers or investors contingent on these preferring locally established suppliers of components over those competing from abroad. As noted above, the potentially most relevant constraints under GATS are the obligations of MFN and National Treatment. Yet, the latter obligation applies only if a Member has undertaken commitments in the sector without listing subsidy-related limitations under the mode concerned.<sup>25</sup>

While subsidy-specific disciplines may yet be negotiated under GATS Article XV in response to one of the rule-making mandates inscribed in the Agreement, prospects for doing so appear dim, as they have long been for other Uruguay Round leftovers.<sup>26</sup>

Alternatively, following similar ongoing negotiations on domestic regulation, interested Members might seek to embed subsidy disciplines as Article XVIII additional commitments. The purpose is obvious: facilitating investment for development while avoiding granting potentially distortive incentives on the part of economically well-endowed countries. The prevailing trend, strongly impacted by the fiscal policy response to the COVID-19 pandemic, appears to point in the opposite direction, however, affording Members with well-filled public coffers ever broader scope for state support measures.<sup>27</sup>

**Other disciplines promoting foreign market participation**

- Recognition of standards, licences, certificates

Not surprisingly, mirroring the poor response to similar requirements under Article III, there have been relatively few notifications concerning the recognition of foreign professional degrees, certificates and

<sup>25</sup> Sauv  & Soprana (2018), *op. cit.*

<sup>26</sup> See Sauv , P. (2002). Completing the GATS framework: Addressing Uruguay Round leftovers. *Aussenwirtschaft*, 57(3), 310-341.

<sup>27</sup> Departures from Members' GATS-committed NT obligations for subsidies are particularly frequent among the limitations inscribed in PTAs (see below): about three-quarters of a sample of 66 PTAs reviewed were found to contain GATS-minus commitments for subsidies. See Adlung, R. & Miroudot, S (2012). Poison in the wine: Tracing GATS-minus commitments in regional trade agreements. *Journal of World Trade*, 46(5), 1045-1082.

licences.<sup>28</sup> In many cases, the (non-)recognition of foreign professional degrees and certificates could be a key determinant of market access, including for foreign investors, and be used to influence competitive conditions for various policy reasons. Many governments might thus be hesitant to disclose their recognition measures and underlying criteria. There is, as well, the possibility of administration-internal information and coordination problems, particularly in federal states. Some officials may also believe, erroneously, that recognition measures applied in the context of PTAs are exempt from GATS Article VII disciplines.

The promotion of recognition initiatives should be a key element of an agreement that attempts to reduce and simplify administrative procedures with a view to streamlining investment conditions. This could include language beyond the mere obligation, in GATS Article VII:3, not to (ab-)use recognition measures as a means of discrimination or a disguised restriction on trade in services.<sup>29</sup> Members might be expected, for instance, to accelerate approval procedures if similar investment projects have been screened and accepted elsewhere or if these comply with certain widely recognized principles, for example in the context of UN, ILO or OECD endorsed guidelines.

- Promoting competition

Potential investors might be deterred by the possibility of seeing access to putatively open markets undermined by powerful domestic operators. While many manifestations of competitive distortions can be identified, the GATS features at least one potentially relevant (but weakly enforceable) discipline. According to Article VIII, Members are required, *inter alia*, to ensure that monopolies and exclusive suppliers do not abuse their position in expanding into market segments that are covered by specific commitments.

In a similar vein, signatories of the Reference Paper on basic telecommunications services, adopted by a majority of WTO Members in the form of an additional commitment, are required to prevent major suppliers from engaging in certain anti-competitive practices.<sup>30</sup> Of course, similar obligations might be used to discipline dominant suppliers and/or state-owned enterprises in other service industries as well. Such obligations could, for instance, complement references to Corporate social responsibility and to measures against corruption as contained, e.g., in some recent PTAs.

- Provision of public services

Pursuant to the Annex on Telecommunications (para 5(a)), foreign service suppliers have to be accorded, *inter alia*, access to and use of public networks and services on 'reasonable and non-discriminatory terms and conditions. This is a potentially powerful requirement that might help dispel concerns about protectionist abuses of existing exclusivity rights and, thus, encourage foreign participation, including via an established presence, in potential user industries.

However, two qualifications need to be borne in mind. First, this obligation covers only supplies to industries in GATS-scheduled services and, second, there are no equivalent WTO rules governing access to and use of other infrastructurally relevant sectors (e.g. road, rail and air transport; postal services; certain financial services). The question arises of whether such gaps could be filled in the context of the current initiative.

### Investment facilitation via Additional Commitments

GATS Article XVIII allows for the negotiation of commitments on issues other than market access and national treatment, 'including those regarding qualifications, standards and licensing matters. Such additional commitments are inscribed in a separate column of a Member's schedule designed for this

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<sup>28</sup> Seventy-three notifications were received between January 1995 and December 2019, of which 14 from Switzerland and 10 from Australia.

<sup>29</sup> For example, under Article 2.6 of the Agreement on Technical Barriers to Trade, annexed to GATT, Members are required 'to give positive consideration to accepting as equivalent the technical regulations of other Members ... provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.'

<sup>30</sup> A major supplier is defined to be a supplier which has the 'ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities or (b) use of its position in the market.'

purpose. Certain elements of what might be covered by such commitments, including competition- and regulation-related disciplines, could also be inscribed in tariff schedules under GATT.<sup>31</sup> However, the scope of such bindings would be confined to trade in products without extending to the regulatory and administrative requirements governing the treatment of producers/suppliers.

Additional commitments under GATS Article XVIII could be used to clarify administrative issues, including authorization requirements and procedures; specify the treatment of flawed applications; and, clarify relevant time frames, fees and charges. They could also address more substantive policy concerns relating, for example, to the provision of public services (e.g. transport or health in remote regions), supervision and control of activities with systemic implications (e.g. prudential or data privacy-related concerns) and independence of the authorities involved. Like other GATS commitments, they could be phased in over specified periods and/or be modified in view of regional or sectoral variations within a country's investment regime.

With the exception of the reference paper on basic telecommunications, WTO Members have made limited use of Article XVIII.<sup>32</sup> The reference paper was prepared among interested governments during the negotiations of these services, which were concluded in early 1997. It contains various regulatory disciplines and transparency-related and institutional obligations. The number of GATS schedules embedding the reference paper now exceeds 100.<sup>33</sup>

Of course, a Member would be free at any time to unilaterally undertake whatever additional commitment it deems appropriate. Nevertheless, a coordinated approach among interested Members might be preferable since it would help avoid excessive fragmentation of regulatory conditions and, thus, reduce information and compliance costs. It might also prove easier to 'sell' to sceptical Members as an initiative that would not undermine existing commitments but rather enhance their relevance with regard to the most important mode of supplying services.

Box 2 contains possible elements which, if further specified, could form part of a reference paper on investment facilitation that might be implemented under GATS Article XVIII. Although the focus here is on initiatives by host countries, guidelines and recommendations for source countries could also be included. Any of these elements could sit alongside full commitments on market access and national treatment in the areas concerned.

The question arises once more about compliance and enforcement. High expectations might, yet again, not be warranted given the experience with existing GATS disciplines, e.g. Articles III (transparency), V (economic integration), VI (domestic regulation) and VII (recognition). However, work on such issues might generate positive learning externalities for the government agencies involved.

Whatever the incentives or disciplines that might form part of additional commitments under GATS, it is easy to conceive of equivalents in non-service sectors. However, creating a consistent and coherent system that, ideally, extends over the whole economy is a challenge. Would all Members be prepared to contribute to, or at least, condone such an initiative that, in non-service sectors, would not build on existing framework provisions?

## Anticipating the post-pandemic recovery

Developments in global trade governance and the world economy do not provide an ideal backdrop to advance new multilateral initiatives. WTO is engulfed in a deep crisis and the COVID-19 pandemic has

<sup>31</sup> Hoekman, B. and Mavroidis, P. C. (2017). MFN clubs and scheduling additional commitments in the GATT: Learning from the GATS. *European Journal of International Law*, 28(2), 387-407.

<sup>32</sup> For example, Canada has scheduled additional commitments providing that foreign legal consultants are exempt, temporarily, from normal accreditation requirements in certain Provinces. See WTO (1994). Canada. *Schedule of specific commitments*. Document GATS/SC/16. Last accessed on 10 March 2021 from [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueList=3671,34022,23146,20088,5079,22853,14218,24805&CurrentCatalogueIndex=7&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueList=3671,34022,23146,20088,5079,22853,14218,24805&CurrentCatalogueIndex=7&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)

<sup>33</sup> Remarkably, given the sensitivities surrounding the use of 'necessity' tests, Section 3 of the paper postulates, *inter alia*, that universal service obligations should not be more burdensome than necessary for the universal service defined by the Member.

precipitated the most profound global economic contraction since the 1930s. In such circumstances, the imperative of saving lives and preserving jobs, rather than pursuing sustainability-enhancing aims, has predominated. Yet, all is not bleak, as can be adduced from the rising traction that the Investment Facilitation for Development initiative has garnered.

Three reasons suggest that such a trend may gain momentum once the economic recovery sets in more durably:

1. As noted by Sauvart, the SDGs have become the lodestar of international economic policy.<sup>34</sup> Such a trend will not suddenly abate, and many voices are calling for the post-pandemic pursuit of more sustainable and inclusive growth trajectories aligned with SDG aims.
2. Learning-by-doing effects: An increasing number of PTAs feature sustainability-promoting elements that could facilitate their future adoption and refinement.
3. There are fewer intractably entrenched positions concerning multilateral rules on services under GATS than, for example, under long-established understandings and agreements in merchandise trade; this may provide more (and much needed) negotiating space and create scope for soft-law provisions that may be more faithfully respected, through regular peer review, than elsewhere.

### What then should an IFD Agreement look like?

Were such a framework to deal solely with investment facilitation in services, potentially relevant GATS templates are readily available. Interested Members, at any time, could launch a coordinated attempt with a view to modifying their services commitments pursuant to GATS Article XXI (modification of schedules).

This could be done at any time. As in previous cases, e.g. the extended Uruguay Round negotiations on telecommunications and financial services, participants could draft a protocol of acceptance to which any agreed improvements in commitments and upgrades of regulatory disciplines, possibly via additional commitments, could be attached.

The Protocols would enter into force upon ratification by all participants or otherwise, if not achievable within a set time frame, proceed from a joint decision by ratifying Members (presumably on a critical mass basis). The existing GATS framework, including its definitional and institutional structure, would remain intact.

A committee on investment facilitation could provide a forum for future consultations among Members. Enforcement would occur via the WTO dispute settlement mechanism.

However, these observations apply to investments in service sectors only. Investments in other sectors, which make up more than one-third of cross-border investment activity, come up against empty normative space within the current scope of the WTO Agreement.

Pursuant to Article X:1, any Member could initiate a proposal to amend the Agreement and widen its substantive remit to address investment issues more broadly. It would then be for the Ministerial Conference to agree, by consensus and within 90 days, whether to submit the proposal to Members for acceptance. In the absence of consensus, the Conference could decide by a two-thirds majority vote. The latter scenario has never been tried and does not arguably offer a realistic option in the current, politically fraught, context.

An IFD Agreement should not in principle consist of two separate regimes for goods and for services. WTO's long-entrenched (and increasingly artificial) goods-services divide does not reflect contemporary cross-border commerce. While such rule-making fusion commands innate intuitive appeal,<sup>35</sup> current

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<sup>34</sup> Sauvart, K. P. (2019). Promoting sustainable FDI through international investment agreements. *Columbia FDI Perspectives*, No. 251.

<sup>35</sup> See, e.g. Hufbauer, G. and Stephenson, S. (2014). The case for a framework agreement on investment. *Columbia FDI Perspectives*, No. 116; Sauv , P. (2019). To fuse, not to fuse, or simply confuse? Assessing the case for normative convergence between goods and services trade law. *Journal of International Economic Law*, 22(3), 355-371.; and Peng, S. Y. (2020). A New trade regime for the servitization of manufacturing: Rethinking the goods-services dichotomy. *Journal of World Trade*, 54(5), 669-726.

approaches raise questions that may need to be addressed in the future course of the negotiations. These include:

- Role of development-related flexibilities in services trade: A key facet of the TFA is the possibility for developing and least developed countries to self-designate their implementation programme; simply extending this flexibility might prove incompatible with certain GATS obligations, both conditional (e.g. Article VI:1) and unconditional (Article III:4), which are already in force (Section C.2);
- Structural differences between GATT (product-related, focus on cross-border trade) and GATS (product- and producer-related, with four modes of supply): Rules governing subsidies and similar incentives differ significantly between goods and services trade, and the same is true for key regulatory disciplines, including the role of necessity tests;<sup>36</sup>
- Definitional scope of 'investment': Important disparities exist between the definitions used in BITs or PTAs, proposals tabled in discussions on investment facilitation, and the GATS concept of commercial presence, where the supplier concerned must be majority-owned or controlled by natural or juridical persons of another Member;
- While the GATS' Annex on the Movement of Natural Persons provides significant scope for the use (or denial) of business visas related to services trade, its relevance for movements in non-service sectors deserves further attention;
- The precise delineation of the envisaged MFN clause: The notion of non-discrimination between like investments and investors, as suggested for inclusion in an IFD Agreement, would deviate from the respective GATS definition and those of many BITs and PTAs;<sup>37</sup>
- Existing transparency and notification obligations under WTO agreements, where the perennial challenge of improving compliance remains;
- Information exchanges and cooperation among Members: The use of existing instruments such as the Trade Policy Review Mechanism would need to be further explored.

Two options can be identified for any future initiative that aims to advance more than hortatory provisions. The resulting IFD Agreement could consist of a broadly applicable understanding among Members of rules and principles covering investments in all sectors; or two parallel regimes, one for services-related investments and one for other types of commercial investments. In both cases, it appears likely that some Members would prefer to avoid making a choice.

The first option would ensure greater cross-sectoral coherence while compromising on interpretative clarity and legal enforceability in a WTO context. Greater uniformity in treatment across sectors might help avoid what are often, and increasingly in the digital age, arbitrary differences in the classification of products/processes under either GATT or GATS (e.g. 3D printing, contract manufacturing).<sup>38</sup> However, it would be quite challenging, in the area of services, to distinguish between GATS-consistent elements that are enforceable under the Agreement and other elements that are intended to apply on a best-endeavours basis.

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<sup>36</sup> An overview of such tests and their interpretation in WTO dispute cases is contained in a note by the WTO Secretariat, WTO (2011). 'Necessity Tests' in the WTO, *Note by the Secretariat, Addendum*. WTO document S/WPDR/W/27/Add.1. Last accessed on 10 March 2021 from [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=104958,101788,28129&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=104958,101788,28129&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)

<sup>37</sup> As noted by Diebold (*supra* n 13, at 138 and 195f), there is little Appellate Body jurisprudence on the MFN clause as enshrined in GATS Article II. In two potentially relevant cases (*EC - Bananas III* and *Canada - Autos*), the likeness issue played no central role.

<sup>38</sup> Manufacturing operations based on inputs owned by others ('contract manufacturing') are classified as services, while identical operations using inputs owned by the manufacturer are beyond the definitional scope of both GATS and GATT. (Twenty-six Members have scheduled GATS commitments on contract manufacturing.) See Adlung, R. & Zhang, W. (2013). Trade disciplines with a trapdoor: Contract manufacturing. *Journal of International Economic Law*, 16(2), 383-408.

In this context, what would be the role of the GATS MFN clause? In contrast, all provisions in non-service sectors would apply on a best-endeavours basis, as is difficult to conceive of a legally binding outcome in these sectors. An additional element of confusion is the possibility that the same terms might have different meanings depending on whether they are used in a goods or services context.

The services track of option two could be made fully consistent with and enforceable under GATS. Any new elements might be implemented via additional commitments and/or could be triggered by the MFN clause of Article II. Application in non-service sectors would be governed, again, by a separate set of (non-legally binding) rules.

IF discussions are still at an early stage, with formal negotiations just now commencing.<sup>39</sup> For a variety of reasons, it remains difficult to conceive of an outcome that simultaneously fits under the WTO umbrella; applies across virtually all sectors and Members; and is free of major incompatibilities. While commercial presence (i.e. Mode 3) accounts for a majority of services trade subject to GATS disciplines and commitments, it has no GATT brethren. Developing a generic set of rules is thus comparable to cultivating segments of virgin land.

The authors have sought to draw attention, from a GATS/services vantage point, to various rule-design challenges with which negotiators will need to contend as the IF talks advance. Solutions to these challenges will be required for interested Members to get what they want (and need): a coherent multilateral framework for investment facilitation for development.

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<sup>39</sup> WTO (25 September 2020). *Structured discussions on investment facilitation for development move into negotiating mode*. Press Release, Geneva: World Trade Organization. Last accessed on 10 March 2021 from [https://www.wto.org/english/news\\_e/news20\\_e/infac\\_25sep20\\_e.htm](https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm)



## Chapter 2 Insulating A WTO Investment Facilitation Framework for Development from International Investment Agreements

Contributed by Manjiao Chi

In recent years, consensus for an Investment Facilitation for Development (IFD) Agreement has been on the rise among the Members of WTO.<sup>40</sup> Although there is no uniform definition of ‘investment facilitation’ at the global level,<sup>41</sup> the term is broadly understood to refer to measures aimed at assisting investors to start, operate and exit businesses, by improving transparency and predictability of investment policies, streamlining administrative procedures and adopting tools to handle inquiries or complaints by investors.<sup>42</sup>

Discussions on investment facilitation in WTO have been ongoing since the 11th Ministerial Conference in 2017. Since September 2020, formal negotiations on a the IFD Agreement have commenced and participating WTO Members hope to achieve a concrete outcome by the 12th Ministerial Conference, scheduled for next year.<sup>43</sup>

A number of proposals for an IFD Agreement have been submitted to WTO.<sup>44</sup> While the form and contents of an IFD Agreement are yet to be negotiated, parties to the negotiations hope to make it a multilateral agreement under the WTO umbrella<sup>45</sup> and expect it to play a role in attracting investment and promoting sustainable development by creating an efficient, predictable and investment-friendly business climate.<sup>46</sup>

Most WTO Members maintain a number of international investment agreements (IIAs), including BITs and investment chapters of FTAs.<sup>47</sup> Naturally, they will be bound by both an IFD Agreement and IIAs. Since both types of legal instruments deal with investment-related issues, they are likely to overlap and interrelate with each other. This situation gives rise to an important and relevant question is, how should an IFD Agreement interrelate with IIAs?

Bearing this question in mind, this chapter aims to analyse how to construct a proper IFD Agreement-IIA relationship, with the goal of insulating potential IFD Agreement claims from investor-state arbitration (ISA), which is the process by which most investor-state dispute settlement (ISDS) is conducted at the global level.

### Subject-matter overlaps with international investment agreements

Although the exact contents of an IFD Agreement remain to be negotiated, there is a consensus that an IFD Agreement should consider measures that aim to improve regulatory transparency and predictability, streamline and speed up administrative procedures, and enhance international

<sup>40</sup> WTO (2017). *Joint Ministerial Statement on Investment Facilitation for Development*. WTO document WT/MIN (17)/59.

<sup>41</sup> Berger, A., Sebastian, G. and Olekseyuk, Z. (2019). Investment facilitation for development: a new route to global investment governance. *DIE briefing Paper No. 5/2019*. Last accessed on 10 March 2021 from <https://www.die-gdi.de/en/briefing-paper/article/investment-facilitation-for-development-a-new-route-to-global-investment-governance/>

<sup>42</sup> Singh, K. (2018). Investment facilitation: Another fad in the offing?. *Columbia FDI Perspectives* (No. 232). Last accessed on 10 March 2021 from <http://ccsi.columbia.edu/files/2016/10/No-232-Singh-FINAL.pdf>

<sup>43</sup> WTO (25 September 2020). *Structured discussions on investment facilitation for development move into negotiating mode*. Press Release, Geneva: World Trade Organization. Last accessed on 10 March 2021 from [https://www.wto.org/english/news\\_e/news20\\_e/infac\\_25sep20\\_e.htm](https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm)

<sup>44</sup> A list of these submissions is available at the official WTO website. Last accessed on 10 March 2021 from [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Language=ENGLISH&SourcePage=FE\\_B\\_009&Context=Scrip\\_t&DataSource=Cat&Query=%40Symbol%3dINF%2fIFD%2f\\*&DisplayContext=popup&languageUIChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Language=ENGLISH&SourcePage=FE_B_009&Context=Scrip_t&DataSource=Cat&Query=%40Symbol%3dINF%2fIFD%2f*&DisplayContext=popup&languageUIChanged=true)

<sup>45</sup> It has also been proposed that an IFD Agreement should be adopted as a WTO plurilateral agreement, which would only bind WTO Members that are parties thereto. See, e.g. Talkmore, C. (19 November 2018). *A WTO Multilateral Investment Facilitation Agreement: An African Perspective*. Tralac online article. Last accessed on 10 March 2021 from <https://www.tralac.org/blog/article/13703-a-wto-multilateral-investment-facilitation-agreement-an-african-perspective.html>

<sup>46</sup> WTO (2018). *Investment facilitation: Relationship between trade and investment*. WTO website. Last accessed on 10 March 2021 from [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/briefing\\_notes\\_e/bfinvestfac\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm)

<sup>47</sup> UNCTAD (2020). *International Investment Agreement Navigator*. UNCTAD website. Last accessed on 10 March 2021 from <https://investmentpolicy.unctad.org/international-investment-agreements>

cooperation; and, on the other hand, it should exclude issues related to market access, investment protection and ISDS from its ambit.<sup>48</sup>

While there is no precise definition of investment facilitation, a recent study shows that typical investment facilitation measures include:

- Transparency of investment measures;
- Simplification of administrative procedures and requirements;
- Digitalization;
- Measures that directly increase the development contribution of FDI;
- Coordination and cooperation;
- Enhanced international cooperation.<sup>49</sup>

The above list of investment facilitation measures, although not exhaustive, provides a helpful basis for not only the negotiation of an IFD Agreement, but also an assessment of states' existing investment facilitation commitments. In fact, many investment facilitation measures listed and envisaged for an IFD Agreement could be found in existing IIAs. In this regard, an empirical study suggests that several categories of provisions that embody or reflect types of investment facilitation elements are incorporated in existing IIAs, which include the following:

- Improving the investment climate;
- Removal of bureaucratic impediments to investment;
- Facilitation of investment permits;
- Facilitation of entry and sojourn of personnel related to investment;
- Transparency;
- Capacity building on investment issues;
- Investment financing;
- Insurance programmes;
- Pre-establishment investor servicing;
- Post-establishment investor aftercare;
- Relations with investors and the private sector;
- Joint cooperation and treaty bodies on investment facilitation.<sup>50</sup>

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<sup>48</sup> WTO (2017). Proposal for a WTO Informal Dialogue on Investment Facilitation for Development. *Joint Communication from the Friends of Investment Facilitation for Development*. WTO document JOB/GC/122.; WTO (2017). *Joint Ministerial Statement on Investment Facilitation for Development*. WTO document WT/MIN (17)/59, para 4; WTO (2017). *Joint Ministerial Statement on Investment Facilitation for Development*. WTO document WT/L/1072.WTO, para 3.

<sup>49</sup> See generally, ITC and DIE. (2020). *An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?*. Last accessed on 10 March 2021 from <https://www.intracen.org/uploadedFiles/intracenorg/Content/Redesign/Events/IF,%20Inventory,%20as%20of%20Dec%2016,%202020.pdf>

<sup>50</sup> See Polanco, R. J. (October 2018). Towards a multilateral investment facilitation framework: Elements in international investment agreements. *RTA Exchange*. Last accessed on 10 of March 2021 from <https://e15initiative.org/blogs/towards-a-multilateral-investment-facilitation-framework-elements-in-international-investment-agreements/>; Polanco, R. J. (2018). Facilitation 2.0: Investment and trade in the digital age. *RTA Exchange*, 5-13. Last accessed on 10 March 2021 from <https://e15initiative.org/publications/facilitation-2-0-investment-and-trade-in-the-digital-age/>



Not all IIAs contain all investment facilitation elements. In fact, the availability and distribution of these elements in IIAs vary dramatically, which could have profound implications for making an IFD Agreement.

Horizontally, some investment facilitation elements are more frequently incorporated in IIAs than others. For instance, many IIAs contain a transparency provision and mention improving the investment climate as an objective of the treaty, whereas few IIAs contain provisions related to investment finance and investment insurance.<sup>51</sup>

The level of popularity of an element in IIAs could denote the level of consensus among states on this element. Elements that feature a higher level of consensus would be more likely to be negotiated and incorporated in an IFD Agreement. For instance, in light of the frequent appearance of transparency provisions in IIAs and the growing convergence of the contents of these provisions,<sup>52</sup> it seems that states have formed a consensus on the purpose, contents and application of transparency provisions in international investment governance. Given such a consensus, it would be unsurprising that an IFD Agreement incorporates transparency provision(s).

Vertically, the concentration of investment facilitation elements is uneven among IIAs. While some IIAs contain multiple elements, others contain barely any. In a sense, if a state has already undertaken certain investment facilitation obligations in IIAs, it is likely to accept similar obligations in an IFD Agreement.

In this regard, Brazil's cooperation and facilitation investment agreements (CFIAs) are worth mentioning. Unlike traditional BITs that aim primarily at protecting foreign investment, the premise of CFIAs is the long-term perspective that states need to cooperate and maintain fluent and organized dialogue with investors to foster sustained investments.<sup>53</sup>

As a result, a CFIA could contain more investment facilitation elements than other types of IIAs. Since Brazil has made a wide range of investment facilitation commitments in CFIAs, it would be unsurprising for Brazil to make similar commitments to an IFD Agreement. In fact, Brazil has put forward a concrete IFD Agreement proposal at WTO.<sup>54</sup>

An IFD Agreement and IIAs are likely to have substantial subject-matter overlaps, which seems to suggest that interrelation between the two types of instruments is inevitable. On specific subject matter, the relationship between an IIA and an IFD Agreement could be classified into one of the following scenarios:

- a. An IFD Agreement is 'IIA-identical' if the obligations in the IFD Agreement and those in the IIA are identical or substantively similar;
- b. An IFD Agreement is 'IIA-plus' if the obligations in the IFD Agreement are greater or at a higher level than those in the IIA;
- c. An IFD Agreement is 'IIA-minus' if the obligations in the IFD Agreement are fewer or at a lower level than those in the IIA;
- d. An IFD Agreement is 'IIA-conflicting' if the obligations in the IFD Agreement conflict with those in the IIA.

In scenario A, although states are subject to both an IFD Agreement and an IIA, they are actually subject to the same or similar investment facilitation obligations. In this scenario, the two instruments are unlikely

<sup>51</sup> Polanco, R. J. (2018). Facilitation 2.0: Investment and trade in the digital age. *The RTA Exchange*, 1-24. Last accessed on 10 March 2021 from: <https://e15initiative.org/publications/facilitation-2-0-investment-and-trade-in-the-digital-age/>.

<sup>52</sup> UNCTAD (2004). Transparency. *UNCTAD Series on Issues in International Investment Agreements (UNCTAD/ITE/IIT/2003/4)*, 13-47. Last accessed on 10 March 2021 from: [http://unctad.org/en/Docs/iteit20034\\_en.pdf](http://unctad.org/en/Docs/iteit20034_en.pdf).

<sup>53</sup> See, e.g. Martins, J. H. V. (2017). *Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments*. International Institute for Sustainable Development (IISD). Last accessed on 10 of March 2021 from: <https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/>; Moreira, N. C. (2018). Cooperation and facilitation investment agreements in Brazil: The path for host state development. *Kluwer Arbitration Blog*. Last accessed on 10 March 2021 from: [http://arbitrationblog.kluwerarbitration.com/2018/09/13/cooperation-and-facilitation-investment-agreements-in-brazil-the-path-for-host-state-development/?print=pdf&doing\\_wp\\_cron=1586831929.0269958972930908203125](http://arbitrationblog.kluwerarbitration.com/2018/09/13/cooperation-and-facilitation-investment-agreements-in-brazil-the-path-for-host-state-development/?print=pdf&doing_wp_cron=1586831929.0269958972930908203125).

<sup>54</sup> WTO (2018). Structured discussions on investment facilitation. *Communication from Brazil*. WTO document JOB/GC/169.

to be interrelated. In scenarios B, C and D, as states are subject to different obligations under an IFD Agreement and an IIA on a same subject matter, constructing a proper IFD Agreement-IIA relationship seems necessary. Furthermore, for the purpose of an IFD Agreement, sustainable development should also be considered in constructing a relationship.

To summarize, investment facilitation elements are not entirely alien to IIAs. This implies that an IFD Agreement and IIAs are likely to share subject-matter overlaps and shows that states have formed certain levels of consensus on these elements. Such overlaps and consensus necessitate construction of a proper IFD Agreement-IIA relationship when developing an IFD Agreement. Since IIAs are highly decentralized at the global level, the IFD Agreement-IIA relationship should be evaluated on an IIA-specific basis. In light of this, it makes sense for states to survey their IIAs for existing investment facilitation elements as a preparatory step for making an IFD Agreement.

## Importation of obligations between an IFD Agreement and IIAs

The construction of a proper IFD Agreement-IIA relationship relies heavily on how potential subject-matter overlaps between an IFD Agreement and IIAs are dealt with, especially how IIA-inconsistent obligations in an IFD Agreement (including IIA-plus, IIA-minus and IIA-conflicting obligations) are addressed. In this connection, it is necessary to understand whether and how the obligations in an IFD Agreement and those in IIAs can be mutually imported.

Modern international trade and investment treaties normally incorporate two major types of treaty-bridging clauses that can be applied for importation of external obligations and rights to the treaty system, namely MFN and umbrella clauses.

MFN is deemed to be a cornerstone principle of WTO agreements. In the context of IIAs, MFN treatment ensures that a host state extends to the covered foreign investor and its investments, as applicable, treatment that is no less favourable than that which it accords to foreign investors of any third state.<sup>55</sup> While MFN clauses are differently drafted in IIAs, many IIAs contain an MFN clause with broad coverage. A typical example can be found in the 2012 US Model BIT, which provides that:

### Article 4: Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.<sup>56</sup>

This MFN clause covers not only investors but also nearly the whole life cycle of an investment. Given its broad coverage, this clause makes it possible for a state's IIA-plus obligations in an IFD Agreement to be imported to an IIA system. Such a possibility could be particularly high considering that MFN clauses in IIAs are often expansively interpreted and that ISA jurisprudence relating to MFN clauses appears inconsistent.<sup>57</sup>

Admittedly, application of MFN clauses has restrictions. Depending on its treaty language, an MFN clause could only be invoked if the following requirements were satisfied: that the IIA-plus obligation in an IFD Agreement was a treatment, was no less favourable, and was applied in like circumstance.<sup>58</sup> Some MFN clauses include exceptions, such as economic integration, government procurement and

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<sup>55</sup> UNCTAD (2010). Most-Favoured-Nation Treatment. *UNCTAD Series on Issues in International Investment Agreements II*, 12-13. Last accessed on 10 March 2021 from [https://unctad.org/en/Docs/diaeia20101\\_en.pdf](https://unctad.org/en/Docs/diaeia20101_en.pdf)

<sup>56</sup> See, e.g. United States Model BIT (Bilateral Investment Treaty) 2012 Annex B art. 4.b.

<sup>57</sup> See Batifort, S. and Heath, J. B. (2017). The new debate on the interpretation of MFN clauses in investment treaties: Putting the brakes on multilateralization. *American Journal of International Law*, 111(4), 873-913.

<sup>58</sup> See UNCTAD, *supra* note 16, at 23.

taxation exceptions.<sup>59</sup> These exceptions could help prevent certain IFD Agreement obligations that fall into the exceptions from being imported to an IIA system through the MFN clause.

Importation of IFD Agreement obligations to an IIA is also possible through an umbrella clause in the IIA. Typically, an umbrella clause requires the contracting states of an IIA to honour their commitments or obligations with regard to foreign investments other than those in the IIA, such as contractual obligations or specific arrangements between host states and foreign investors.<sup>60</sup>

The wording of umbrella clauses varies among IIAs. In ISA jurisprudence, umbrella clauses are often applied to lift a state's breach of a contractual obligation to violation of an IIA obligation.<sup>61</sup> Yet, this does not exclude the possibility that a broadly drafted umbrella clause could also be applied to import external treaty obligations.

A typical example of such a clause can be found in some German BITs, such as the Germany-Lebanon BIT (1997), which includes the following article:

Article 7: Other Obligations

2. Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting State.<sup>62</sup>

The term 'any other obligation it has assumed' in this clause appears quite broad, which arguably encompasses both contractual obligations and treaty obligations. In such a case, it is possible for an IFD Agreement obligation to be imported to an IIA system through such an umbrella clause.

To sum up, both MFN and umbrella clauses can be used for mutual importation of obligations between an IFD Agreement and IIAs. Such importation could bring about profound legal uncertainty to states, as states will almost always be subject to the greater or the higher level of investment facilitation obligations, whether in an IFD Agreement or an IIA. Thus, a major aspect of a proper IFD Agreement-IIA relationship is to regulate the mutual importation of obligations between an IFD Agreement and an IIA through MFN and umbrella clauses in the IIA.

In other words, it is necessary to explore whether and how the obligations in an IFD Agreement and those in IIAs can be insulated from each other, especially in dispute settlement. In light of the bridging role of MFN and umbrella clauses, it is advisable that states conduct a thorough review of the MFN and umbrella clauses in their IIAs to assess the possibility and risk of importation of IFD Agreement obligations to the IIA system, especially through ISA.

## Dispute arising between investor-state and WTO dispute settlement and de facto parallel proceedings

An IFD Agreement and IIAs are enforced through different dispute settlement regimes. As an IFD Agreement is likely to be a multilateral or plurilateral agreement under WTO, disputes under an IFD Agreement should be subject to the exclusive and compulsory jurisdiction of WTO, according to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).<sup>63</sup> WTO has one of the most active international dispute settlement mechanisms in the world, which has admitted nearly 600 disputes since its establishment.<sup>64</sup>

<sup>59</sup> See Nikiéma, S. H. (2017). The most-favoured-nation clause in investment treaties. *IISD Best Practice Series*, 6-7. Last accessed on 10 March 2021 from <https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf>; OECD (2004). Most-favoured-nation treatment in international investment law. *OECD Working Papers on International Investment*, 2004(02), 5-8. Last accessed on 10 March 2021 from [www.oecd.org/daf/inv/investment-policy/WP-2004\\_2.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf).

<sup>60</sup> See, e.g. Schreuer, C. (2004). Travelling the BIT route: of waiting periods, umbrella clauses and forks in the road. *The Journal of World Investment & Trade* 5 (2), vii-256.

<sup>61</sup> See Yannaca-Small, K. (2006). Interpretation of the umbrella clause in investment agreements. *OECD Working Papers on International Investment*, 2006 (03), 15-21. Last accessed on 10 March 2021 from [https://www.oecd.org/daf/inv/investment-policy/WP-2006\\_3.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2006_3.pdf)

<sup>62</sup> See, e.g. Article 7.2, Germany-Lebanon BIT (1997); Article 8.2, German-Nigeria BIT (2000).

<sup>63</sup> Article 23, WTO DSU.

<sup>64</sup> WTO (2020). *Dispute Settlement*. WTO website. Last accessed on 10 March 2021 from: [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm).

In contrast, ISA is allowed in many IIAs, which has become the predominant way of pursuing an ISDS. To date, there have been about 1,000 ISA cases, and a major part of them have been submitted to the International Centre for Settlement of Investment Disputes (ICSID).<sup>65</sup>

The fact that IIAs and an IFD Agreement share subject-matter overlaps implies that a state regulatory measure related to investment facilitation could fall within the ambit of both an IFD Agreement and an IIA. As a result, disputes arising from or relating to the same measure could be submitted to either ISA or WTO dispute settlement, or both, by different disputants and relying on different treaties.<sup>66</sup> At this juncture, several scenarios could arise.

### Three dispute scenarios

Scenario A: A dispute is submitted to WTO as both an IFD Agreement claim and an IIA claim. This scenario inquires whether an IIA claim can be admitted under the WTO dispute settlement mechanism. On this issue, WTO jurisprudence suggests a negative answer. DSU provides that WTO shall have jurisdiction over disputes between WTO Members brought under WTO covered agreements.<sup>67</sup> Thus, an IIA claim seems inadmissible under the WTO dispute settlement mechanism, since IIAs are not WTO covered agreements. In this sense, states do not need to be concerned about dispute roving from ISA to WTO dispute settlement mechanisms.

Scenario B: A dispute is submitted to ISA as both an IIA claim and an IFD Agreement claim. This scenario inquires whether and how an ISA tribunal can deal with a WTO claim. In this regard, the high-profile case of Philip Morris Asia vs Australia is an illustrative example. In 2011, Australia adopted the Tobacco Plain Packaging Act, aiming to limit tobacco consumption for public health purpose.<sup>68</sup> The adoption of the Act provoked a number of disputes against Australia.

In Philip Morris Asia vs Australia, the investor, relying on the umbrella clause of the Australia-Hong Kong BIT,<sup>69</sup> claimed that Australia should honour its obligations not only under the BIT, but also under a number of other international treaties, including the Paris Convention for the Protection of Industrial Property, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Technical Barriers to Trade (TBT).<sup>70</sup> Both TRIPS and the TBT agreement are WTO agreements.

Australia argued that the ISA tribunal cannot admit WTO claims. It first denied that the umbrella clause in the BIT can be used to import obligations owed by Australia to other states under other treaties; then it further argued that '[i]t is not the function of a dispute settlement provision ... of the BIT to establish a roving jurisdiction that would enable a BIT tribunal to make a broad series of determinations that would potentially conflict with the determinations of the agreed dispute settlement bodies under the nominated multilateral treaties [i.e. the WTO agreements and the Paris Convention]. This is all the more so in circumstances where such bodies enjoy exclusive jurisdiction.'<sup>71</sup>

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<sup>65</sup> As of 31 December 2019, the number of known treaty-based ISDS cases had 1023, out of which 745 were registered under the ICSID Convention and Additional Facility Rules. See, ICSID, 'The ICSID Caseload – Statistics' (Issue 2020-1). Last accessed on 10 March 2021 from

<https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282020-1%20Edition%29%20ENG.pdf>, at 7.

<sup>66</sup> See Alford, R. P. (2013). The convergence of international trade and investment arbitration. *Santa Clara Journal of International Law*, 12(1), 35-64. Last accessed on 10 March 2021 from <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1148&context=scujil>

<sup>67</sup> Article 1, WTO DSU.

<sup>68</sup> Article 3.1, the Act. Last accessed on 10 March 2021 from <https://www.legislation.gov.au/Details/C2011A00148>

<sup>69</sup> See Article 2 (2), the Australia-Hong Kong BIT (providing that 'Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.')

<sup>70</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Notice of Arbitration, para.7.15-7.17. (21 November 2011). Last accessed on 10 March 2021 from <https://www.italaw.com/sites/default/files/case-documents/ita0665.pdf>

<sup>71</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Australia's Response to the Notice of Arbitration para.35 (21 December 2011). Last accessed on 10 March 2021 from <https://www.italaw.com/sites/default/files/case-documents/ita0666.pdf>

The tribunal ruled that the investor's claims were inadmissible and that the tribunal lacked jurisdiction over the dispute<sup>72</sup> but it did not expressly address the issue of dispute roving from WTO dispute settlement to ISA through the application of the umbrella clause of a BIT.

Whether WTO obligations can be enforced through ISA remains largely unsettled. It could be argued, as Australia did in *Philip Morris Asia vs Australia*, that because Article 23 of DSU establishes the exclusive and compulsory jurisdiction of WTO over 'all disputes arising under the WTO Agreement', WTO Members should not and cannot consent to submit WTO claims to ISA.

On the other hand, a literal reading of Article 23 of DSU seems to suggest that, while WTO Members are obliged to accept the exclusive and compulsory jurisdiction of WTO, this Article does not prohibit private investors from bringing WTO claims in ISA.<sup>73</sup>

Scenario C: A dispute is submitted to both ISA as an IIA claim by an investor, and to WTO as an IFD Agreement claim by a WTO Member, creating *de facto* parallel proceedings. This could particularly be the case considering that a same state regulatory measure could well fall within the ambit of both an IFD Agreement and an IIA. In this connection, FET and IE clauses in IIAs are especially relevant, as both deal with how states should exercise their regulatory power. Typically, an FET clause requires states not to exercise regulatory power that could unduly harm foreign investors or investments, such as taking arbitrary or discriminatory measures or seriously violating due process.<sup>74</sup>

Similarly, an indirect expropriation (IE) clause requires that states not take regulatory measures that could amount to expropriation of foreign investments.<sup>75</sup> Depending on their wording, both FET and IE clauses could serve as a linkage between an IFD Agreement and an IIA, since the same regulatory measure of a state could be pursued as an IFD Agreement claim and an FET or IE claim in parallel. Such likelihood could be high considering that both FET and IE clauses are often broadly drafted in many IIAs and flexibly interpreted in ISA practice.<sup>76</sup>

A typical example of such *de facto* parallel proceedings is the series of disputes against Australia after its adoption of the Act in 2011. First, a few tobacco producers filed domestic litigations in the High Court of Australia.<sup>77</sup> Then, Philip Morris Asia launched an ISA case, claiming that Australia has violated the FET and IE clauses of the Australia-Hong Kong BIT.<sup>78</sup>

Further, several WTO Members initiated disputes in WTO against Australia, claiming violations of several WTO agreements.<sup>79</sup> These legal proceedings occurred around the same time. As can be seen, despite their different forums and legal basis, these disputes targeted the same state regulatory measure of Australia, i.e. the adoption of the Act, and thus constituted *de facto* parallel proceedings.

In the strict sense, neither dispute roving nor *de facto* parallel proceedings are illegal. But their impact on states should not be neglected. They not only put states under high pressure for dealing with parallel

<sup>72</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility 186 (17 December 2015). Last accessed on 10 March 2021 from [https://www.italaw.com/sites/default/files/case-documents/italaw7303\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf)

<sup>73</sup> See Li, S. (2018). Convergence of WTO dispute settlement and investor-state arbitration: A closer look at umbrella clauses. *Chicago Journal of International Law*, 19(1), 189-232. Last accessed on 10 March 2021 from <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1740&context=cjil>

<sup>74</sup> See, generally, UNCTAD (2012). Fair and Equitable Treatment. *UNCTAD Series on Issues in International Investment Agreements II*. Last accessed on 10 March 2021 from [https://unctad.org/en/Docs/unctadddiaeia2011d5\\_en.pdf](https://unctad.org/en/Docs/unctadddiaeia2011d5_en.pdf)

<sup>75</sup> See, generally, OECD (2004). 'Indirect Expropriation' and the 'Right to Regulate' in international investment law. *OECD Working Papers on International Investment*, 2004(04). Last accessed on 10 March 2021 from <http://dx.doi.org/10.1787/780155872321>; Nikièma, S. H. (2012). Best Practices Indirect Expropriation. *IISD Best Practice Series*. Last accessed on 10 March 2021 from <https://www.iisd.org/publications/best-practices-indirect-expropriation>

<sup>76</sup> See Weiler, T. (2013). *The Interpretation of International Investment Law*. Leiden, Netherlands: Brill | Nijhoff. DOI. Last accessed on 10 March 2021 from <https://doi.org/10.1163/9789004232235>

<sup>77</sup> Attorney-General's Department, 'Tobacco Plain Packaging—Investor-State Arbitration'. Last accessed on 10 March 2021 from <https://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobacoplainpackaging.aspx>

<sup>78</sup> UNCTAD, *Philip Morris Asia Limited v. The Commonwealth of Australia*. Last accessed on 10 March 2021 from <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/421/philip-morris-v-australia>

<sup>79</sup> WTO, *Australia - Tobacco Plain Packaging (Ukraine)*(DS434), *Australia - Tobacco Plain Packaging (Honduras)*(DS435), *Australia - Tobacco Plain Packaging (Dominican Republic)*(DS441), *Australia - Tobacco Plain Packaging (Cuba)*(DS458), *Australia - Tobacco Plain Packaging (Indonesia)*(DS467). Last accessed on 10 March 2021 from [https://www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm)



proceedings but, more importantly, they also expose states to potentially conflicting decisions made by different adjudicatory bodies. In particular, the broad coverage and flexible interpretation of FET and IE clauses in IIAs increase the possibility of dispute roving and *de facto* parallel proceedings.

In recent years, some states have revised FET and IE clauses in IIAs. For instance, unlike many IIAs that include an open-ended FET clause, the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) incorporates a closed-list FET clause, which identifies five specific situations as FET violations.<sup>80</sup>

Likewise, exceptions of IE clauses have been incorporated in some IIAs, so that state regulatory measures for public interest purposes will not be deemed as an act of indirect expropriation, except in rare circumstances.<sup>81</sup> While the primary purpose of such revisions is to preserve state regulatory power, they could also help limit the possibility of using FET and IE clauses for creating dispute roving or *de facto* parallel proceedings, although such a possibility cannot be completely eliminated.

However, because IIAs are decentralized, it would be unrealistic to make systematic revisions of FET and IE clauses in IIAs. Consequently, it remains possible for investors to select IIAs with broad FET and IE clauses, typically through nationality planning or MFN clauses, for creating dispute roving or *de facto* parallel proceedings.

## Proposed treaty interference clauses

As mentioned, a number of provisions in IIAs could link an IFD Agreement with IIAs. While MFN and umbrella clauses could create obligation importation from an IFD Agreement to IIAs, FET and IE clauses could create dispute roving and *de facto* parallel proceedings.

While these situations are not necessarily illegal, they could bring about profound uncertainty to states. This implies that construction of a proper IFD Agreement-IIA relationship should aim at disallowing obligation importation and insulating IFD Agreement claims from ISA. Ideally, these issues could and should be addressed by both IIAs and an IFD Agreement concurrently. Yet, as a systematic revision of IIAs seems impossible due to their decentralization, it seems only feasible for an IFD Agreement to address these issues.

It is necessary for WTO Members to consider incorporating proper treaty interface clauses in an IFD Agreement for disallowing obligation importation and insulating IFD Agreement claims from ISA.<sup>82</sup> Drawing reference from existing trade and investment treaties, several types of treaty interface clauses are proposed below.

Alternative A: As subject-matter overlaps between an IFD Agreement and IIAs are the reason that gives rise to interrelation between these two types of instruments, it seems natural for states to incorporate a coverage clause in the IFD Agreement, which could reaffirm the subject-matter coverage of the IFD Agreement and separate the IFD Agreement from IIAs. Such a clause could be in the form of a positive statement, a negative statement or a combination of both.

A positive statement could read that,

For greater certainty, Members confirm that this Agreement shall only apply to issues relating to investment facilitation.

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<sup>80</sup> Article 8.10, Comprehensive Economic and Trade Agreement (CETA).

<sup>81</sup> See, e.g. Article 4 (b), Annex B, 2012 US Model BIT.

<sup>82</sup> See Bermann, G., Calamita, N. J., Chi, M. and Sauvart, K. P. (2020). Insulating a WTO Investment Facilitation Framework from ISDS. *Columbia FDI Perspectives No.286*. Last accessed on 10 March 2021 from <http://ccsi.columbia.edu/files/2018/10/No-286-Bermann-Calamita-Chi-and-Sauvant-FINAL.pdf>

A negative statement could read that,

For greater certainty, Members confirm that this Agreement shall not apply to any issues relating to or arising out of market access, protection of investors or investments, and investor-state dispute settlement.

A combination could be made of both positive and negative statements:

For greater certainty, Members confirm that this Agreement only applies to investment facilitation; it shall not apply to any issues relating to or arising out of market access, protection of investors or investments, and investor-state dispute settlement.

Alternative B: States could consider inserting an MFN restriction clause in an IFD Agreement, which could limit the function of an MFN clause from importing an IIA obligation to the IFD Agreement system. In this respect, the recent European Union-Vietnam Investment Protection Agreement (EU-Vietnam IIA) offers an example:

Article 2.4: Most-Favoured Nation Treatment

5. For greater certainty, the term 'treatment' referred to in paragraph 1 does not include dispute resolution procedures or mechanisms, such as those included in Section B (Resolution of Disputes between Investors and Parties) of Chapter 3 (Dispute Resolution), provided for in any other bilateral, regional or international agreements. Substantive obligations in such agreements do not in themselves constitute 'treatment' and thus cannot be taken into account when assessing a breach of this Article. Measures by a Party pursuant to those substantive obligations shall be considered 'treatment'.<sup>83</sup>

The above MFN clause denies that substantive obligations in other treaties constitute treatment in the EU-Vietnam IIA. Such a denial has at least two implications. First, as an MFN clause is typically used to import treatment, this denial by implication disables the importation role of the MFN clause in the IIA. Second, the term 'substantive obligations' by implication excludes procedural obligations from the application scope of the MFN clause, especially obligations of ISA.

This seems to be a reasonable and timely response to the inconsistent ISA jurisprudence on whether an MFN clause can be used to import procedural obligations.<sup>84</sup> If a similar MFN restriction clause is incorporated in an IFD Agreement, such a clause could help prevent IIA obligations from being imported to the IFD Agreement system.

Such an MFN restriction clause has limits. As investment facilitation obligations in an IFD Agreement are likely to be IIA-plus, it does not make good sense to import IFD Agreement-minus obligations in an IIA to the IFD Agreement system. Rather, importation of IIA-plus obligations in the IFD Agreement to an IIA system should be restricted, but the MFN restriction clause seems unhelpful in this regard.

To address this concern, a second sentence could be inserted in the MFN restriction clause in the IFD Agreement, which should state that,

For greater certainty, substantive obligations in this Agreement do not constitute 'treatment' in any other bilateral, regional or international agreements.

This sentence demonstrates the intention of states to restrict IFD Agreement obligations from being imported to an IIA system.

Alternative C: States should also consider inserting an 'insulation clause' in an IFD Agreement, which reaffirms that IFD Agreement rights and obligations and those in other treaties, including IIAs, should not affect each other, particularly when the relevant treaty clauses are in conflict. An example of such a clause can be found in the 2012 US Model BIT, on the issue of taxation, which reads:

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<sup>83</sup> Article 2.4.5, EU-Vietnam IPA.

<sup>84</sup> See, e.g. Douglas, Z. (2011). The MFN clause in investment arbitration: Treaty interpretation off the rails. *Journal of International Dispute Settlement*, 2(1), 97-113.

Article 21: Taxation

4. Nothing in this Agreement shall affect the rights and obligations of either member under a tax convention. In the event of any inconsistency between this Agreement and any such tax convention, the tax convention shall prevail to the extent of the inconsistency.

The above insulation clause not only separates the BIT from the tax treaty, but also addresses potential conflicts between the BIT and the tax treaty by prioritizing the latter. If a similar insulation clause is incorporated in an IFD Agreement, it could be in one of the following three forms:

Members of the Agreement confirm that nothing in this Agreement shall affect the rights and obligations of any bilateral, regional and international investment agreements.

or

Members of this Agreement confirm that this Agreement does not create any new obligations or modify any existing obligations relating to treatment or protection of investors and investments in any bilateral, regional and international investment agreements.

or

Members of this Agreement confirm that both themselves and the covered investors of their bilateral, regional and international investment agreements shall not refer to or rely on this Agreement for any purpose.

Such a clause could help an IFD Agreement to be insulated from IIAs, despite their subject-matter overlaps. It could especially help prevent IIA-plus obligations in the IFD Agreement from being imported to an IIA system through the MFN and umbrella clauses in the IIA, because importation of IFD Agreement obligations could be deemed as 'creating new obligations' or 'modifying existing obligations' in the IIA.

Alternative D: From the enforcement or dispute settlement perspective, states could consider inserting a dispute roving prevention clause in an IFD Agreement, e.g. to prevent alleged IIA violations from being treated as IFD Agreement violations. An example of such a clause could be found in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which provides that,

Article 9.6: Minimum Standard of Treatment

3. A determination that there has been a breach of another provision of this Agreement, or a separate international agreement, does not establish that there has been a breach of this Article.<sup>85</sup>

By denying that a breach of a different treaty constitutes a breach of the minimum standard of treatment (MST) clause of the CPTPP, this clause insulates claims based on other treaties from MST claims under the CPTPP. While this clause is confined to MST, it could be used in a broader setting. If a similar clause is incorporated in an IFD Agreement, it could insulate IIA claims from being treated as IFD Agreement claims, thus preventing potential dispute roving from ISA to the WTO. Such a clause, however, could not insulate IFD Agreement claims, which are likely to be related to IIA-plus obligations, from ISA. To address this issue, it is helpful to insert a second sentence to this clause, which should state that,

A determination that there has been a breach of any provision of this Agreement does not establish that there has been a breach of any separate international agreement.

Such a sentence clearly shows the intention of states of denying IFD Agreement claims to be treated as IIA claims, thus potentially preventing dispute roving from WTO to ISA. Similarly, as this is an IFD Agreement clause, it is not necessarily binding on ISA tribunals.

Alternative E: Treaty interpretation could play a crucial role in ascertaining a state's obligation in international dispute settlement. It is necessary to include a treaty interpretation restriction clause to

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<sup>85</sup> Article 9.6.3, Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation Act (CPTPP).



help prevent IFD Agreement obligations from being imported to an IIA system through treaty interpretation.

The Vienna Convention on the Law of Treaties provides the general framework for treaty interpretation. According to the Convention, adjudicators may consider, among other things, 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' and 'any relevant rules of international law applicable in the relations between the parties'.<sup>86</sup> In fact, in both ISA and WTO dispute settlement practices, adjudicators often refer to 'other treaties' for treaty interpretation purposes.

Using an IFD Agreement clause to interpret an IIA clause *per se* does not import an IFD Agreement obligation into the IIA system, but because it allows IFD Agreement clauses to be considered in ascertaining and enforcing a state's IIA obligation, it potentially connects the IFD Agreement with IIAs. This could particularly be the case as ISA tribunals sometimes adopt a flexible approach in treaty interpretation, especially with regard to FET and IE clauses. In light of this, it is advisable for states to consider restricting an IFD Agreement to be used as a treaty interpretative tool in ISA. Towards this end, states may consider inserting a clause as the following:

This Agreement shall not be treated as a subsequent agreement and any provisions of this Agreement shall not be treated as relevant rules of international law in the meaning of Vienna Convention on the Law of Treaties in the interpretation of any provisions of investment treatment and protection in a bilateral, regional or international investment agreement.

To sum up, while these proposed treaty interface clauses vary in wording and coverage, all of them share a clear aim of insulating an IFD Agreement from IIAs, through limiting importation of IFD Agreement obligations to the IIA system, reducing the possibility of dispute roving and restricting flexibility of treaty interpretation in ISA. Such insulation is necessary since an IFD Agreement is likely to contain IIA-plus obligations. However, because these proposed treaty interface clauses are IFD Agreement clauses, they are only binding on WTO Members in the strict sense. This situation could limit the effectiveness of these clauses.

As these IFD Agreement clauses do not necessarily bind ISA tribunals, whether and to what extent ISA tribunals would follow these clauses remains to be observed. On the other hand, if a contracting state of an IIA is not a WTO Member, it is not bound by the IFD Agreement. In such a case, it is uncertain whether these clauses could still play a helpful role in insulating an IFD Agreement from IIAs.

In light of this, it seems reasonable to say that, while the proposed clauses could be helpful in insulating an IFD Agreement from IIAs and ISA, such insulation is incomplete. Complete insulation also calls for proper treaty interface clauses in IIAs and necessary restriction of the adjudicative power of ISA tribunals, neither of which could be easily achieved.

## A pro-sustainable development IFD Agreement and its relationship with IIAs

An IFD Agreement is not just for facilitating investment; it is also expected to promote sustainable development in all states. Given that states make investment facilitation commitments in IIAs that could overlap those made in an IFD Agreement, and that such commitments may be inconsistent, construction of a proper IFD Agreement-IIA relationship could create more predictability as to how investment facilitation is regulated in the two different legal frameworks.

It could also create more certainty to WTO and IIA legal systems through insulating IFD Agreement obligations from IIAs and ISA. Enhanced legal predictability and certainty could enhance the contribution of foreign investment to sustainable development.

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<sup>86</sup> Article 31.3 (a) and (c), Vienna Convention on the Law of Treaties (VCLT).

To achieve this goal, incorporating sustainable-development-related provisions in an IFD Agreement could be helpful. Several investment facilitation elements in IIAs are related to sustainable development. For instance, it is generally agreed that transparency and international cooperation provisions in both an IFD Agreement and IIAs embody investment facilitation elements, and they could also be viewed as sustainable development provisions in international economic treaties. Also, some investment facilitation measures with a focus on sustainable development have been proposed by international experts.<sup>87</sup> It is advisable that states consider these suggested measures and elements in making an IFD Agreement.

Most sustainable-development-related provisions in international economic treaties concern states' exercise of regulatory power for public interest purposes. In reality, such provisions often fail to sufficiently promote sustainable development. Many have weak normativity and are deemed as balancing rules instead of legal norms.<sup>88</sup>

Besides, neither WTO dispute settlement nor ISA have proved to be adequately supportive to states' regulatory efforts in promoting sustainable development. For instance, ISA is frequently blamed for causing a 'chilling effect', which hinders states in taking regulatory measures for public interest purposes.<sup>89</sup> Likewise, WTO jurisprudence on GATT Article XX (General Exceptions) seems to imply that WTO favours free trade over public interest.<sup>90</sup>

In light of this, to make a pro-sustainable-development IFD Agreement, it is necessary to ensure that the IFD Agreement will not unduly limit states' regulatory power. This requires that an IFD Agreement be insulated from IIAs and ISA, so that IFD Agreement claims will not be treated as FET and IE claims in ISA. In this regard, construction of a proper IFD Agreement-IIA relationship is crucial for states.

## Recommendations

Considering that an IFD Agreement and IIAs may share substantial subject-matter overlaps, and that a number of IIA clauses can be used to bridge an IFD Agreement with IIAs, such as MFN, umbrella, FET and IE clauses, constructing a proper IFD Agreement-IIA relationship is important and necessary. Because an IFD Agreement is expected by states to exclude investment protection, market access and ISDS, the key to a proper IFD Agreement-IIA relationship lies in insulating the IFD Agreement from IIAs and ISA.

To achieve this, proper treaty interface clauses should be designed and included in an IFD Agreement and IIAs, so that the two types of legal instruments could be separated from each other. Considering that systematic revision of IIAs is almost impossible due to their decentralization, such treaty interface clauses should be incorporated in an IFD Agreement.

Towards this end, several model clauses are proposed, each with a different function and scope of application. They are neither exhaustive nor mutually exclusive. Although they are unlikely to create complete insulation between an IFD Agreement and IIAs, they could help create more predictability and certainty for the regulation of investment facilitation at the global level.

Aside from the proposed model treaty interface clauses, the following policy recommendations are proposed to facilitate negotiations relating to such clauses.

1. States are encouraged to carry out a comprehensive survey of their IIAs that covers the investment facilitation commitments they have undertaken in IIAs, and the FET and IE clauses in their IIAs. This could help states formulate their overall and subject-matter-specific positions in IFD

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<sup>87</sup> See Sauvart, K. P. & Stephenson, M. (2020). *Concrete Measures for a Framework on Investment Facilitation for Development: Report*. *Columbia FDI Perspectives*, No. 116, 3-8. Last accessed on 10 March 2021 from: <http://ccsi.columbia.edu/2020/03/05/concrete-measures-for-a-framework-on-investment-facilitation-for-development-report/>.

<sup>88</sup> See Chi, M. (2017). Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications. *London and New York: Routledge*, 163.

<sup>89</sup> See, e.g. Tienhaara, K. (2011). Regulatory Chill and the Threat of Arbitration: A View from Political Science. In Chester Brown and Miles, K. (eds.), *Evolution in Investment Treaty Law and Arbitration* (pp. 606-628). Cambridge: Cambridge University Press.

<sup>90</sup> See, e.g. Chi, M. (2014). Exhaustible Natural Resource in WTO Law: GATT Article XX (g) Disputes and Their Implications. *Journal of World Trade*, 48(5), 939-996; Pauwelyn, J. (2011). The Dog that Barked but Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO. *Journal of International Dispute Settlement*, 1(2), 389-429.

Agreement negotiations and assess the potential disputes related to investment facilitation obligations.

2. As treaty interface clauses in an IFD Agreement bind all WTO Members, states are encouraged to carefully examine the proposed clauses to assess which one(s) would best meet their needs, including the need to promote sustainable development, with due account paid to existing investment facilitation provisions in their IIAs and their ISA experiences.
3. Treaty interface clauses in an IFD Agreement only bind WTO Members, but not non-WTO Members, private investors and ISA tribunals. Thus, states should keep in mind that revising relevant IIA clauses (such as MFN, umbrella, FET and IE clauses) and restricting the power of ISA tribunals (such as the power of interpreting FET clauses) should remain a policy option for constructing a proper IFD Agreement-IIA relationship where possible.

## Chapter 3 From Trade to Investment Facilitation – Parallels and Differences

*Contributed by Bernard Hoekman*

One of the WTO's main achievements since the creation of the organization in 1995 has been the negotiation of an agreement to facilitate trade, the Trade Facilitation Agreement (TFA), which entered into force in 2017. That same year, WTO Members launched discussions to explore whether a similar agreement could be negotiated to facilitate investment. This chapter reflects on lessons from the experience of negotiating and implementing TFA for a possible multilateral framework for investment facilitation.

Given the commonalities in the goal of cooperation – to facilitate specific types of economic activity by reducing red-tape costs for economic actors that do not benefit society (reduce national welfare/do not support realization of sustainable development goals) – elements of what was done in TFA can be applied in the IFD Agreement talks and inform the potential shape of a deal. In addition to highlighting parallels, the chapter identifies differences between facilitating trade and facilitating investment and discusses the implications for the negotiation process and design of an IFD Agreement.

Investment facilitation is being discussed by a subset of WTO Members as one of four Joint Statement Initiatives (JSI) launched by groups of WTO Members at the December 2017 WTO Ministerial Conference in Buenos Aires. The WTO JSI on investment facilitation brought together 70 Members in Buenos Aires. Over time participation grew and to date the group encompasses 106 WTO Members.

The mandate given to the group by ministers of participating countries is to identify and develop the elements of a framework for facilitating FDI by improving the transparency and predictability of investment measures and reducing 'red tape' costs associated with administrative procedures and requirements.

A key goal is to facilitate greater FDI flows to developing countries and least developed countries. The mandate calls for any IF framework to encompass international cooperation, information sharing, exchange of best practices, engagement with relevant stakeholders and dispute prevention mechanisms.

According to the mandate, several issues are excluded from the IFD Agreement discussions: market access, investment protection and ISDS. The latter two dimensions of investment policy are covered in more than 3,200 extant IIAs,<sup>91</sup> while the market access element is addressed in some preferential trade agreements and in the General Agreement on Trade in Services, insofar as WTO Members have made commitments on Mode 3 (commercial presence of foreign services suppliers).<sup>92</sup> The investment facilitation discussions and prospective negotiations will not touch on these matters.

The focus on facilitation as opposed to liberalization is similar to – and builds on – the Doha Development Agenda initiative on trade facilitation. Transaction costs associated with complying with administrative requirements, policy uncertainty and non-transparent regulatory frameworks negatively affect investment flows in ways analogous to the effects of border clearance inefficiencies on trade flows.

The types of measures that figure in trade facilitation programmes, such as certification of authorized economic operators, green channels, risk-assessment-based enforcement or single windows are all applicable to an investment context in ways similar to what is done to facilitate trade. For example, the

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<sup>91</sup> UNCTAD (2020). *World Investment Report*. UNCTAD website. Last accessed on 10 March 2021 from <https://unctad.org/webflyer/world-investment-report-2020>

<sup>92</sup> For a discussion of the links between investment facilitation for services and GATS, see Echandi, R. and Sauvé, P. (2019). *Investment Facilitation and Mode 3 Trade in Services: Are Current Discussions Addressing the Key Issues?*. *World Bank Policy Research Paper*, 9229.

idea of a recognized sustainable investor builds on the concept of an authorized economic operator in the context of customs clearance.<sup>93</sup>

This chapter does not discuss the substance of the IFD Agreement discussions or the draft text, as the latter is incomplete and certain to change substantially as the negotiations proceed.<sup>94</sup> Instead, the focus is on parallels with trade facilitation and the TFA negotiations and some of the lessons suggested by the trade facilitation experience.

## Trade facilitation negotiations

The WTO discussions on trade facilitation commenced in the late 1990s. Trade facilitation was one of four new issues put forward for possible negotiation at the 1996 WTO Ministerial Conference in Singapore. It ended up being the only one on which negotiations were launched as part of the Doha Development Agenda.<sup>95</sup> After 10 years of negotiations, an agreement emerged. Signed in 2013, it entered into force in 2017, once a critical mass of WTO Members had ratified it. The whole process took more than two decades.

### Cross-issue linkage adds time

Why did it take so long? In part because of an inability to agree on other subjects that figured on the agenda of the Doha Round, notably trade in services, agricultural trade policies and non-agricultural market access – all central to WTO. A basic feature of multi-issue trade rounds is cross-issue linkage, implying that trade facilitation is seen to be part of an overall package deal. Only once it became clear to most WTO Members that such a package deal was unlikely to emerge did they focus on ‘harvesting’ TFA as a stand-alone agreement.

One important reason this was possible is that trade facilitation does not lend itself well to an issue linkage strategy because trade facilitation is mostly in the interest of the countries that pursue it. As a result, other countries are not willing to ‘pay’ much in the way of concessions on specific trade policy areas to incentivize trading partners to take measures to facilitate trade.<sup>96</sup> The exception to this presumption arises for land-locked countries, where trade facilitation, in part, will depend on what

<sup>93</sup> Authorized economic operators are customs-trader partnerships in which a trader is recognized as satisfying standards pertaining to compliance with customs regulations, supply chain security and accounting and financial standards. This status provides certain benefits, including simplification of customs clearance procedures and/or security and safety inspections. The concept and associated agreed international standards were developed by the World Customs Organization. For a discussion of the potential of using this type of partnership framework to define and certify firms as recognized sustainable investors, see Sauvart, K. and Gabor, E. (2019). Advancing Sustainable Development by Facilitating Sustainable FDI, Promoting CSR, Designating Recognized Sustainable Investors, and Giving Home Countries a Role. Last accessed on 10 March 2021 from <https://ssrn.com/abstract=3496967>

<sup>94</sup> For overviews of the background to the investment facilitation discussions, see Berger, A., Gsell, S. and Olekseyuk, Z. (2019). Investment facilitation for development: a new route to global investment governance. *DIE Briefing Paper*, 5/2019. Last accessed on 10 March 2021 from [https://www.die-gdi.de/uploads/media/BP\\_5.2019.pdf](https://www.die-gdi.de/uploads/media/BP_5.2019.pdf). (Berger, 2019). See also Baliño, S., Brauch, M. and Jose, R. (2020). Investment Facilitation: History and the latest developments in the structured discussions. Geneva: IISD and CUTS International. Last accessed on 10 March 2021 from <https://www.iisd.org/system/files/publications/investment-facilitation.pdf>; and Sauvart, K. and Stephenson, M. (2020). *Concrete measures for a Framework on Investment Facilitation for Development: Report*. Last accessed on 10 March 2021 from <http://ccsi.columbia.edu/files/2020/03/KPS-Stephenson-Inv-fac-11-Dec-19-workshop-final-report-31-Jan-20-rev-1.pdf>. For an analysis of the state of play of the investment facilitation discussions as of September 2020, see Bernasconi-Osterwalder, N., Campos, S. and van der Ven, C. (2020). The Proposed Multilateral Framework on Investment Facilitation: An analysis of its relationship to international trade and investment agreements. IISD and CUTS International.

<sup>95</sup> No agreement was possible to launch talks on investment policy, competition policy and transparency in government procurement. The launch of plurilateral discussions on investment facilitation in 2017 brought some elements of the investment policy agenda back to WTO. A major difference is that current talks are limited to investment facilitation and do not extend to market access, investment incentives or investor-State dispute settlement elements that were at the core of resistance by many developing countries to talks on investment in the early 2000s. See, e.g. Hoekman, B. and Saggi, K. (2000). Assessing the Case for Extending WTO Disciplines on Investment Related Policies. *Journal of Economic Integration*, 15(4): 588-610; Wolfe, R. (2004). Crossing the river by feeling the stones: where the WTO is going after Seattle, Doha and Cancun. *Review of International Political Economy*, 11:3, 574-596; and Sauvart, P. (2006). Multilateral rules on investment: is forward movement possible?. *Journal of International Economic Law*, 9(2), 325-355.

<sup>96</sup> Hoekman, B. (2016). The Bali Trade Facilitation Agreement and rulemaking in the WTO: milestone, mistake or mirage? In Bhagwati J., Krishna, P. and Panagariya, A. (eds.), *The World Trade System: Trends and Challenges*. Cambridge, MA: MIT Press; Belastegui, A. (2017). *National Trade Facilitation Committees: Beyond compliance with the WTO Trade Facilitation Agreement?* Geneva: UNCTAD. Last accessed on 10 March 2021 from [https://unctad.org/system/files/official-document/dtlitb2017d3\\_en.pdf](https://unctad.org/system/files/official-document/dtlitb2017d3_en.pdf). (Hoekman, B., 2016).

neighbouring countries do, with respect to the operation of transport corridors and access to maritime port facilities.

Investment facilitation is like trade facilitation in this regard. Given that investment facilitation measures (like trade facilitation measures) give rise to limited cross-border spillovers (terms of trade externalities), this should facilitate a stand-alone agreement. Indeed, such an agreement does not need to include all WTO Members because free-riding concerns do not arise; it does not matter what non-Members of an agreement do. As investment facilitation does not give rise to the type of trade facilitation externalities that are a factor for landlocked countries, an IFD Agreement should be easier to define than was the case for TFA.

### Defining what constitutes good policy

A characteristic of international cooperation on investment facilitation – as was the case for trade facilitation – is that it largely centres on defining what constitutes good policy, identifying the reasons that may inhibit such policy from being adopted by a country and establishing a platform or framework through which countries can be assisted by others in implementing what they have agreed constitutes good policy.

Establishing what makes good policy and getting all participating countries to buy in to a common vision of the ultimate objective of an agreement proved to require a significant amount of time. This was a major reason why the TFA took so long to materialize. Many governments had not focused on trade facilitation as a distinct area of activity that deserved priority attention from an economic development perspective.

Not only was time required to gain a common understanding of what constitutes a set of good practices for countries at differing levels of development, but it was also not clear to many countries what the resource implications of the effort needed to implement them would be. The mix of identifying and agreeing on what constitutes good practice and what it would take to operationalize them on the ground on a country-by-country basis helps to explain why the negotiating process took so long.

### An 'epistemic community' to support progress

In the case of trade facilitation and the TFA negotiations, an 'epistemic community'<sup>97</sup> of non-WTO actors played a major role in supporting the process of identifying good trade facilitation practices and principles. They comprised national customs agencies – often working with and through the World Customs Organization – development agencies, other international organizations (including the International Chamber of Commerce, ITC, OECD, UNCTAD, World Economic Forum and the World Bank) and the private sector, notably several international express carriers and logistics services providers.

The active involvement of these groups and organizations helped negotiators to understand what trade facilitation entails and why it matters to them.<sup>98</sup> The community also helped negotiators craft an agreement that explicitly recognizes the prevailing heterogeneity in initial conditions and the differential capacity to implement trade facilitation improvements. One result of this is that the design of TFA differs substantially from the other multilateral agreements included in WTO.

A major contribution made by these actors was to provide information and analysis. This helped to establish a common understanding of what trade facilitation comprises and why it matters. Their analysis showed that facilitating trade is distinct from removing explicit market access barriers (tariffs, taxes, etc.) and can greatly reduce trade costs without affecting the degree of desired protection accorded to

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<sup>97</sup> Haas, P. (1992). Introduction: Epistemic Communities and International Policy Coordination. *International Organization*, 46(1), 1-35, defines this as a group of professionals with a shared set of normative and principled beliefs that provide a value-based rationale for the social action of community members; shared causal beliefs, derived from their analysis of practices to address problems in their domain, that serve as the basis for understanding linkages between possible policy actions and desired outcomes; shared notions of validity – criteria for weighing and validating knowledge in the domain of their expertise; and a set of common practices – associated with the problems to which their professional competence is directed with a view to enhance welfare. For an application of the framework to the negotiations that led to GATS, see Drake, W.J. and Nicolaïdis, K. (1992). Ideas, Interests, and Institutionalization: 'Trade in Services' and the Uruguay Round. *International Organization*, 46(1): 37-100.

<sup>98</sup> Comprehensive handbooks on customs modernization and trade facilitation were compiled by the World Bank. See De Wulf, L. and Sokol, J. (eds.). (2005). *Customs Modernization Handbook*. Washington DC: World Bank. Last accessed 10 March 2021 from <https://openknowledge.worldbank.org/handle/10986/7216>; and McLinden, G., Fanta, E., Widdowson, D. and Doyle, T. (eds.). (2010). *Border Management Modernization*. Washington DC: World Bank.



domestic producers helped to address concerns of developing countries that trade facilitation is a Trojan horse for liberalization.

## Tracking implementation

Research documenting that trade facilitation is a vehicle for lowering prices and disciplining the scope for corruption and rent-seeking behaviour further increased political support for engaging in trade facilitation talks. Over time, the analysis provided by international organizations and researchers became more precise, focusing on specific types of trade facilitation measures and addressing questions that concerned negotiators. Examples include analysis of the distributional effects (incidence) of trade facilitation measures across different types of firms – small vs large; domestic vs foreign<sup>99</sup> – and the salience of trade facilitation for diversification goals.<sup>100</sup>

Initial studies estimated the effects of trade costs created by administrative processes at borders using World Bank-type indicators.<sup>101</sup> Once the TFA negotiators had identified specific trade facilitation measures, it became possible to define and measure detailed trade facilitation indicators, allowing more fine-grained assessments of potential benefits and associated implementation costs. The OECD compiled a set of trade facilitation indicators<sup>102</sup> that helped to establish a baseline for the state of play across countries. The relevant international organizations continue to compile trade facilitation performance indicators, allowing assessments of progress in implementing TFA and the economic effects of trade facilitation initiatives.

Following the TFA signature, the regional United Nations economic commissions launched an initiative to track its implementation through a Global Survey on Trade Facilitation and Paperless Trade Implementation. The survey collects data on the state of play for 128 countries for each of the substantive provisions of TFA and areas not covered by it, such as digital trade facilitation, sustainability dimensions (gender, SMEs) and trade finance.<sup>103</sup> The most recent survey (2019) reveals much progress in setting up the domestic institutional framework required by TFA, with 81% of countries having put in place a national trade facilitation committee (NTFC) and more than 70% satisfying the transparency provisions of the agreement.

Less progress is observed in areas involving paperless transactions, such as a facility for electronic application and issuance of preferential certificates of origin and electronic application for customs refunds (37% and 34%, respectively). Progress on single window provisions is also below average, with only half of all countries having put in place measures through which government agencies delegate

<sup>99</sup> See, e.g. Hoekman, B. and Shepherd, B. (2015). Who Profits from Trade Facilitation Initiatives: Implications for African Countries. *Journal of African Trade*, 1(2): 51-70.

<sup>100</sup> See, e.g. Beverelli, C., Neumueller, S. and Teh, R. (2015). Export Diversification Effects of the WTO Trade Facilitation Agreement. *World Development*, 76: 293-310.

<sup>101</sup> Work to estimate the overall economic effects of (non-)trade facilitation include; Wilson, J., Mann, C. and Otsuki, T. (2005). Assessing the Benefits of Trade Facilitation: A Global Perspective. *The World Economy*, 28(6): 841-71; Djankov, S., Freund, C., and Pham, C. (2010). Trading on Time. *Review of Economics and Statistics*, 92(1): 166-73; Hoekman, B. and Nicita, A. (2010). Assessing the Doha Round: Market Access, Transactions Costs and Aid for Trade Facilitation. *Journal of International Trade & Economic Development*, 19(1): 65-80; Hoekman, B. and Nicita, A. (2011). Trade Policy, Trade Costs and Developing Country Trade. *World Development*, 39(12): 2069-79; Hufbauer, G. and Schott, J. (2013). Payoff from the World Trade Agenda 2013. *ICC Research Foundation report*, Washington DC: Peterson Institute for International Economics; World Economic Forum. 2013. *Enabling Trade: Valuing Growth Opportunities*. Last accessed on 10 March 2021 from [http://www3.weforum.org/docs/WEF\\_SCT\\_EnablingTrade\\_Report\\_2013.pdf](http://www3.weforum.org/docs/WEF_SCT_EnablingTrade_Report_2013.pdf); and World Trade Organization. (2015). *World Trade Report 2015: Speeding up trade: benefits and challenges of implementing the WTO Trade Facilitation Agreement*. Geneva: WTO. (WTO, 2015). Such work was complemented by initiatives by the World Bank and the OECD to define and measure trade facilitation indicators, e.g. World Bank's logistics performance indicators (starting in 2007. Last accessed on 10 March 2021 from <https://lpi.worldbank.org/report>) and Trading across Borders indicators (starting in 2003. Last accessed on 10 March 2021 from <https://www.doingbusiness.org/en/data/exploretopics/trading-across-borders/what-measured>)

<sup>102</sup> Moisé, E., and Sorescu, S. (2013). Trade Facilitation Indicators: The Potential Impact of Trade Facilitation on Developing Countries' Trade. *OECD Trade Policy Papers*, No. 144. Last accessed on 10 March 2021 from <http://dx.doi.org/10.1787/5k4bw6kg6ws2-en>; Moisé, E., Orliac, T. and Minor, P. (2011). Trade Facilitation Indicators: The Impact on Trade Costs. *OECD Trade Policy Papers*, No. 118. Last accessed on 10 March 2021 from <http://dx.doi.org/10.1787/5kg6nk654hmr-en>

<sup>103</sup> The UN agencies do not provide open access to the underlying data, while the option to access TFI data on the OECD website was not functional when this chapter was written. It is also noteworthy that the OECD is one of the few international organizations that maintains a policy of placing its publications behind a paywall – e.g. its 2018 report Trade Facilitation and the Global Economy – inhibiting access to its analysis of progress in implementing the TFA.



control functions to customs authorities.<sup>104</sup> This type of monitoring exercise is important to track progress and identify areas on which to focus.

### Providing technical assistance

The epistemic community also provided substantial technical assistance to countries requesting it during the negotiations. One significant contribution involved estimating the likely costs of implementing different types of trade facilitation measures,<sup>105</sup> documenting – based on experience and assessments of specific countries – that such costs were not insignificant but manageable if donors were to support implementation in low-income nations.

Once the TFA had been agreed, many of the organizations continued to work together to help countries to implement the provisions of the agreement. In doing so, the organizations working in this area benefited from dedicated coordination mechanisms. These include NTFCs, the WTO Trade Facilitation Committee overseeing the TFA implementation, the Aid-for-Trade partnership between WTO and the donor community, and several dedicated (earmarked) multi-donor trust funds supporting TFA implementation assistance.

This experience is relevant to the investment facilitation discussions, raising the question of whether there is an equivalent epistemic community that brings together the relevant actors, and what (more) could (or should) be done to do so. In the TFA context, the epistemic community anchored to WCO and the research/operational arms of international development organizations (World Bank, UN bodies) provided analysis of the potential economic effects of trade facilitation that was an important factor supporting efforts to cooperate.

### Emergence of a common understanding

By providing information on the size of the possible benefits, their distribution, e.g. whether small firms would benefit as well as large traders, and the costs of implementing trade facilitation measures, a common understanding emerged of the salience of the trade facilitation agenda for helping to achieve national development goals. Similarly, the IFD Agreement discussions need to be informed by analysis that identifies the elements of an investment facilitation agenda that would have the greatest positive effects in terms of supporting FDI and realizing sustainability goals.

The same observation pertains to the existence of metrics (indicators) that help governments assess where their country stands on different dimensions of investment facilitation and provide a basis for engagement with stakeholders, including addressing concerns about the potential cost implications of moving towards whatever emerges as agreed good practices from the negotiating group.

The Investment Facilitation for Development project managed at the ITC and DIE has an analogous role to that played by the international organizations in the trade facilitation context. Deliberations of a Commentary Group comprising national investment promotion agencies, business representatives and FDI service providers are captured in an inventory of investment facilitation measures,<sup>106</sup> which also benefits from contributions by the World Bank and OECD. It is complemented by an Expert Network that provides policy papers and regular engagement with delegations participating in the JSI or interested in investment facilitation.

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<sup>104</sup> UNESCAP. (2019). UN Global Survey on Digital and Sustainable Trade Facilitation 2019. Last accessed on 10 March 2021 from <https://unnex.unescap.org/content/un-global-survey-digital-and-sustainable-trade-facilitation-2019>

<sup>105</sup> World Bank. (2006). Needs, Priorities and Costs Associated with Technical Assistance and Capacity Building for Implementation of a WTO Trade Facilitation Agreement: A Comparative Study Based on Six Developing Countries. Last accessed on 10 March 2021 from <http://documents1.worldbank.org/curated/en/852991468179960487/text/430090WP0Needs1and1Priorities01PUBLIC1.txt>; McLinden, G. (2011). World Bank Gap Assessment Study. Last accessed on 10 March 2021 from [http://www.wto.org/english/tratop\\_e/tradfa\\_e/case\\_studies\\_e/wb\\_pres\\_e.ppt](http://www.wto.org/english/tratop_e/tradfa_e/case_studies_e/wb_pres_e.ppt); Moisé, E. (2013). The Costs and Challenges of Implementing Trade Facilitation Measures. *OECD Trade Policy Paper*, 157. Last accessed on 10 March 2021 from <https://www.oecd-ilibrary.org/docserver/5k46hzqxt8jh-en.pdf?expires=1609956120&id=id&accname=quest&checksum=E9D9D5017F745801C7A168FBD4B1EFFF>

<sup>106</sup> Sauvart, K., Stephenson M., Hamdani K. and Kagan Y. (2020). An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?. Geneva and Bonn, International Trade Centre (ITC) and German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE). Last accessed on 10 March 2021 from <https://www.intracen.org/uploadedFiles/intracenorg/Content/Redesign/Events/IF.%20Inventory.%20as%20of%20Dec%2016.%202020.pdf>.

As discussed further below, this type of initiative is particularly important in the investment facilitation context because there is no analogue to the WCO for investment facilitation. As a result, there is no established network of government officials responsible for policies salient to inward FDI who know each other and have a track record of working together to define good regulatory practices in areas of common interest. This was arguably critical for the establishment of TFA as it meant much of the technical work on standards-setting and defining good practice had already been undertaken at WCO.

## TFA features salient to an investment facilitation initiative

In several respects, the TFA is an innovative agreement for WTO.<sup>107</sup> Elements that differentiate it from the usual type of WTO agreement include the focus on defining good practices as opposed to seeking agreement on measures to liberalize market access – the goal of most extant WTO agreements. The TFA entails so-called positive integration: all WTO Members agree to adopt a variety of specific trade facilitation practices as opposed to negative integration measures centred on committing not to use certain types of policies or to reduce the extent of discrimination against foreign products.

### Focus on good practices

The focus on good practices that have been agreed by all WTO Members explains why there is much less in the way of permanent exceptions or provisions that call for developing countries to do only X% of what developed nations have committed to do.<sup>108</sup> The presumption is that all WTO Members will seek to implement all the different substantive and procedural obligations because they will be welfare-enhancing for all countries, including developing economies.

### TFA implementation supports economic development

The counterpart of the focus on agreeing what constitutes good trade facilitation practices is the common judgement emerging from the negotiation process that implementation of TFA provisions is consistent with and supports economic development. Thus, TFA does not include the standard WTO approach to address development differentials – special and differential treatment. Instead, the agreement that was negotiated considered the need to ensure that its provisions were supportive of development. One reflection of this is that no use is made of uniform implementation or transition periods for all developing countries.

Instead, they are determined by each developing economy for themselves. There are three categories of commitments by developing countries and LDCs: unconditional commitments; commitments conditional on a transition period determined by the country itself; and commitments conditional on an indicative transition period and acquisition of implementation capacity through assistance and capacity building.

### Link between assistance and implementation

Another reflection of this is the explicit linkage between the provision of requested technical assistance and implementation obligations for TFA provisions where individual developing country signatories have specified such conditionality. Donors agreed to facilitate provision of assistance, either bilaterally or through relevant international organizations.

Although in principle the link between implementation and assistance had been agreed in 2004, it proved difficult to craft an approach that was acceptable to both developing and high-income countries. The latter opposed suggestions for earmarking of donor funding into a dedicated trust fund. In part this reflected fear of creating a precedent for countries to take a ‘pay me for reform’ position in future

<sup>107</sup> This section only highlights some aspects of TFA. For in-depth discussions of the agreement, see Neufeld, N. (2014). The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement. *WTO ERSD Working Paper*, 2014-06. Last accessed on 10 March 2021 from [https://www.wto.org/english/res\\_e/reser\\_e/ersd201406\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201406_e.pdf) and see above footnote 94, Hoekman, B. (2016).

<sup>108</sup> The exception here concerns LDCs that are only called on to implement the TFA insofar as ‘consistent with their individual development, financial and trade needs or their administrative and institutional capabilities’ (TFA Art. 13(3)). See World Trade Organization (2014). Agreement on Trade Facilitation, WT/L/940. Last accessed on 10 March 2021 from [https://www.wto.org/english/docs\\_e/legal\\_e/tfa-nov14\\_e.htm](https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm)

negotiations. Even more important was a desire by donor and development agencies to abide by the 2005 Paris Declaration on Aid Effectiveness, under which donor countries committed to align support with the priorities established by developing countries (so-called country ownership and alignment principles).

The contours of a deal on assistance for implementation of TFA emerged only a few days before the 2013 Bali Ministerial conference. This comprised a best endeavour promise to assist when requested – that is, assistance was not a binding, i.e. enforceable, commitment. The *quid pro quo* was acceptance that, absent assistance, provisions of the TFA where developing countries indicated a need for external support would not be enforceable.

Insofar as the investment facilitation negotiations result in binding (enforceable) commitments by signatories – whether enforcement occurs at the national level through domestic review mechanisms and/or through State-to-State WTO dispute settlement procedures – on matters that give rise to implementation costs, these could similarly be made conditional on provision of assistance.

Even if the eventual outcome of the JSI talks is a ‘soft law’ agreement in which provisions are voluntary or best endeavours commitments, explicitly incorporating a technical assistance dimension will be important for realizing the development goal of the deliberations, with the committee overseeing the implementation of the agreement acting as a coordination and review mechanism for different actors to provide assistance to countries requesting it.

### Provisions to address implementation difficulties

An important TFA innovation was to move away from the default WTO approach to enforce commitments, which centres on transparency via notifications, bilateral consultations and, if these do not resolve the matter, invocation of formal dispute settlement procedures. In addition to containing many soft law provisions that are not enforceable, TFA includes various provisions aimed at understanding why an implementation problem has arisen and resolving the difficulties.

This includes an early warning provision calling for notification by a country and extension of time periods by the WTO Membership if implementation difficulties arise, and a call for an expert group to assess notified implementation problems after transition periods have expired to assess the situation and identify possible solutions.

### A cooperative approach through NTFCs

In conjunction with the presumption of good faith in providing technical and financial assistance to countries needing it, this approach relies on ‘cooperation for compliance’ instead of recourse to adjudication, the standard approach of WTO Members when it comes to other multilateral agreements.

This cooperative approach relies in part on the creation of NTFCs that bring together stakeholders – government agencies and the private sector – with a mandate to coordinate and oversee domestic implementation of the agreement.<sup>109</sup> NTFCs act as a bridge connecting the actors concerned with trade facilitation at the national level with each other and with the donor community, both bilateral agencies and the international organizations.

NTFCs provide an institutional mechanism to identify gaps and weaknesses that call for action and, potentially, external support (technical assistance). NTFC analogues are not called for in other WTO agreements, which tend to be limited to calls for establishing domestic transparency entities (e.g. enquiry points) or enforcement bodies. For example, the Agreement on Government Procurement requires creation of domestic review (appeal) bodies.

NTFCs or analogues already existed in many countries before the advent of TFA, but the fact that an international agreement (TFA) requires such bodies is important in ensuring that they are functional, as countries must regularly report on progress in implementing the agreement to WTO.

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<sup>109</sup> World Trade Organization. 2016. National Committees on Trade Facilitation: current practices and challenges. Geneva: WTO. Last accessed on 10 March 2021 from [https://www.tfafacility.org/sites/default/files/news/tfa\\_national\\_committees\\_trade\\_facilitation\\_web\\_e.pdf](https://www.tfafacility.org/sites/default/files/news/tfa_national_committees_trade_facilitation_web_e.pdf)

This ‘commitment device’ role is valuable in helping to overcome standard political economy constraints to sustaining a focus on measures to enhance trade facilitation performance. One such constraint is funding. The legal commitment to implement TFA increases the likelihood of allocation of public resources to these bodies to support their operation.

NTFCs can both increase awareness in the country of the trade facilitation agenda and help sustain the attention needed to improve trade facilitation performance over time. In principle, NTFCs need not limit their focus on implementing TFA, but can also leverage TFA to address constraints and weaknesses in relevant policy areas not covered by it – e.g. logistics services, transport, and network infrastructure.<sup>110</sup>

How well they play their role in promoting trade facilitation and understanding what has worked and what has not in the limited period that the TFA has been operational is important for investment facilitation negotiators. NTFC analogues are salient in the investment facilitation context as well. Indeed, they may be more salient given that the investment facilitation agenda spans sub-central government entities located throughout the country. Investment inevitably is geography-specific, so that local and regional authorities are part of the facilitation agenda in a way that does not arise in the trade facilitation context.

Based on a survey of 52 NTFCs,<sup>111</sup> these bodies have become the focal point for trade facilitation in many countries, with their mandate, scope, institutional framework and composition evolving to adapt to needs of their constituencies. In about one-third of the surveyed NTFCs, the committee has a donor coordination role, and many report that they interact with NTFCs in neighbouring countries. On average, NTFC membership comprises two-thirds government officials and one-third private stakeholders. Gaps identified include a lack of focus on e-commerce and limited focus on communications and outreach (website; social media). Most NTFCs in least developed countries do not have a domestic budgetary resource allocation, instead depending on donor funding, raising potential sustainability concerns.<sup>112</sup>

### An expanding mandate

Given that trade and investment are closely linked, and that investment facilitation often will be associated with trade, expanding the mandate of NTFCs to encompass investment facilitation could be considered as a way of focusing domestic attention on trade and investment facilitation. While building on the extant domestic infrastructure embodied in the NTFCs by making them national trade and investment facilitation committees could have advantages – identifying complementarities and synergies, helping to improve policy coherence – it should be recognized that the two policy areas involve very different parts of government.

One important difference is that investment facilitation concerns firms (investors) whereas trade facilitation concerns processes applying to entry of products (consignments) into the country. Another important difference is that investment facilitation will implicate sub-central government bodies because much FDI regulation and interactions between investors, government agencies and communities are local and specific to a given geography.

<sup>110</sup> See above footnote 94, Hoekman, B. (2016).

<sup>111</sup> Belastegui, A. (2020). National trade facilitation committees as coordinators of trade facilitation. Transport and Trade Facilitation Series No 14. Geneva: UNCTAD (Belastegui, A., 2020).

<sup>112</sup> Since TFA entered into force, there have been several country studies of the experience with setting up NTFCs that provide a picture consistent with the main messages emerging from the Belastegui, A. (2020), review of the state of play. Space constraints preclude an in-depth discussion of the rapidly growing literature. This includes Creskoff, S. (2019). India’s Path to Improved Trade Facilitation and Enhanced Economic Development. *Trade, Law and Development*, 11(1): 93-111; Hassan, M. (2020). Africa and the WTO Trade Facilitation Agreement: State of Play, Implementation Challenges, and Policy Recommendations in the Digital Era, in Gbadebo, O., Odularu, A., Hassan M. and Babatunde, M. (eds.), *Fostering Trade in Africa Trade Relations, Business Opportunities and Policy Instruments*. Springer; Hossain, M. (2019). Bangladesh. In Abdou et al. (eds.); Kumar, U., de Leon, L. and Reddy, S. (2019). Sri Lanka. In Abdou et al. (eds.); Odularu A. (2019). Addressing Trade Facilitation Commitments and Implementation Capacity Gaps: Issues and Evidence from Nigeria. In: Odularu G., Alege P. (eds) *Trade Facilitation Capacity Needs*. Palgrave Pivot, Cham. Last accessed on 10 March 2021 from [https://doi.org/10.1007/978-3-030-05946-0\\_2](https://doi.org/10.1007/978-3-030-05946-0_2); Parshotam, A. (2019). Implementing the TFA: Trade Facilitation Activities in Zambia. SAIIA Occasional Paper, 298. Last accessed on 10 March 2021 from <https://www.africaportal.org/publications/implementing-tfa-trade-facilitation-activities-zambia/>; Reddy, S. (2019). India. In Abdou et al. (eds.); Stijepovic, S. and Konar-Leacy, V. (2017). Establishing a National Trade Facilitation Committee: Lessons Learned from Montenegro. Washington DC: IFC.; Tomlinson, K. (2017). Jamaica’s Trade Facilitation Task Force: Involving Public and Private Sectors to Improve Competitiveness. Washington DC: IFC; and Wangdi, P. (2019). Bhutan. In Abdou et al. (eds.). Widdowson, D., Short, G., Blegen, B. and Kashubsky, M. (2018). National committees on trade facilitation. *World Customs Journal*, 12(1): 27-48.

Trade facilitation, in contrast, is centred on what happens at the border to products/consignments. Expanding the ambit of NTFCs to also encompass investment facilitation matters may therefore generate little in the way of economies of scale and scope.

## Lessons from the negotiations process and implementation experience

Eight lessons or implications emerge from the TFA negotiations that are salient to the talks on a multilateral IFD Agreement. Some of the suggestions that follow are listed in the Sustainable Investment Facilitation Inventory,<sup>113</sup> which includes a compilation of proposals and ideas that have been put forward by governments and analysts on what an IFD Agreement might cover. Mostly they fall into the category of suggestions that have not (yet) been taken up in the IFD Agreement discussions.

### Mobilize an epistemic community to agree on good practice

A lesson from the trade facilitation experience is the importance of mobilizing a broad 'epistemic community' to establish/agree on what constitutes good practice. In the TFA context, such a community existed, organized around the WCO (which brings together all national customs administrations) and several international organizations, including UNCTAD, ITC, OECD, the World Bank and the Inter-American Development Bank.

In the investment facilitation context, there is a nascent community with an interest in the agenda, spanning many international organizations – many of which participate in the G20 Trade and Investment Working Group. However, there is no analogue to WCO, i.e. no international organization representing (bringing together) the national agencies responsible for the administration of investment-related policies. The international organizations have departments dealing with elements of investment facilitation, but their work programmes usually go beyond facilitation and/or deal with specific mandates such as the promotion of foreign investment.

Most countries have investment promotion agencies (IPAs). Much attention has been given to what makes for good practices in promoting investment, based on reviews and assessments of the operations of IPAs. Good practices include transparency in applicable policies and requirements; creating effective enquiry points for foreign investors; establishing one-stop shops ('single windows' in trade facilitation speak); and effective coordination between national and sub-national regulatory agencies and strong partnerships between public and private sectors.<sup>114</sup>

The activities of IPAs are consistent with a facilitation focus insofar as they are not responsible for investment policies (although some have a mandate to engage in advocacy for changing policies that have adverse impacts on FDI). However, IPAs only partially involve facilitation in the sense of reducing red tape and the transaction costs that confront potential investors when determining the conditions applying to establishment in a country (or a specific location within a country).

Their main task is marketing, a function that is distinct from facilitation. Moreover, the instruments used to promote inward FDI are naturally country-centric. A consequence is that national IPAs directly compete with each other for investment. Such competition is at most indirect when it comes to trade facilitation, which differentiates the incentives to cooperate on trade facilitation from investment facilitation.

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<sup>113</sup> See above footnote 104, Sauvart P. et al. (2020).

<sup>114</sup> UNCTAD. (2016). Global action menu for investment facilitation. Last accessed on 10 March 2021 from [https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%2023-05-2017\\_7pm\\_web.pdf](https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%2023-05-2017_7pm_web.pdf); World Bank. (2017). Investment policy and promotion diagnostics and tools: maximizing the potential benefits of FDI for competitiveness and development. Washington DC: World Bank. Last accessed on 10 March 2021 from <https://openknowledge.worldbank.org/handle/10986/28281>; Heilbron, A. and Whyte, R. (2019). Institutions for Investment: Establishing a High-Performing Institutional Framework for FDI. Last accessed on 10 March 2021 from <https://openknowledge.worldbank.org/handle/10986/33285>; Sanchiz, A. and Omic, A. (2020). State of Investment Promotion Agencies: Evidence from WAIPA-WBG's Joint Global Survey. Washington DC: World Bank. Last accessed on 9 March 2021 from <http://documents1.worldbank.org/curated/en/499971594008431029/pdf/State-of-Investment-Promotion-Agencies-Evidence-from-WAIPA-WBG-s-Joint-Global-Survey.pdf>



## Define scope, generate qualitative and quantitative indicators

Defining the scope of a potential initiative and generating associated qualitative and quantitative indicators should be a priority. This helps negotiators – and stakeholders – determine where countries stand with respect to the elements that may figure on the agenda for international cooperation. In the case of trade facilitation and TFA, the World Bank and the OECD made significant contributions on this front.

This included providing a baseline and regularly updating data on trade facilitation outcomes – the Trading Across Borders and Logistics Performance Indicators, more fine-grained time-release studies and corridor-specific measurement of throughput and stoppages.<sup>115</sup> It also involved defining and measuring trade facilitation inputs, e.g. use of single windows; risk assessment-based controls – put together by the OECD in its TFA-specific set of trade facilitation performance indicators.

This work was important to establish a common understanding of the state of play on trade facilitation within and across countries and to enable monitoring of changes over time. Cross-country benchmarking and comparisons require compilation of indicators at the country level, which in turn must encompass performance of key ports and (transit) routes.

Data on the relative performance of a country can be a powerful inducement to initiate and sustain action to pursue facilitation initiatives, in part because this is something that investors will do in any event. A challenge here is to determine which organizations should do this. In practice, a collaborative effort leveraging the comparative advantages of different agencies would appear appropriate, e.g. based on a call by the prospective signatories of an IFD Agreement and with the financial support of high-income country Members.<sup>116</sup>

Several international organizations are active in generating trade facilitation indicators, including data that is pertinent to assessing the extent of implementation of TFA provisions.<sup>117</sup> One lesson from the trade facilitation experience is that, notwithstanding the cooperation between organizations, there are incentives within them to compete and keep information in-house with a view of ‘selling’ advisory services to countries.

There is a potential role that the WTO Secretariat could fill by providing an open access platform that brings together disparate investment facilitation indicators and related quantification efforts, making the data accessible to the public as well as to governments.

## Determine measures to reduce uncertainty and transaction costs

In the context of the investment facilitation talks, there is a need for analysis to determine which type of investment facilitation measures can be expected to have the greatest impact in reducing uncertainty and transactions costs for investors.

Performance indicators are critical inputs for empirical analysis, including the identification of priorities at the national level and monitoring progress over time. Analysis of the likely impact of investment facilitation will help mobilize political support for investment facilitation actions, especially if these actions require high-level engagement by political decision-makers to overcome resistance to beneficial reforms – for example, to ensure there is communication, coordination and cooperation between central government agencies, sub-central government entities and the private sector.

There has been limited empirical research on the impact of a potential IFD Agreement,<sup>118</sup> in part due to a lack of clarity on what an IFD Agreement should encompass. Identifying relevant measures by

<sup>115</sup> See, e.g. Fitzmaurice, M. and Hartmann, O. (2013). *Border crossing monitoring along the Northern Corridor*. Washington DC: World Bank Group. Last accessed on 9 March 2021 from <https://openknowledge.worldbank.org/handle/10986/16555>

<sup>116</sup> Any such effort requires leadership by IFD Agreement proponent countries in terms of providing the resources needed and ensuring there is broad support for giving the relevant organizations such a mandate.

<sup>117</sup> See, e.g. Duval, Y., Utoktham, C. and Kravchenko, A. (2018). Impact of implementation of digital trade facilitation on trade costs. *ARTNeT Working Paper*, 174. Last accessed on 9 March 2021 from <https://www.unescap.org/sites/default/files/AWP174.pdf>. For a contrasting assessment, see Hillberry, R. and Zhang, X. (2017). Policy and performance in customs: Evaluating the trade facilitation agreement. *Review of International Economics*, 26:438–80.

<sup>118</sup> See above footnote 92, Berger (2019).

mapping domestic administrative procedures affecting foreign investments is a necessary first step being undertaken by DIE through the development of an Investment Facilitation Index. The Index can help negotiators to narrow down the focus to specific measures based on potential effects and information on the associated implementation requirements, and thus the potential need for and magnitude of technical assistance and capacity-building efforts for developing countries.

The need for such analysis arguably is more important in the investment facilitation setting than it was for trade facilitation because many of the issues were already known to policymakers – in part because of the epistemic community associated with WCO and other international organizations that raised awareness of the importance of trade facilitation for trade expansion, diversification and economic development.

### Mobilize technical assistance for country-level assessment

Mobilize technical assistance to undertake country-level assessments of needs and gaps. This mobilization helps to address uncertainty over the implications of an investment facilitation agenda and enhance buy-in. Establishing what investment facilitation entails and what issues need to be resolved will help countries determine whether to join an IFD Agreement and to what extent they will need assistance.

It is likely that the IFD Agreement will adopt the TFA approach to address capacity differentials affecting implementation. Here again, there is a need for promoting coordination among donors and international organizations in mobilizing the resources needed to do assessments and engage in country-level activities if requested by developing country governments. Such assistance should include South-South cooperation, as there is much to learn from the experience of successful developing countries in facilitating FDI.

In the case of trade facilitation this was somewhat easier to orchestrate given the strong evidence base that trade facilitation was beneficial<sup>119</sup> and the types of actions comprising trade facilitation had already been discussed in WCO and operationalized by the World Bank and other international organizations.

The situation is somewhat different for investment facilitation, bolstering the case for country-level analysis and assessments. Generating this may be more difficult than for trade facilitation because the latter could benefit from the Aid-for-Trade initiative. There is no analogous aid-for-investment mechanism – aid resources must come from general official development assistance (ODA) funding or compete with trade projects. This puts a greater burden on developing country governments requesting investment-facilitation-related assistance and making clear to donors that it is a national priority.

### Determine extent of State-to-State dispute settlement

Although ISDS is off the table, whether and to what extent formal State-to-State dispute settlement will factor into the IFD Agreement remains to be determined.

There are lessons from TFA that apply, notably to encourage alternatives to formal dispute settlement, including deliberations in the body charged with oversight of the IFD Agreement, consultations between parties informed by independent expert groups to understand and propose solutions to implementation problems, and regular monitoring of progress on investment facilitation-related actions and outcomes.

Building in (mandating) regular thematic sessions of the Investment Facilitation Committee at WTO level – for example, an annual session to monitor implementation progress, the assistance provided by donor countries, engagement with the private sector and IPAs to foster exchange of experiences – is likely to be more constructive for supporting cooperation. This is an element of WTO Trade Facilitation Committee meetings.<sup>120</sup> Members are asked what new themes they would like next for the informal meetings on implementation of the Agreement.

The TFA Committee has a dedicated trust fund that sponsors attendance in its sessions by an official from any developing country Member that needs it. This has facilitated LDC participation, reflected in

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<sup>119</sup> See footnote 99, WTO. (2015).

<sup>120</sup> Wolfe, R. (2020). Informal Learning and WTO Renewal: Using Thematic Sessions to Create More Opportunities for Dialogue. *EUI RSCAS Working Paper*, 2020/51. Last accessed on 10 March 2021 from <https://cadmus.eui.eu/handle/1814/67957>.



representatives from LDCs appearing as speakers in Trade Facilitation Committee meetings more frequently than in any other WTO body.<sup>121</sup>

### Listen to stakeholders, understand governance implications

Several institutional-cum-governance implications are suggested by the TFA experience. One such lesson is to connect to stakeholders. In the trade facilitation setting, this includes customs administrations (WCO), express carriers and freight forwarders. In the investment facilitation context, an analogue group comprises national IPAs. As IPAs will likely be part of whatever national mechanisms are put in place to implement an IFD Agreement, connecting with this community during the negotiations would appear sensible.

In the case of TFA, NTFCs play this role but, as they did not exist in many countries prior to TFA, their experience did not feed into the deliberations. Instead, national considerations were reflected in submissions by WTO delegations, as well as the needs assessments and inputs provided by international organizations. In the investment facilitation case, IPAs already exist in most countries.

Creating a platform through which they can engage with each other and with the negotiating group could provide a valuable source of information and feedback on proposals put forward by delegations. The World Association of Investment Promotion Agencies (WAIPA) is an obvious counterpart to engage with in this regard.<sup>122</sup>

At the national level, coordination within and across different levels of government (national, sub-national, municipal) will be critical in defining national priorities and the implementation of an agreement. This is a challenge that goes beyond the one that confronted TFA negotiators and the NTFCs mandated by TFA.

The WAIPA-World Bank survey of IPAs shows that limited mandates to encourage cooperation and coordination across agencies regulating FDI and difficulties in promoting cooperation across regulatory agencies are the most frequently mentioned problem/constraining factor identified by IPAs: 60% of those surveyed highlighted this issue.<sup>123</sup> How to address this matter and how an IFD Agreement could assist signatories do so would appear an appropriate subject for negotiators, as it will influence the salience of any agreement for investment facilitation 'on the ground'.

It would be useful to reflect on the experience with deliberative mechanisms that bring together key stakeholders – regulators, government officials, business and NGOs/community groups – to assess the impact of investment policy regimes and identify potentially beneficial reforms. While IPAs may be a natural focal point for such activities, of the 70% of surveyed IPAs that have advisory or executive boards, only one-half includes private-sector representation and only one-quarter includes members of the CSO or academic communities.<sup>124</sup>

Moreover, only one-quarter of IPAs have sub-national affiliated offices. These figures reveal that there is much to be done to move towards an institutional framework for deliberation on investment facilitation in most countries.

Putting such an institutional framework in place is particularly pressing if a decision is taken to include sustainability goals in an IFD Agreement; there has been some advocacy for their inclusion, along with CSR principles.<sup>125</sup> While this would be consistent with the realization of the SDGs, whether such a dimension will be included and what form commitments might take remains to be seen. Sustainability goals did not figure in TFA and so the trade facilitation experience offers little guidance. Realization of

<sup>121</sup> Ibid.

<sup>122</sup> Omic, A. and Stephenson, M. (2019). What Can Governments Do to Facilitate Investment? WAIPA and World Economic Forum. Last accessed on 10 March 2021 from [http://www3.weforum.org/docs/WEF\\_Investment\\_Facilitation\\_2019.pdf](http://www3.weforum.org/docs/WEF_Investment_Facilitation_2019.pdf). WAIPA is an international non-governmental organization established in 1995 under the auspices of UNCTAD, and has worked with UNCTAD, the World Bank and the World Economic Forum to generate knowledge products and advocate investment facilitation – see footnote 112, Sanchiz and Omic (2020).

<sup>123</sup> See above, Sanchiz and Omic (2020).

<sup>124</sup> Ibid.

<sup>125</sup> Sauvank, K. and Mann, H. (2017). Towards an Indicative List of FDI Sustainability Characteristics. E15 Initiative. Geneva: ICTSD and World Economic Forum. Last accessed on 10 March 2021 from <https://ssrn.com/abstract=3055961>

sustainability goals depends on the behaviour of private actors (investors) and on the broader investment climate in a country, including policies that a facilitation agenda takes as given.<sup>126</sup>

Public-private policy dialogue or knowledge platforms and stakeholder initiatives are commonly used to pursue environmental or social sustainability and CSR objectives.<sup>127</sup> Examples include initiatives that focus on private governance of value chains and promote dialogue between the (private) actors involved in or affected by them. These may include pursuit of voluntary sustainability standards (VSS) systems that include certification of producers and monitoring of implementation.<sup>128</sup> The multi-sector, cross-cutting nature of such initiatives can add to extant national business-government investment policy dialogue mechanisms that are found in some countries.

Stakeholder initiatives can encompass non-economic issues in a way that purely government or government-private-sector IPAs do not. While complex to manage, they can improve the transparency of applied policies, support independent analysis of policies and identify the nature of good practice and the constraints impeding their adoption, and options (based on international experience) for addressing them.<sup>129</sup>

A first step could be for IFD Agreement participants to bring the investment facilitation and VSS/CSR communities together to reflect on the design of NTFC analogues to address national investment facilitation challenges and realize the goals that are agreed in any IFD Agreement. Doing so can help to emulate and build on TFA features, such as implementation of AEO frameworks. The concept of an AEO and the applicable standards to obtain this status were the subject of extensive international deliberation in WCO.

Insofar as there is interest in developing the concept of a recognized sustainable investor in an IFD Agreement or including supply chain traceability and sustainability standards as criteria for inward investors to obtain fast-track status, it is important that associated standards have broad support and ideally have been agreed internationally. As there is no WCO analogue for investment facilitation, this implies that proponents must engage with the VSS/CSR/international business communities.

At the international level, consideration could be given to establishing an open knowledge platform to support engagement by the epistemic community concerned with facilitation of investment and learning from implementation experience; again, this would need to be a stakeholder initiative. Some of the elements exist, and a platform could build on the activities and knowledge products provided by WAIPA, UNCTAD, the World Bank and organizations with a country presence dealing with investment matters.

### Encourage a plurilateral agreement with a code of conduct

If – as seems likely – the investment facilitation talks result in an IFD Agreement that is plurilateral and encompasses a subset of WTO Membership, it should, ideally, take the form of an open plurilateral agreement – where commitments are applied on a most-favoured-nation basis; countries that want to join later can do so on the same basis as original signatories; incumbents commit to providing technical assistance to developing country signatories and to countries that initially stay out but want to join later; and the operation of the arrangement is made transparent through open access to documents, meetings and periodic reporting on activities by the WTO secretariat.

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<sup>126</sup> Research has shown that, while investment promotion can influence investor decisions, what matters more is the general investment climate and business environment in a country. See, e.g. Harding, T. and Javorcik, B. (2011). Roll Out the Red Carpet and They Will Come: Investment Promotion and FDI Inflows. *The Economic Journal*, 121(557): 1445-76.

<sup>127</sup> Bitzer, V. and Glasbergen, P. (2015). Business–NGO partnerships in global value chains: part of the solution or part of the problem of sustainable change? *Current Opinion in Environmental Sustainability* 12:35-40; Soundararajan, V, Brown, J. and Wicks, A. (2019). Can multi-stakeholder initiatives improve global supply chains? Improving deliberative capacity with a stakeholder orientation. *Business Ethics Quarterly*, 29(3): 385-412.

<sup>128</sup> Schleifer, P., Fiorini, M. and Fransen, L. (2019). Missing the Bigger Picture: A Population-level Analysis of Transnational Private Governance Organizations Active in the Global South. *Ecological Economics*, 164: 106362.

<sup>129</sup> For an argument for public-private policy partnerships anchored on value chains and international production networks to facilitate their operation while helping to attain domestic regulatory goals, see Findlay, C. and Hoekman, B. (2020). Value chain approaches to reducing policy spillovers on international business. *Journal of International Business Policy*. Last accessed on 10 March 2021 from <https://doi.org/10.1057/s42214-020-00083-5>

Committing to a code of conduct that is an integral part of the IFD Agreement and lays out such principles will ensure that any plurilateral agreement is not detrimental to its signatories.<sup>130</sup> Given the absence of a market access liberalization dimension and related enforcement mechanisms (including investor-state dispute settlement) there is no reason why an IFD Agreement cannot become a truly multilateral agreement that is signed by all WTO Members. Putting in place mechanisms to support such an outcome will help to realize it.

### Incorporate independent evaluation of the development impact

Independent monitoring and evaluation (M&E) of the development impact of an IFD Agreement should be incorporated into the agreement.

Insofar as the IFD Agreement includes provisions on CSR and sustainability, baseline information will need to be collected to complement investment facilitation indicators to permit assessment of progress in improving facilitation performance and attaining sustainable development objectives.

Given that the investment facilitation talks aim to identify a framework for cooperation that supports sustainable development, and that there is less in the way of an established knowledge base and experience with investment facilitation, an important role for the WTO Secretariat would be to put in place a platform that incentivizes collection of data on applied investment facilitation measures and acts as a repository for relevant work undertaken by other international organizations, as well as independent research and analysis of the impacts of investment facilitation efforts.

WTO has a trade policy monitoring mandate but it is limited to periodic trade policy review reports and associated discussion among WTO Members. The Secretariat does not assess the impact of national policies. Although development practitioners devote much effort to evaluation of projects and programmes, the 'E' in M&E is missing when it comes to WTO practice reduces opportunities to learn from experience. An IFD Agreement could help to change this fact and, in the process, show how a domain-specific agreement can help to move WTO to become more relevant from a sustainable development perspective.

## Conclusions

There are similarities between trade facilitation and investment facilitation, notably the limited salience of cross-border spillovers (terms-of-trade effects) and the resulting nature of cooperation: agreeing on what constitutes good practice and assisting those countries that want to realize these to do so. But there are also important differences between investment facilitation and trade facilitation. We conclude with a brief recap of key findings.

1. TFA covers only goods and builds explicitly on existing provisions in the General Agreement on Tariffs and Trade that had a trade facilitation dimension. Investment facilitation spans all sectors, both goods and services. There are provisions in GATT and GATS that have a bearing on investment policy but the facilitation dimension is much weaker than for trade in goods. Thus, there is less on which to build. This provides an opportunity for crafting a plurilateral agreement that is fit for purpose as opposed to having to be retrofitted to provisions in extant WTO agreements, as was the case for TFA.
2. The epistemic community that is concerned with investment facilitation is nascent and more diffuse than the one that supported TFA. Because there is no WCO analogue for investment facilitation, and thus less of a common understanding of what constitutes good practice, negotiators confront more of a challenge in defining/agreeing on the substance of a potential agreement, how to measure investment facilitation performance and how to understand what is needed to improve it. The implication is a need to focus on generating relevant indicators and supporting analysis to determine what to prioritize. Such work needs to be encouraged by participants in the JSI deliberations, not only to help determine the contours of an agreement but also to monitor and assess progress in attaining investment facilitation and sustainable development objectives.

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<sup>130</sup> Hoekman, B. and Sabel, C. (2019). Open Plurilateral Agreements, International Regulatory Cooperation and the WTO, *Global Policy*, 10(3), 297-312.

3. Investment facilitation has both a central-government and a sub-national dimension. This makes effective investment facilitation more difficult than trade facilitation, as the trade facilitation agenda is centred mostly around what happens at the border. Investment facilitation calls for coordination within a country as well as cooperation across countries to exchange information and learn from national experience. As a result, the design of NTFC analogues mandated to support national implementation of an IFD Agreement must encompass relevant entities across and within the country.
4. TFA has no CSR dimension and no focus on sustainability considerations. There are, nonetheless, dimensions of TFA that are relevant if an IFD Agreement incorporates provisions targeting sustainability goals, including the use of AEO public-private partnerships and risk-based enforcement. Establishing applicable standards is a necessary condition for the design of such approaches. In the case of TFA, negotiators could refer to and use international standards set by WCO and United Nations bodies (e.g. UNECE). Investment facilitation negotiators have less to build on. Engaging with actors that have knowledge of and an interest in sustainability should therefore be part of the equation. Stakeholder partnership approaches have emerged that pursue sustainability goals in a range of sectors and activities. The extent to which these can serve to support sustainable development in the investment facilitation context requires analysis and deliberation.
5. TFA could be and was supported by the broader Aid-for-Trade initiative. Donors opposed earmarking of assistance for trade facilitation and instead have worked with (incentivized) international organizations and their national development agencies to assist in TFA implementation. The ODA funding environment today is less supportive than that prevailing when TFA was being negotiated. With the donor community focused on achieving the SDGs, it is particularly important that an IFD Agreement be designed to support sustainable development in order to mobilize assistance for implementation of provisions that require investments.
6. Only a subset of the WTO Membership is participating in the JSI talks on an IFD Agreement. Although the number of Members engaging in the group has expanded to 106, it is likely that not all WTO Members will sign an agreement. This makes it important to consider the multilateral governance framework that will apply if it is decided – as advocated above – to make an IFD Agreement an open plurilateral agreement.

## Chapter 4      Legal Options for Integrating a New Investment Facilitation Agreement into the WTO Structure

*Contributed by Hamid Mamdouh*

In the design and implementation of investment policies, a useful distinction can be made between the substantive elements of a given policy on the one hand (e.g., market access rules for foreign investors, foreign equity limitations, sectoral regulations for investors, local content requirements, taxation) and, on the other hand, other procedural elements and measures that facilitate the implementation of, and ensure compliance with, such policies (e.g., transparency of regulation and streamlining and simplification of administrative procedures). An informative example of this distinction between substantive and procedural elements is found in the approach followed in developing the Trade Facilitation Agreement (TFA) of the World Trade Organization (WTO). The Agreement does not address market access issues such as tariffs or quantitative restrictions on merchandise trade but rather focuses on clarifying and improving the WTO General Agreement on Tariffs and Trade (GATT) rules relating to freedom of transit of goods (Article V), fees and formalities for imports and exports (Article VIII) and, transparency (Article X).

Attracting and retaining foreign direct investment (FDI) have always been matters of priority for developing countries and least developed countries (LDCs). It has also been long recognised that progress on this front requires a set of enabling factors, not the least of which is an attractive regulatory environment in the host country. Such an environment would generally depend on the policy mix that affects the business environment in which investors operate and the coherence among its various components. Some of those enabling factors may even go beyond the strict boundaries of investment policy per se. However, an important enabling aspect of such an environment will always be how transparent and predictable relevant policies and measures are and the nature of administrative procedures that implement them and how streamlined they are.

Against this backdrop, at the 11<sup>th</sup> WTO Ministerial Conference, at Buenos Aires, in December 2017, a group of 70 WTO Members adopted a Joint Statement Initiative to start structured discussions aimed at creating a framework for investment facilitation for development.<sup>131</sup> The elements identified for inclusion in such a framework included: improvement of transparency and predictability of investment measures, streamlining and speeding up administrative procedures and enhancing international cooperation, information sharing and relations with relevant stakeholders.

This initiative has been launched and driven to a large extent by the efforts of developing countries and LDCs aspiring to promote increasing inflows of FDI to satisfy their development needs. It therefore assigns importance to development concerns, including issues relating to special and deferential treatment as well as technical assistance and capacity building.

It was agreed and stated clearly among the cosponsors of this initiative, at the outset, that discussions shall not address other substantive investment policy matters relating to market access, investment protection or investor-state dispute settlement. Therefore, the elements identified for inclusion in the framework would not have implications for such sensitive policy areas.

Based on long preceding “Structured Discussions”, the actual negotiations on an Investment Facilitation for Development (IFD)<sup>132</sup> Agreement started in September 2020. As the process unfolded, participation in this endeavour has expanded to over 100 WTO Members in mid-2021, representing around 64% of world gross domestic product, 78% of world exports and 69% of world inward FDI stock. The negotiations have made steady progress, from the identification of substantive elements to be covered in the IFD Agreement to the development of a full-fledged negotiating text in mid-April 2021.

This negotiating process is by definition “plurilateral” in nature since it is taking place only among a subset of the WTO Membership. However, this does not define the nature of the outcome and how it might be implemented.

A plurilateral negotiating process may not necessarily produce a plurilateral outcome that benefits only its participants: often, plurilateral negotiations have produced outcomes that were applied multilaterally

<sup>131</sup> WTO (2017). Joint Ministerial Statement on Investment Facilitation for Development. WTO document WT/MIN (17)/59.

<sup>132</sup> This title of the expected outcome of the negotiations, IFD Agreement, is used only as a working assumption for the purpose of this discussion. Of course, the final decision in that respect will have to be taken by Members.

on a most-favoured-nation (MFN) basis.<sup>133</sup> Examples are the negotiations on financial services, basic telecommunications, and the WTO Information Technology Agreement (ITA). In such cases, the plurilateral process of the negotiations did not affect the multilateral nature of the outcome. A point of terminology to clarify is: what would constitute a “multilateral outcome” and whether it would have to be binding on all Members to qualify as “multilateral”? The track record of the negotiating function of the WTO would not lead to such a restrictive definition. A definition that is more systemically consistent would be based on whether a given negotiated outcome is in itself “plurilateral” benefiting only its signatories or it is only the result of a plurilateral process but applied multilaterally to the benefit of all WTO Members on an MFN basis.

As the features of the outcome develop further and become clearer, one of the important issues that will have to be addressed in the IFD Agreement negotiations, is how to integrate the outcome into the WTO treaty architecture. The purpose of this paper is to briefly consider this question, clarify options for such integration and consider the feasibility and desirability of each of them. Given the current stage in the process, such a discussion would need to be based on a set of working assumptions emerging from the negotiating process regarding the expected outcome. Section II of this paper will review these working assumptions, while section III will discuss the options available according to current WTO rules and section IV concludes with final observations.

## Working assumption for the expected outcome

A discussion of different legal options to integrate an IFD Agreement into the treaty architecture of the WTO needs to be based on a set of working assumptions regarding the nature, form, and content of what participating Members wish to achieve. While, at this point, there is no definitive agreement on some of the elements of the agreement, the following might be a reasonable set of assumptions for the purpose of this discussion:

- a. The scope of the IFD Agreement should cover only FDI and no other forms of investment. It will cover FD across all sectors of the economy and all industries. Where it applies, the IFD Agreement would address only investment related regulation and would not extend to other regulatory aspects (e.g., services regulation such as licensing and other regulatory requirements).
- b. The IFD Agreement should be an integral part of the WTO treaty architecture.<sup>134</sup>
- c. It should be legally binding on Members who accept it and subject to WTO rules and disciplines, including dispute settlement.
- d. It should be applied on an MFN basis. While the IFD Agreement will not be binding on all Members, those who will accept it will have the obligation to extend to all other WTO Members treatment no less favourable than that provided for by its provisions.
- e. It should remain open for future acceptance by any Member wishing to do so.

Of course, these working assumptions may be further confirmed or changed by participating Members during the negotiations. They are identified here only as a basis for the analysis that follows, and the consideration of different legal options for integrating the IFD Agreement into the WTO legal architecture.

## Options for integrating the IFD Agreement into the WTO

The integration of an IFD Agreement into the legal architecture of the WTO could be achieved through more than one way, depending on choices to be made by participating Members. Perhaps a first question to consider would be whether, as a negotiated outcome, an IFD Agreement would take the form of a set of commitments to be consolidated in participating Members’ schedules under the WTO General Agreement on Trade in Services (GATS) and the WTO General Agreement on Tariffs and Trade (GATT) or, whether it would take the form of a new standalone agreement within the WTO treaty

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<sup>133</sup> See, Hamid Mamdouh (2021). Plurilateral Negotiations and Outcomes in the WTO, available here: <https://fmq-geneva.org/7-plurilateral-negotiations-and-outcomes-in-the-wto/>

<sup>134</sup> This is the current working assumption that gives rise to most of the legal issues under examination in this discussion. If participants eventually decide to pursue other options outside the WTO, that would obviate the need for any extensive analysis of WTO rules.



architecture. These two pathways are different in terms of the legal procedures to be followed as well as the implications for the scope of application of the final outcome.

### Scheduling of commitments under the GATS and the GATT

According to this scenario, participating Members would proceed to consolidate the obligations of the IFD Agreement into their respective schedules of commitments under the GATS and their schedules of concessions under the GATT. The newly consolidated commitments and concessions would then be given legal effect by means of “certification” of the new schedules. This is a procedure for which specific rules have long been agreed by WTO Members. Upon conclusion of the certification procedure, new commitments become an integral part of a Member’s original schedule which, in turn, is an integral part of the main Agreement (GATS or GATT). If no objection is raised by any WTO Member, the certification of a schedule containing new commitments would be concluded at the end of a period of 45 days for GATS schedules and 90 days for GATT schedules. In case of objection, consultations between the certifying Member(s) and the objecting Member(s) would take place with a view to reaching a satisfactory resolution. A certification would be concluded upon withdrawal of an objection or the expiry of respective deadlines (45 and 90 days), whichever comes later. This pathway has the advantage of requiring less demanding legal procedures compared to the other pathway of integration of a new standalone agreement into the WTO system. The latter would require an amendment procedure pursuant to Article X of the WTO Agreement which would have to be based on consensus by all Members.

While completing a certification procedure requires the absence of objections by other Members, this should not be equated with “consensus” within the meaning of Article IX (Decision-Making) of the WTO Agreement which also is based on the absence of objections.<sup>135</sup> While the latter provides the rules for joint action that binds the entire Membership through consensus-based decisions, a schedule certification procedure has the sole object and purpose of the technical verification of the content of the modifying Member’s schedule regarding any possible adverse effects on existing rights of other Members under the Agreement. Hence, the expectation, in accordance with the procedures adopted by the Services Council,<sup>136</sup> is that, in a certification procedure, an objecting Member would identify the specific elements giving rise to its objection and consult with the certifying Member with a view to resolving the matter. If the matter is not resolved, the procedures provide for other negotiating routes with the possibility of arbitration as a final resort. The mere fact that the footnote to Article IX of the WTO Agreement refers to the absence of objection should not mean equivalence between the certification of a schedule and the adoption of a consensus decision by all Members.

Apart from the conclusion of the certification process as such and securing the non-objection of any Member to the content of a new set of commitments, there are normally other procedural questions that participants in the negotiations would need to consider, such as conditions for, and dates of entry into force of new commitments. For example, would the new commitments enter into force once certification is concluded or at a subsequent date and whether such date would be coordinated among participating Members so that all commitments would enter into force at the same time. Such questions need not involve non-participating Members since they relate mainly to the negotiating dynamics between participants. In this regard, two scenarios have been followed in the past and they might provide some guidance going forward. In the first, as in the case of the ITA, participants have resorted to individual certification of schedules of concessions, each specifying the date of entry into force of the new obligations once certification is completed. Such an arrangement would, of course, be based on an understanding among participants in the negotiations regarding the timing for submission of schedules for certification and subsequent entry into force of new commitments. However, the act of initiating certification would be taken individually by each participating Member.

In the second scenario, as in the case of the post Uruguay Round negotiations on telecommunications and financial services, participants in the negotiations would use a protocol as a vehicle to synchronize

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<sup>135</sup> Footnote 1 to Article IX of the WTO Agreement states: “The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”

<sup>136</sup> See WTO (2000). Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, Adopted by the Council for Trade in Services on 14 April 2000 (S/L/84).



the various procedural steps all the way to the entry into force of the new commitment. Typically, a protocol, to which new commitments would be annexed, would contain elements such as:

- Timeframe during which the Protocol would be open for acceptance.
- Date of entry into force of the protocol and annexed commitments.
- Conditions required for the entry into force of the protocol (e.g., acceptance by all Members concerned/a certain number of Members or any other formula).
- The legal effect of entry into force of the Protocol on participating Members' schedules specifying the relationship between old and new commitments (replacing, supplementing, or modifying pre-existing commitments).
- Contingent scenarios upon the expiry of the timeframe for acceptance in case not all Members concerned or required number of Members have accepted (e.g., those who have accepted would decide upon entry into force or otherwise).
- Institutional provisions such as depositary, registration, date, and venue.

Such a protocol is normally used only if needed to coordinate procedural and legal steps among participating Members as well as guarantee the “conditionality” of commitments made by each, being contingent upon other participants fulfilling their commitments at the same time. Such an arrangement is likely to be more the case as the circle of participation in the negotiations get larger and more diverse. A protocol of this type would only be binding on participants hence its adoption by all Members would not be legally necessary, as politically desirable as it might be.

In the cases of telecommunications and financial services, the Fourth and Fifth Protocols were adopted by the Council for Trade in Services by consensus decisions. While this collective adoption by the entire Membership is politically desirable, it should not be considered as a legal requirement without which a protocol could not be used. The content of a protocol is typically concerned with legal and procedural issues relating to the acceptance and entry into force of the negotiated outcome. In situations where such an outcome commits only a group of Members, it would be up to them to agree on such stipulations. The rights of other non-participating Members would be preserved through the certification process and their right to object at that stage.

Despite the relatively less demanding nature of a certification procedure compared to other legal options, this option entails a considerable challenge if applied to the IFD Agreement with respect to the legal scope of application of the new commitments and how they would apply to domestic policy and regulatory frameworks in participating Members. Members' schedules under the GATT and the GATS are integral parts of those Agreements. The scope of application of all legal obligations, including those in schedules, will always be limited to the respective scopes of the GATT and the GATS.

The scope of the GATT is limited to the treatment of goods crossing borders and the non-discriminatory treatment of such goods in national markets once they cross the border. It does not extend to the treatment of producers nor investors in the territory from where goods are being imported. Any concession contained in a Member's schedule under the GATT would not be legally applicable beyond that scope, absent an amendment to the GATT itself to that effect. Accordingly, the GATT, including the content of Members' schedules thereunder, would hardly capture any significant part of what is currently being negotiated in the IFD Agreement which is primarily about FDI and foreign investors seeking to have access to the domestic economy.

In the case of the GATS, the scope of the Agreement is focused on “measures by Members affecting trade in services”.<sup>137</sup> Legal obligations in the Articles and Annexes of the GATS and commitments in Members' schedules cover the treatment of services and service suppliers of other WTO Members. Unlike the GATT, the scope of the GATS covers products (services) and producers (service suppliers). Therefore, it covers situations where an FDI (actual or prospective establishment) qualifies as a “service supplier of another Member”. That is, if the entity in question is owned (50% or more) or controlled by a person of another Member.<sup>138</sup> This would cover a significant segment of FDI; however, it would not extend to cover the full range of situations currently considered in the ongoing negotiation of the IFD Agreement. It would not cover situations where the foreign investor is operating (or seeking to operate) in a non-services sector of the economy or, even within the services sector but does not qualify as a service supplier of another Member. However, there is no legal reason why any of the elements currently

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<sup>137</sup> See Article I:1 of the GATS (Scope and Definition).

<sup>138</sup> See Article XXVIII: (g), (m) and (n) of the GATS (Definitions).

contained in the draft IFD Agreement could not be scheduled as Additional Commitments under GATS Article XVIII and be applied in accordance with the scope of the Agreement (i.e., only to services related FDI). Such commitments would also trigger all other provisions of the GATS which apply where specific commitments are scheduled. Those include good governance obligations on transparency (Art. IV), domestic regulation (Art. VI), payments and transfers (Art. XI) and other disciplines in GATS Annexes.

If such a pathway is adopted, in addition to the question of legal scope of application, the question of sectoral coverage of the IFD Agreement would also arise. Normally, specific commitments (Market Access (Art. XVI), National Treatment (Art. XVII) and Additional Commitments (Art. XVIII)) apply in the sectors that a Member lists in its schedule. Such commitments do not apply to all sectors covered by the GATS. However, participants in the negotiations may decide whether the IFD Agreement would apply only in services sectors listed in a Member's schedule or apply horizontally to all services sectors covered by the GATS. That is, all services sectors except services supplied in the exercise of governmental authority (government services) and air transport services. An appropriate entry in the horizontal section of a Member's schedule to that effect would extend the sectoral coverage of the IFD Agreement and would be consistent with the rules of the GATS.

Of course, participating Members would need to consider the extent to which adopting the pathway of scheduling commitments under the GATT and the GATS would fulfil their aspirations for investment facilitation, considering other factors that go beyond legal questions.

### New standalone Agreement to be inserted into the current WTO legal architecture

The WTO Agreement provides clear rules for the integration of new standalone agreements into its treaty architecture. This approach, however, calls for a distinction to be made, in terms of negotiated outcomes, between what might be referred to as Agreements (with capital A) and agreements (with small a). That is, between an outcome that takes the form of a new standalone Agreement as opposed to an agreement on an outcome that takes the form of a package of new commitments to be consolidated into schedules of participating Members. In the case of the latter, as explained in the previous section, such schedules become integral parts of a pre-existing Agreement and do not constitute a new standalone agreement as such. For example, the Trade Facilitation Agreement (TFA) took the form of a new standalone Agreement (with capital A) that was inserted into the WTO treaty architecture through an amendment procedure, in accordance with Article X of the WTO Agreement.<sup>139</sup> However, the ITA is an agreement (with small a) that took the form of new binding tariff concessions added to schedules under the GATT, a pre-existing Agreement.

If participating Members take the pathway of concluding the IFD Agreement as a new standalone Agreement, a starting point would be the initiation of an amendment procedure in accordance with the provisions of Article X of the WTO Agreement. This, of course, would require a consensus decision by all Members of the WTO. The rules and procedures for taking that path are clear; however, the challenge would be political in terms of securing the consent of all Members.

A further question to consider would be: in which of the Annexes to the WTO Agreement should the new IFD Agreement be inserted? The two Annexes that contain substantive trade Agreements are Annex 1 and Annex 4. Annexes 2 and 3 contain the institutional provisions of the Dispute Settlement Understanding and the Trade Policy Review Mechanism, respectively, and therefore are not relevant to this discussion.

Annexes 1 and 4, however are different in terms of the types of Agreements they comprise. The descriptions of what these Annexes cover is to be found in the provisions of paragraphs 2 and 3 of Article II of the WTO Agreement (Structure of the WTO) which state that:

“2. The agreements and associated legal instruments included in **Annexes 1, 2 and 3** (hereinafter referred to as “Multilateral Trade Agreements”) are integral parts of this Agreement, **binding on all Members**.

3. The agreements and associated legal instruments included in **Annex 4** (hereinafter referred to as “Plurilateral Trade Agreements”) are also part of this Agreement for those

<sup>139</sup> See WTO (2014). Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization (WT/L/940).

Members that have accepted them and are binding on those Members. The Plurilateral Trade Agreements **do not create either obligations or rights for Members that have not accepted them.**" (Emphasis added)

Accordingly, under the current structure, if the IFD Agreement is to be binding on, and creates rights for, all Members, it should be inserted in Annex 1, following the example of the TFA. A further question, of course, would be whether it should be inserted in sub-Annex A (Trade in Goods), sub-Annex B (Trade in Services) or, sub-Annex C (Trade Related Aspects of Intellectual Property Rights)? Alternatively, if none of the three sub-Annexes is considered suitable, it would also be legally possible in an amendment procedure to create a new sub-Annex D. In any case, under Annex 1 the IFD Agreement would be binding on all Members.

On the other hand, if the IFD Agreement is not binding on all Members and creates rights only for its signatories, it should then be inserted in Annex 4 (currently comprising of two Agreements on Government Procurement and Trade in Civil Aircraft). In this case, signatories could still extend the benefits of the IFD Agreement to non-signatories if they wish to do so. However, in this case it would be on a voluntary basis and would not create any legal rights for non-signatories.

Given that one of the current working assumptions in section II above is that the IFD Agreement will be applied on an MFN basis and create rights for all Members while being binding only on a subset of the membership and, unless Members decide to amend the characterization of Annex 1 or 4 in Article II of the Marrakesh Agreement, the IFD Agreement would not be fitting under neither of the two Annexes.

### New standalone Agreement to be inserted into a new Annex 5 to the WTO Agreement

Indeed, having a new standalone agreement binding on some Members but creating rights for all would be unprecedented in the WTO. Therefore, it might require a novel solution. In this regard, the creation of a new Annex 5 might be worth contemplating as a fitting legal option in light of the following considerations:

- The option of scheduling IFD Agreement obligations under the GATS and the GATT would not be an optimal solution for the reasons explained in section II above.
- All other approaches for the integration of the IFD Agreement into the WTO legal architecture would require an amendment in accordance with Article X of the WTO Agreement.
- An amendment procedure would require the consent of all WTO Members expressed in a decision by the Ministerial Conference (or the General Council acting on its behalf, in accordance with Article IV:2 of the WTO Agreement) to be agreed by consensus.
- An amendment inserting a new agreement into the WTO structure, as in the case of the TFA, would be an amendment of the WTO Agreement itself, not an amendment of any of the existing Agreements under any of its Annexes.
- Consequently, from a legal perspective, an amendment adding a new Annex 5 to the structure of the WTO Agreement would be no different in its legal nature from the act of inserting the IFD Agreement into one of the existing Annexes (1 or 4). In both cases, it would be the same legal act of amending the WTO Agreement itself.
- Proceeding with the insertion of the IFD Agreement into Annex 1 would require either making it binding on all Members (which is not foreseen) or amending paragraph 2 of Article II of the WTO Agreement to allow for agreements that would not be binding on all Members. Similarly, inserting the IFD Agreement into Annex 4 would also require the amendment of paragraph 3 of the same Article to allow for agreements that would create rights for non-signatories. Members may see merit in preserving the nature and integrity of Annexes 1 and 4 and proceed with a solution tailored to the IFD Agreement.
- From a broader systemic perspective Members might also see the desirability of entertaining new standalone agreements binding on a subset of the Membership but creating rights for all. In the wider context of WTO reform discussions and efforts to revive the negotiating function of the Organization, many believe that more variable geometry is needed to entertain wider possibilities that cater for the increasing diversity among a growing membership as well as the ever-evolving global trade landscape.

All decisions needed for any of the options, other than scheduling of new commitments under the GATT and the GATS, would require a decision by all Members to be agreed by consensus. This would probably lead to linkages and trade-offs to be drawn with other issues of interest to non-participating Members

which might require the “packaging” of some other outcomes in other areas of negotiation. If this political hurdle is crossed, the technical details of any legal option would be facilitated.

Linking the IFD Agreement with other negotiated outcomes, including those related to WTO reform, raises the challenge of timeline discrepancies between different processes. The negotiations on the IFD Agreement may very well be concluded much sooner than other areas that are candidates for “trade-offs” or even before sufficient progress on WTO reform. This could represent a significant obstacle to reaching agreement on integrating the IFD Agreement into the WTO structure. In this case, a sequencing of legal events may be considered as a means of bridging the time gap. The customary rules of public international law, as codified in the Vienna Convention on the Law of Treaties, distinguish between the conclusion of the negotiating process by the “Adoption of the text” of a treaty (Art. 9), its “Provisional application” (Art. 25) and, its “Entry into force” (Art. 24). Those three events, in many situations are decided upon all at once on a given occasion or at a conference. However, they are legally distinct and could take place at different points in time with the same legal validity.

A possible scenario that may be considered for the IFD Agreement would be to aim at concluding the negotiations by adopting the text of the agreement (among participants) and agree on its implementation on a provisional basis, pending its entry into force through a WTO amendment procedure. A commitment to provisionally apply the agreement would be more of a political nature rather than legally enforceable and it would be agreed among participants in the negotiations, pending its definitive entry into force. Such an agreement could provide for full implementation of the provisions of the IFD Agreement or simply to refrain from adopting any measures that would be inconsistent with its provisions. That, of course, would depend on what participants in the negotiations would eventually agree on. There are several examples of such arrangements throughout the history of the multilateral trading system, ranging from the Protocol of Provisional Application of the GATT<sup>140</sup> to more recent examples such as the Decision on Disciplines Relating to the Accountancy Sector.<sup>141</sup> The exact content of a possible decision of a similar nature for an IFD Agreement would depend on how participants in the negotiations would wish to proceed and what they would be ready to commit to at that point.

In such a scenario, while the integrity of the IFD Agreement is preserved through the adoption of the text and a decision on provisional application, negotiations in the WTO regarding the broader agenda of reform and other negotiating items would continue in search for the right balance of trade-offs that would generate the political will for the necessary amendment decision to integrate the IFD Agreement into the WTO structure.

## Final observations

A discussion about integrating a new agreement in the legal architecture of the WTO is a political discussion in the first order. It will normally have to involve considerations wider than the subject matter of the agreement in question. In the case of the IFD Agreement, it will inevitably have to be part of a bigger picture and a wider process where political balances and compromises are at play. Such a process will probably be guided, not only by Members’ transactional interests across specific negotiating files and trading off one against the other, but also by their views on systemic questions regarding the future direction of the WTO and the expected role of the negotiating function in a deeply troubled trading system with widely diverse membership.

Among the systemic issues to be addressed in reforming the WTO negotiating function are: (a) the role of plurilateral negotiating processes and their outcomes; (b) the application of special and differential treatment; and (c) how to integrate new subjects that are so far not covered by current WTO Agreements. These three systemic issues will be relevant in the case of the IFD Agreement.

The IFD Agreement negotiations are an initiative that was launched and driven by aspirations of developing countries and LDCs. It initially started with the group of “Friends of Investment Facilitation for Development” in the WTO in 2017. It aimed at starting exploratory discussions on how to enable participating Members to attract inward FDI through benchmarking best practices and mobilizing

<sup>140</sup> See GATT (1947). Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Geneva, 30 October 1947.

<sup>141</sup> See WTO (1998). Decision on Disciplines Relating to the Accountancy Sector, adopted by the Council for Trade in Services, 14 December 1998 (S/L/63).

technical assistance and capacity building to support domestic regulatory reforms. A successful conclusion of the IFD Agreement would be a major achievement that would respond to the aspirations of developing countries and LDCs and strengthen the WTO's role in promoting their development and integration in the global economy.<sup>142</sup> Such an achievement would also be significantly enhanced by ensuring that the IFD Agreement contains effective provisions providing flexibilities for developing countries and LDCs as well as ensuring meaningful implementation assistance. In this regard, the experience with the TFA approach should provide instructive guidance.

Concerns regarding investment policy space have been present in these discussions from the outset. Participants therefore focused on issues relating to transparency of regulations and simplification and speeding up of administrative procedures. They statedly did not address core sensitive issues that relate to the direction and content of investment policies.

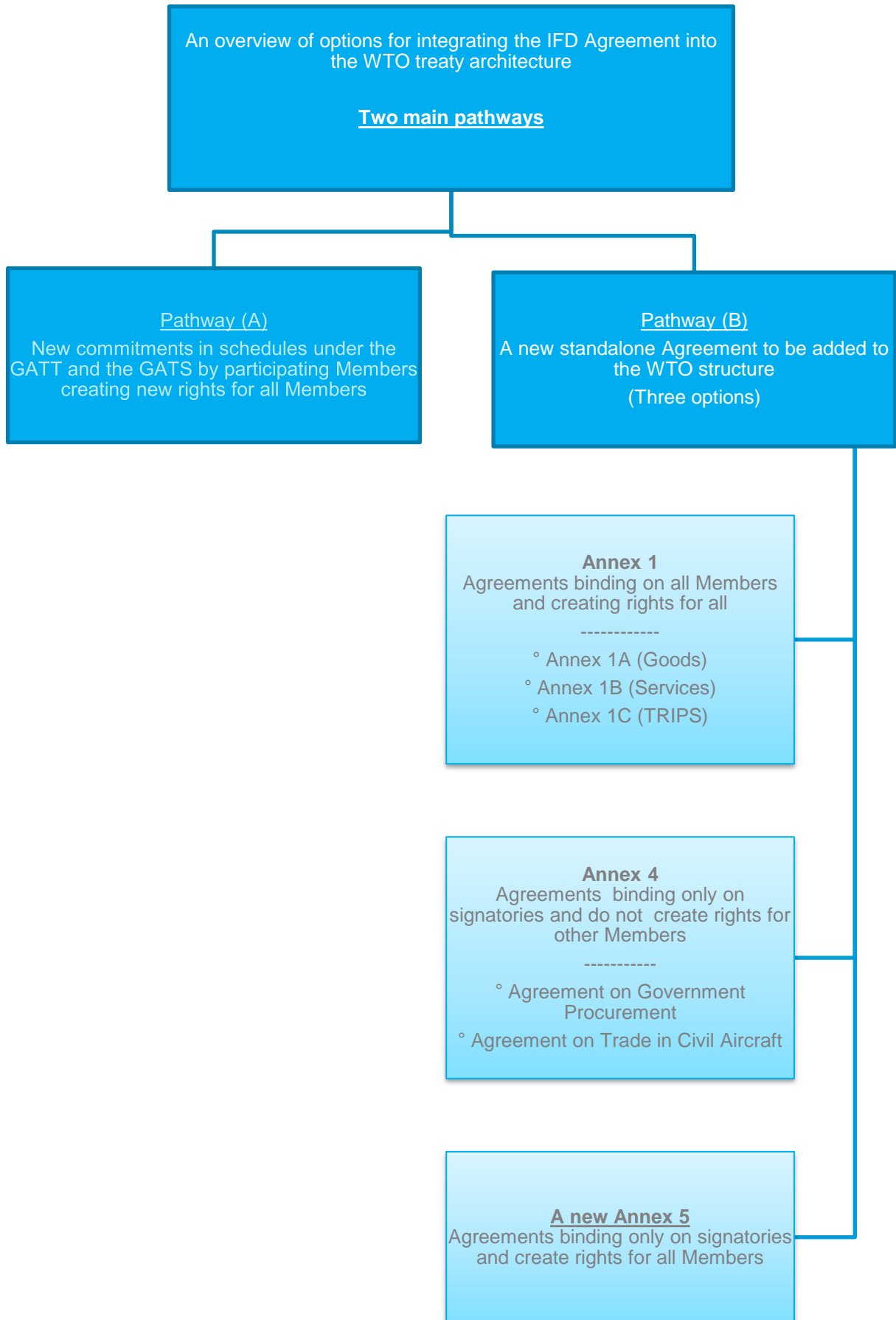
The expected scope of the IFD Agreement, according to current working assumptions, will cover FDI flows in all sectors of the economy. It will not be confined to FDI in the services sector as currently covered by the GATS. Current WTO rules do not cover non-services related FDI. This raises concerns about the viability of following a scheduling approach to integrate the IFD into the WTO structure. The scope and coverage of scheduled commitments would necessarily be confined to the scope and coverage of the GATT and the GATS. This leads to the conclusion that preserving the integrity of the IFD Agreement and its intended scope and coverage would best be achieved through the introduction of a new standalone Agreement.

Introducing a new standalone Agreement into the WTO structure would require an amendment within the meaning of Article X of the WTO Agreement. In this case, it would be an amendment to the WTO Agreement itself, not to any of the existing Agreements, as has been the case for the Trade Facilitation Agreement.

Whether an amendment takes the form of inserting a new Agreement into one of the existing Annexes (Annex 1 or Annex 4) or introduces a new Annex 5 into the treaty structure, it remains the same legal act of amendment by the Membership.

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<sup>142</sup> See Rolf Adlung, Pierre Sauvé and Sherry Stephenson, "Investment Facilitation for Development – A WTO/GATS Perspective", Chapter 1.



## Chapter 5 What Foreign Investors Want: Findings from an Investor Survey of Investment Facilitation Measures in Latin America and the Caribbean

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FDI is important for achieving the Sustainable Development Goals. However, FDI inflows are declining since 2016, and governments are facing increasing competition for a smaller number of FDI projects. Although most recent estimates by the United Nations Conference on Trade and Development show a strong rebound of FDI flows in 2021, this growth is mainly driven by financial flows and mergers and acquisitions and is concentrated in developed countries that are recovering strongly from the Covid-19 pandemic. FDI flows to developing countries grew as well, but the growth was much less pronounced. FDI flows to the Latin American and Caribbean region have only recovered to near pre-pandemic levels (UNCTAD 2022). This recovery is encouraging and, hopefully, will continue. At the same time, if the Sustainable Development Goals are to be reached, considerably more FDI is needed, especially of the type that contributes most to development. Against the backdrop, investment facilitation can play a role in helping countries attract new and retain existing FDI.

WTO Members are currently negotiating an IFD Agreement.<sup>143</sup> The WTO defines investment facilitation as “the setting up of a more transparent, efficient and investment-friendly business climate by making it easier for domestic and foreign investors to invest, conduct their day-to-day business and expand their existing investments” (WTO 2020). It is important to note that investment facilitation does not cover investment policies and matters related to investor protection, market access and investor-state dispute settlement — it is strictly focused on technical, process-related aspects of the implementation of investment policies. In this respect, the negotiators are considering a variety of concrete measures that governments can take to facilitate new FDI and engage with existing investors to expand their operations sustainably. Investment facilitation measures are also increasingly included in other international investment agreements, both of a bilateral and regional nature, and, of course, they are put in place by individual countries.

As investors are directly affected by investment facilitation, their perspective is highly relevant for negotiators at the WTO and elsewhere. In addition, investor preferences regarding specific investment facilitation measures are an under-researched area. The aim of this report is to better understand those preferences. It is based on a survey of investors’ views on the importance of different investment facilitation measures and, also, their perception of the need for capacity building in government agencies to effectively deliver these measures.

The survey covered key investment facilitation measures that are discussed in the framework of the WTO IFD negotiations, as well as a small number of selected additional measures that are currently not part of the discussions at the WTO. Annex 1 provides an overview of the measures covered by this survey, ranked by importance, and annex 2 disaggregates the data according to respondent characteristics. The survey focused on investment facilitation measures that host countries can implement, although attention was also given to investment facilitation measures implemented by home countries (Section II H). In discussing measures that can be taken by host countries, a distinction was made between measures that *indirectly* or *directly* increase the development impact of incoming FDI (Berger & Sauvart, 2021). The former (Section II A-F) facilitate higher FDI flows (e.g., by increasing the transparency of the FDI regulatory framework) that, subsequently, contribute to development; the latter (Section II G) not only facilitate FDI flows, but also directly increase the development contribution of incoming FDI (e.g., by helping domestic enterprises to become more competitive with the help of supplier development programmes). Direct investment facilitation measures are therefore of particular interest for host countries.

To put the survey results into perspective, a comparison is made between the responses of company representatives about the importance they attach to certain investment facilitation measures on the one hand, and their current level of adoption at the country level on the other hand. This comparison allows

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<sup>143</sup> A summary of the discussions by the Coordinator of the WTO Investment Facilitation for Development negotiations is available at: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Language=English&SourcePage=FE\\_B\\_009&Context=Script&DataSource=Cat&Query=%40Symbol%3dINF%2fFD%2f\\*&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Language=English&SourcePage=FE_B_009&Context=Script&DataSource=Cat&Query=%40Symbol%3dINF%2fFD%2f*&languageUIChanged=true#).



us to assess the gap between what is discussed and the reality on the ground. The data on the adoption of investment facilitation measures are sourced from an Investment Facilitation Index that covers 117 investment facilitation measures and maps their adoption in 86 countries (Berger et al., 2021).

As detailed in annexes 3 and 4, the survey was designed to allow for a quick, easy and anonymous on-line response. In June 2021, 550 member companies of the Americas Business Dialogue (a private sector led initiative facilitated by the IDB) were invited to participate in the survey; 12 per cent submitted a fully completed questionnaire. The Americas Business Dialogue is one of the most important private sector initiatives in the Western Hemisphere. It represents companies and business organisations from all sectors of the economy and all countries in the Americas. Its mission is to develop, disseminate and support the implementation of policy recommendations that contribute to a business environment that enables increased investment, innovation and productivity, generates more and better jobs and fosters sustained economic growth towards the development of the countries across the continent. The Americas Business Dialogue carries out a sustained, high-level exchange with the governments of the region, seeking to develop collaborative relationships for the formulation and implementation of public policies. It is the private sector consultation mechanism for the Summit of the Americas.

The Latin America and Caribbean region as a case study allows for a useful canvas of investor preferences. The region is a destination for significant FDI inflows, attracted by a diversity of host countries that range across different income levels and comprising relatively closed and more open economies. The home countries of investors for the region are also diverse, being located both within and outside the region. While this variety may make the results from the Latin America and Caribbean region broadly representative of the full span of investors' perspectives on investment facilitation concerning this region, it needs to be noted that the number of responses is relatively small, and that the respondents are not necessarily representative of investors world-wide.

The next section of the report presents and discusses key findings of the survey, clustered along main policy areas under negotiation at the WTO. Section III, then, assesses foreign investors' perceptions on the need for strengthening the implementation capacity of host countries regarding key investment facilitation dimensions. Section IV concludes and presents policy recommendations. Readers interested in the analytical basis of the survey are invited to consult annexes 3 and 4, which include a description of the methodology, data on the responses and the questionnaire.

## Findings

In general, investors considered investment facilitation to be useful, and all measures included in this survey were indicated as measures that provide value to investors – but at different degrees of importance.

Among different investment facilitation topic areas, those related to information and transparency, one-stop-shops that allow investors to deal with administrative procedures through a single office and e-government services were considered “very important” by investors (see table 1). A number of measures that not only facilitate FDI flows but also directly contribute to sustainable development – such as the acceptance of international standards for responsible business conduct and “red carpet” service for investments having a significant positive sustainable development impact – were also considered as considerably important by investors.

Furthermore, outward FDI investment facilitation measures provided by home countries were supported by a majority of investors as “very important”. Finally, respondents indicated that the investment facilitation measures that are seen as “very important” are also considered to be in need of technical assistance and capacity building, to ensure efficient implementation (see table 1).

Notwithstanding a relatively small sample, the results also presented notable differences in the ranking of measures that are considered “very important” by the respondents according to firm size, sector and headquarters location (see annex 2).

- Larger firms attached a relatively higher importance to such regulatory measures as the possibility to review and comment on draft laws, whereas smaller firms mainly favoured information and operational support measures.
- Investment facilitation was relatively more important for services and manufacturing than for extractive industries.
- Investors from developed economies attached relatively higher importance to topics of stakeholder engagement and sustainability, whereas investors from developing economies mainly favoured information and operational support measures.

**Table 1: The importance of a topic area and the need for capacity building (scores in per cent).**

Investment facilitation topic area	Average share of respondents that see measure as “very important”	Share of respondents that see capacity building in this topic area as “very important”
Information and transparency	72	60
One-stop-shop services	69	66
E-government services	69	61
Stakeholder-government consultations	59	48
Outward FDI support services (by home countries)	56	46
Streamlining administrative procedures	50	54
The role of IPAs	50	39
Measures that directly increase the development impact of FDI	47	n.a.

Source: IDB/ITC/DIE investor survey.

The findings for each investment facilitation topic area are detailed below, along with commentary contrasting the perceptions of investors (as reported in the present survey) with the coverage of the measure in the ongoing WTO IFD Agreement negotiations and with what countries are actually doing in practice as measured by the Investment Facilitation Index.

### Information and transparency

Information and transparency constitute basic building blocks for effective investment facilitation. To make an investment decision, investors require information about relevant laws, regulations and other factors affecting their business, as well as transparency about administrative procedures, to be able to properly plan and conduct an investment. Measures in this area also facilitate the due diligence that investors need to undertake.

Overall, the survey results indicate that the topic of information and transparency is considered the most important topic for investors, with an average of 72 per cent of the respondents deeming them as “very important” (see table 1). The publication of relevant laws and regulations affecting FDI, e.g., on an IPA website, received the highest rating of all individual measures, with 79 per cent of the respondents deeming it “very important” (see table 2). The publication of timeframes and fees of relevant investment application processes is considered “very important” by 64 per cent of the respondents. No respondent considered any of these measures as “unimportant”.

Revealingly, 60 per cent of the respondents stated that it is “very important” to increase government capacity in this field, and none replied that increasing government capacity is “unimportant”.

There is a high correlation between investor perceptions and the WTO IFD Agreement negotiation agenda. A consensus among WTO Members seems to exist to include such measures as the timely publication of relevant laws and regulations as well as the publication of timeframes and fees of relevant investor application processes in an IFD Agreement. The survey findings confirm that these are useful measures for investors.

**Table 2: Importance of measures related to information and transparency and the need for capacity building (scores in per cent).**

Investment facilitation measures	Very important	Important	Somewhat important	Unimportant	No answer
Publication of relevant laws and regulations affecting FDI, e.g., on the IPA website	79	15	6	0	0
Publication of timeframes and fees of relevant investor application processes	64	30	6	0	0
How important is increasing government capacity in this field?	60	33	7	0	0

Source: IDB/ITC/DIE investor survey.

Data on investment facilitation measures at the country-level show that measures related to the publication of laws, regulations and procedures are indeed widely adopted: almost all of the 86 countries included in the Investment Facilitation Index currently implement similar measures. However, in view of the fact that a great majority of respondents called for an increase in government capacity (and none considered this as “unimportant”), there seems to be considerable room for further improvement in the area of information and transparency of investment frameworks.

### The role of investment promotion agencies

IPAs are the main organisations tasked to attract, retain and expand FDI in most countries. As a focal point for investment-related inquires, they offer a wide array of services to investors, ranging from providing information about investment opportunities to aftercare services. Depending on the country context, IPAs may also offer one-stop-shop or single window services, which serve as an institutional single point of entry for foreign investors interacting with various governmental agencies in processing investment applications and other registration requirements. This distinct function is discussed in section F. IPAs help to shape a country’s image as an investment location and are usually the face and main contact to facilitate international investors.

Overall, IPAs are of great importance to a great majority of investors. This is reflected in the responses to a question inquiring about the availability of a government focal point to provide information and address enquires related to an investment project: 64 per cent of the respondents consider this as “very important”, the highest percentage in this category of questions (see table 3). The importance of individual measures related to IPAs, however, depends heavily on the specific measure in question. A list of support measures/incentives offered to inward investors is also seen as “very important” (60 per cent).

Measures related to supporting companies with recruiting and training received a low rating, with 25 per cent of investors considering this measure as “very important”; in fact, such measures are perceived as “unimportant” by 6 per cent of the respondents. Perhaps recruitment and training are considered company matters, and companies see no additional need to seek support from IPAs in this area.

A large majority of respondents stated that it is “very important” (39 per cent) or “important” (46 per cent) to increase government capacity in this field, and none replied that increasing government capacity is “unimportant”.

**Table 3: Importance of measures related to the role of investment promotion agencies (scores in per cent).**

Investment facilitation measure	Very important	Important	Somewhat important	Unimportant	No answer
Availability of a government focal point to provide information and address enquires related to an investment project	64	32	4	0	0
List of support measures/incentives offered to inward investors	60	33	7	0	0
Support with recruiting or training needs	25	36	33	6	0
How important is increasing government capacity in this field?	39	46	15	0	0

Source: IDB/ITC/DIE investor survey.

The importance of focal points for investment facilitation and of transparency about the availability of public incentives for investors seems to be reflected in the WTO IFD Agreement text. In these areas, the current state of negotiations therefore seems to be in line with what investors consider as important. The measure on supporting investors with regard to recruiting and training, on the other hand, does not seem to be considered in the IFD Agreement negotiations.

Almost all of the countries covered by the Investment Facilitation Index have a government focal point to provide information and address enquires related to investment projects. Lists of support measures and incentives offered to inward investors are provided in more than 70 per cent of countries in the Index.

### Streamlining administrative procedures

A typical FDI project involves numerous applications for permits and other administrative processes. Streamlined procedures ensure that investors are able to get the necessary approvals on time and without overburdening bureaucracy. Effective streamlining helps to create a business-friendly environment for investors. In the worst case, lengthy and prolonged administrative procedures risk to deter investment.

The survey shows that investor preferences vary with respect to the usefulness of different measures to streamline administrative procedures, but virtually no respondent considers them “unimportant” (see table 4).

Fast tracked approvals for reinvestments and the possibility to have a review of administrative decisions and “silent yes” procedures,<sup>144</sup> were all rated as “very important” by over 50 per cent of the respondents, a percentage that raises to almost 90 per cent or higher if the rating “important” is added. On the other hand, accepting copies of documents in place of originals necessary for applications and the availability of an ombudsperson-type mechanism to handle investment grievances were considered as “very important” by only 45 per cent and 39 per cent, respectively; if, however, the “important” responses are added, the percentage raises to around 80 per cent.

<sup>144</sup> Meaning that, if no response is received until the stated deadline, the investor's application is automatically approved, unless otherwise notified.

**Table 4: Importance of measures related to streamlining administrative procedures (scores in per cent).**

Investment facilitation measure	Very important	Important	Somewhat important	Unimportant	No answer
Fast-track approval for reinvestments	57	38	1	1	3
Possibility to have a review of administrative decisions	55	38	1	0	6
"Silent yes" for administrative procedures	54	35	4	0	7
Accepting copies of documents in place of originals necessary for applications	45	31	16	1	7
Availability of an ombudsperson-type mechanism to handle investment grievances	39	46	7	1	7
How important is increasing government capacity in this field?	54	37	4	0	4

Source: IDB/ITC/DIE investor survey.

The importance of further capacity building in this area is considered high: over 90 per cent of the respondents marked this area as “very important” or “important”, and none as “unimportant”.

The possibility to have a review of administrative procedures and the acceptance of copies in application processes are apparently already considered in the WTO IFD Agreement negotiations. The inclusion of ombudsperson-type mechanisms and “silent yes” procedures (with appropriate qualifications) seem to be still under discussion among WTO Members, or may be considered as a possible part of a future work programme. In view of the high importance investors in the present survey attached to these two measures, negotiators may want to take this finding into account in their further negotiations. Fast-tracked approvals for reinvestments (with appropriate safeguards) have apparently not yet been considered in the negotiations — which is surprising given that over 90 per cent of respondents consider this measure as “very important” or “important”, and that reinvestment accounts for a considerable share of FDI flows.

According to the Investment Facilitation Index, the measure currently adopted by the lowest number of countries in this policy area is the “silent yes” procedure, adopted by fewer than 5 per cent out of the 86 countries in the Index. The possibility to review administrative decisions, on the other hand, are among the most commonly adopted measures of countries included in the Index. Different variations of Ombudsperson-type services are offered in around 20 per cent of countries, and the acceptance of copies of document in close to 80 per cent of the countries for which data have been gathered.

### Stakeholder-government consultations

Regular stakeholder-government consultations foster the exchange of information on the facilitation of investment. They can help bring investment-related issues to the attention of governments and establish a feedback loop that allows for the updating and improvement of the business environment and the development impact of FDI. Governments can also solicit stakeholders’ advance comments before reforms or policy changes are implemented, to better understand their consequences for the business environment and development. In the FDI context, stakeholders are not limited to investors, but also

include other groups such as non-governmental organisations. However, given the focus of this survey, this report focusses on investors.

In fact, the measure considered most important in this field was the opportunity to comment on proposed changes in laws and regulations in advance, which was rated “very important” by 63 per cent of the respondents (see table 5). Furthermore, regular government-investor roundtables to discuss relevant issues are considered “very important” by 55 per cent of the respondents, and only 4 per cent describe this measure as “unimportant”.

As to capacity-building, over 90 percent of the respondents considered this an important necessity, 48 per cent among them, in fact, as “very important”.

A consensus seems to exist among negotiators to include an advance opportunity to comment on draft laws and regulatory changes in the WTO IFD Agreement. On the other hand, regular government-investor roundtables have apparently not been discussed in the IFD Agreement negotiations; WTO negotiators may want to build on this broad consensus on the usefulness of regular government-investor roundtables and consider a provision on this matter.

Commenting on drafts is already provided by more than 70 per cent of the countries covered by the Investment Facilitation Index. Hence, there seems to be broad alignment in the area of advance comments on proposed laws and regulations with regard to investor preferences, WTO Members’ negotiation priorities and the current adoption at country level. Moreover, consultations between investors and governments are provided by almost all countries covered in the Index.

**Table 5: Importance of measures related to stakeholder-government consultations (scores in per cent).**

Investment facilitation measure	Very important	Important	Somewhat important	Unimportant	No answer
Advance opportunity to comment on proposed changes in laws and regulations	63	35	1	1	0
Regular government-investor roundtables to discuss relevant issues	55	31	10	4	0
How important is increasing government capacity in this field?	48	46	3	3	1

Source: IDB/ITC/DIE investor survey.

### E-government services

The growing importance of the digitalization of public services also affects the field of investment facilitation. Online services are increasingly demanded by investors and have the potential to improve both the efficiency and transparency of administrative procedures. Besides these direct benefits to investors and government agencies, digital services can improve a country’s reputation and brand as a progressive, technology and business friendly nation.

Investors rank e-government services as one of the three most useful benefits of investment facilitation (see table 1). More specifically, the availability of e-government services to submit necessary applications and the ability to track the status of applications online were ranked as “very important” by 70 per cent and 67 per cent of the respondents, respectively; if “important” answers are added, the score reaches 98 per cent (see table 6).

At the same time, 61 per cent of the respondents considered increasing government capacity in this field as “very important” – the second highest score among all topic areas (see table 1). If “important” answers are added, the score reaches 94 per cent (see table 6).

E-government services seem to be covered in the WTO IFD Agreement negotiations, including through provisions on the electronic submission of applications and the payment of fees online. An area that



could be strengthened in the Agreement, given the high importance that investors attach to it, is the opportunity to track the status of an application online.

**Table 6: Importance of measures related to e-government services (scores in per cent).**

Investment facilitation measure	Very	Somewhat		No	
	important	Important	important	Unimportant	answer
Availability of e-government services (i.e., use of electronic forms and online submission of applications and payment of fees and charges)	70	28	1	0	1
Ability to track status of applications online	67	31	1	0	1
How important is increasing government capacity in this field?	61	33	3	1	1

Source: IDB/ITC/DIE investor survey.

The Investment Facilitation Index shows that e-government services are less broadly adopted by countries compared to other measures discussed above. For example, e-government services in the form of electronic forms are currently provided by only slightly more than 40 per cent of countries, and fewer than 60 per cent of the countries included in the Investment Facilitation Index provide for online status tracking of applications. This relatively low level of adoption shows that an IFD Agreement could be used to help countries make progress in an area that is of high importance for investors, and whose importance, if anything, will increase further. Substantial technical assistance will be needed in this respect.

### One-stop-shop services and visa measures

There are a number of additional measures that fall within the scope of investment facilitation, such as one-stop-shop services and visa measures. One-stop-shops, also sometimes referred to as single windows, consolidate the services of different governmental departments at one central location for the convenience of investors. These typically include the issuance of permits, applications for visas, requests for tax identification numbers, and other authorizations necessary to establish a FDI project. One-stop-shops are a popular mechanism, which, if effective, can make life easier for investors.

Not surprisingly, therefore, the survey showed that 67 per cent of the respondents consider one-stop-shops as “very important”, and an additional 29 per cent as “important” (see table 7). Furthermore, the success of FDI projects often depends on company representatives being able to travel to their foreign affiliates. The provision of multiple entry visas for investors or other visa and work permit support services is therefore a crucial element of a facilitative investment framework in host countries. This measure has received a high rating, with 70 per cent of respondents considering it “very important”.

The survey reveals that the need to build capacity on measures related to one-stop-shop services and visa measures is particularly high: 66 per cent considered it as “very important” and a further 31 per cent as “important”; none of the respondents considered capacity building in this area as “unimportant”.

The IFD Agreement negotiations seem to include a single window measure for the provision of investment-related information and proposals to expand this portal into a single-entry point for receiving applications. Under discussion seems to be a provision concerning the entry and temporary stay of investment-related personnel; the high importance investors attach to visa measures would favour their consideration in the final IFD Agreement.

The one-stop-shop measure is implemented by only 30 per cent of countries included in the Investment Facilitation Index, showing considerable room for the further improvement of country-level investment frameworks. Multiple entry visas for investors on the other hand are already provided by more than 80

per cent of countries included in the Index. Here, country-level practice is already in line with the high importance investors attached to this measure, and (in the case of visas) ahead of the negotiations.

**Table 7: Importance of measures related to one-stop-shop services and visa measures (scores in per cent).**

Investment facilitation measure	Very important	Important	Somewhat important	Unimportant	No answer
Provision of multiple entry visas for investors or other visa and work permit support services	70	26	3	0	1
Availability of one-stop-shop services to file all relevant applications simultaneously	67	29	1	0	3
How important is increasing government capacity in this field?	66	31	1	0	1

Source: IDB/ITC/DIE investor survey.

### Measures that directly increase the development impact of FDI

WTO Members are negotiating an agreement on investment facilitation *for development*. The great majority of investment facilitation measures considered so far in the negotiations have the potential to indirectly support the development of host countries, by helping to increase the volume of FDI flows. In addition, there is a set of measures that not only facilitate FDI flows, but also directly increase the development contribution of FDI. Naturally, such measures are of particular interest to, and importance for, host countries, especially developing ones. This survey included five measures that have a direct impact on development, but there are more that could be considered, and some of these were indeed proposed in the negotiations (Sauvant et al., 2021, pp. 10-11 for a list of this type of measures).

Measures that directly increase the development impact of FDI, as a group, received the lowest overall level of support in terms of being “very important” according to the feedback from investors: only 47 per cent of respondents see this area as “very important” (see table 1) – but only a very small percentage (4 per cent or fewer) see them as “unimportant” (see table 8). Interestingly, the measure that is considered most important within this category is the acceptance of international standards for responsible business conduct and/or CSR guidelines: 64 per cent of the respondents considered it “very important” and another 29 per cent as “important”. This result shows that foreign investors are quite open to contribute directly to sustainable development in host countries by aligning their business with international standards of responsible business conduct. Of similar importance to investors is the provision of “red-carpet” services for investments with a significant positive impact on sustainable development: such “red-carpet” services are considered “very important” by 60 per cent of the respondents. Some IPAs seek to increase the development contribution of FDI projects by designating CSR coordinators to facilitate investor relations with local communities and stakeholders, and 43 per cent of the respondents considered such a measure as “very important”. Measures related to the availability of supplier databases and supplier development programmes are considered as “very important” by 36 per cent and 34 per cent of the respondents, respectively, and by an additional 39 per cent and 44 per cent as “important”.

There seems to be consensus among WTO Members to include a provision on international standards of responsible business conduct, as well as supplier databases, in the IFD Agreement. Although apparently proposed, negotiators have not yet reached consensus on the inclusion of supplier development programmes; since a large majority of respondents considered such programmes as important investment facilitation measures, this may help negotiators in their decision-making. The other

two measures with a direct contribution to development – “red-carpet” services for investments and CSR coordinators – do not seem to be part of the IFD Agreement negotiations so far.<sup>145</sup>

**Table 8: Importance of measures that directly increase the development impact of FDI (scores in per cent).**

Investment facilitation measure	Very important	Important	Somewhat important	Unimportant	No answer
Acceptance of international standards for responsible business conduct and/or CSR guidelines	64	29	3	3	1
“Red carpet” service for investments having a significant positive sustainable development impact	60	29	7	4	0
Availability of a CSR coordinator in IPAs to facilitate investor relations with local communities and stakeholders	43	42	12	3	0
Availability of a supplier database to increase opportunities for local sourcing	36	39	24	1	0
Availability of supplier development programmes to support local suppliers to upgrade to meet standards of international investors	34	44	19	3	0

Source: IDB/ITC/DIE investor survey.

### Outward FDI support services

Outward FDI support measures are offered by many home countries to support the international expansion of their companies. Home countries can benefit from outward investment through (among other things) access to resources, new markets and technologies. In most home countries, however, the information on such measures is dispersed and not transparent, a situation accentuated by the fact that typically there is no central institution that is the depository of information related to such measures.<sup>146</sup> This makes it difficult for outward investors – and especially SMEs among them – to take advantage of such measures.

Home country facilitation measures include the provision of information on the relevant laws, regulations and administrative procedures relevant for outward FDI projects. In aggregate (see table 1), 56 per cent of investors considered such measures as “very important”. When the share of those who considered such measures as “important” is added to this percentage, 90 per cent or more of investors considered them as being “very important” or “important”.<sup>147</sup> More specifically, transparency of support measures for outward investors, e.g., through online portals in home countries, is ranked “very important” by 61 per cent of the respondents, while 51 per cent considered the publication of information on requirements and procedures for outward investment by the home country as “very important” (see table 9).

<sup>145</sup> The direct measures covered in this survey were not part of the initial version of the Investment Facilitation Index (Berger et al., 2021).

<sup>146</sup> For a full discussion of such home country measures, see Knoerich et al., 2021, and Sauvart et al., 2014.

<sup>147</sup> Calculated based on table 9.

As to capacity building, 89 per cent of the respondents had the view that this is “very important” or “important” (see table 9). Only 1 per cent responded that it is “unimportant” to increase capacity in this area.

**Table 9: Importance of outward FDI support services (scores in per cent).**

Investment facilitation measure	Very important	Important	Somewhat important	Unimportant	No answer
Transparency of support measures for outward investors, e.g., through online portals in home countries	61	31	4	3	1
Publication of information on requirements and procedures for outward investment, if any by home country	51	39	7	0	3
How important is increasing government capacity in this field?	46	43	5	1	4

Source: IDB/ITC/DIE investor survey.

Outward FDI measures provided by home countries are currently not part of the WTO IFD Agreement negotiations, although one delegation seems to have proposed to include them. In light of the support of foreign investors for the provision of home country investment facilitation measures, strong arguments suggest to broaden the scope of the IFD framework beyond host country measures, to cover home country investment facilitation measures as well.

The Investment Facilitation Index shows that fewer than 30 per cent of countries for which data have been gathered currently provide information on investment opportunities abroad, the investment climate and home-country measures. This finding, however, may not be too surprising in light of the fact that most countries covered by the index do not have substantial volumes of outward FDI.

### Other findings

The following sub-sections consider second-order differences in the importance of measures. These relate to variations in investor responses according to headquarter location, firm size and sector of activity. Moreover, the respondents' position within their firms is also considered.

#### Home country of investor

The firms in the sample were separated into two categories, based on their home country: firms headquartered in a developing country and firms headquartered in a developed country (according to UN classification<sup>148</sup>). As can be seen from annex 2, companies from developed economies attached a slightly higher average importance (58 per cent responded “very important”) to all the investment facilitation measures considered in the survey than companies from developing countries (53 per cent responded “very important”). When also taking the share of “important” responses into account, the picture changed: 91 per cent of respondents from developing countries consider the investment facilitation measures in this survey “very important” or “important”, compared with 86 per cent from developed countries. While there was no significant difference in the importance attached to investment facilitation in the aggregate, there was a notable variation in responses for certain measures.

The following measures had the highest relative importance for firms from *developing countries*:

- Publication of relevant laws and regulations affecting FDI, e.g., on the IPA website.
- Publication of timeframes and fees of relevant investor application processes.

<sup>148</sup> See detailed list of developed and developing countries here:

[https://www.un.org/en/development/desa/policy/wesp/wesp\\_current/2014wesp\\_country\\_classification.pdf](https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf)

- Support with recruiting or training needs.

On the other hand, the following measures were the relatively most important ones for firms from *developed countries*:

- “Red-carpet” service for investments having a significant positive sustainable development impact.
- Regular government-investor roundtables to discuss relevant issues.
- Acceptance of international standards for responsible business conduct and/or guidelines for CSR.

Generally, measures related to transparency and operational needs were considered relatively more important by investors from developing countries. This might be due to less in-house capacity in developing country MNEs regarding these issues, so government support in these fields was considered more important. Investors from developed countries, on the other hand, attached relatively higher importance to measures concerned with issues such as roundtables, sustainability and CSR.

### Firm size

When the sample was divided into firms with an annual turnover below USD 1 billion (“small firms”) and firms with an annual turnover above USD 1 billion (“large firms”), the results showed that large firms attached comparable (but slightly higher) importance to the investment facilitation measures covered in this survey, ranking 56 per cent of measures as “very important” compared to 50 per cent for small firms. On first sight, this seems counterintuitive, as smaller firms often have less in-house capacity and hence can be assumed to be more in need of government support for their FDI projects. Taking a closer look at the issue on a measure-by-measure basis helps to shed light on this seemingly paradox finding.

The following measures were ranked as the relatively most important measures for *small firms*:

- List of support measures/incentives offered to inward investors.
- Support with recruiting or training needs.
- Availability of one-stop-shop service to file all relevant applications simultaneously.

The following measures were ranked as the relatively most important measures for *large firms*:

- Advance opportunity to comment on proposed changes in laws and regulations.
- Possibility to have a review of administrative decisions.
- ‘Red-carpet’ service for investments having a significant positive sustainable development impact.

These results showed that small firms attached a relatively higher importance to standard practical and operational support measures. Large firms seemed to require less support with this type of measures, and rather appreciated more measures related to regulations and administrative decisions. The high number of such measures compared to operational ones included in the survey might also be a reason for the overall lower rating by smaller firms. They might think that many of these more advanced measures are not relevant for them, while they are of high importance for larger firms.

### Sector

Firms in the extractive sector attached the lowest importance to the investment facilitation measures considered in this survey, with an average of 35 per cent of the measures being rated as “very important”, compared with 53 per cent for firms in the manufacturing sector and 58 per cent for those in the services sector. This is most likely because companies from extractive industries have to invest where the resources are located and may not easily have the opportunity to invest in another location with better investment facilitation frameworks. Furthermore, they are typically large firms with significant in-house capacity. For manufacturing and service firms on the other hand, investment facilitation is more important as it has an impact on the attractiveness of a location and hence might influence in which country to invest or not to invest.

### Respondent position within the firm

Respondents with positions in corporate communications or external relations departments gave on average a 12 per cent higher “very important” judgement than respondents with positions that gave them direct exposure to conducting FDI projects.

There were only a few measures that respondents with a direct exposure to FDI projects considered more important than the former group:

- Support with recruiting or training needs.
- Availability of a supplier data base to increase the opportunities for local sourcing.
- Availability of supplier development programmes to support local suppliers to upgrade to meet standards of international investors.
- Availability of a CSR coordinator in investment promotion agencies to facilitate investor relations with local communities and stakeholders.

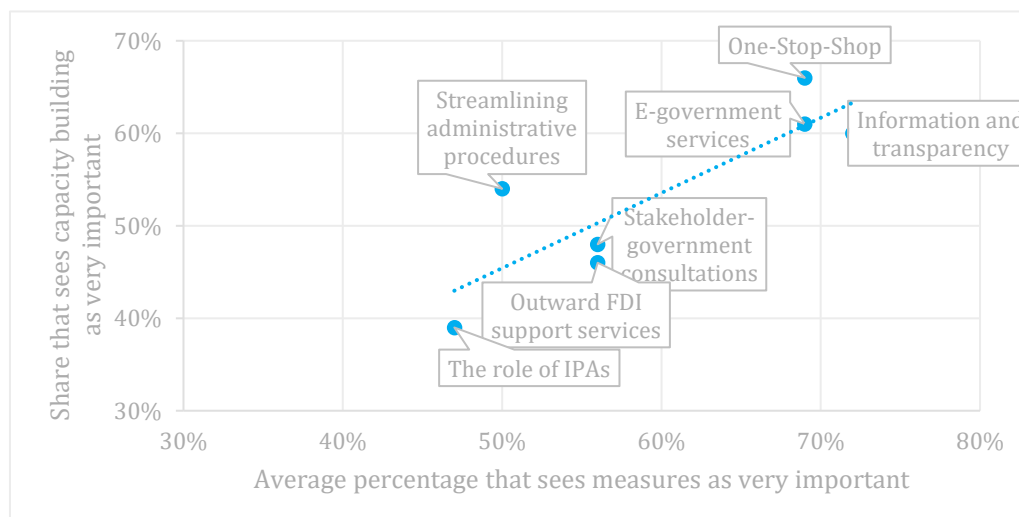
These are mostly measures that directly impact firms' operations, reflecting on-the-ground experience. It might be that the responses by communication and external relations functions led to an upward bias in the overall importance of measures and potentially to a relative downward bias for such operational measures as supplier databases and workforce-related support.

## Capacity building

Technical assistance and capacity building for developing and least-developed WTO Members seems to be discussed as part of the IFD Agreement negotiations at the WTO; it is a key issue for this group of Members. This investor survey underlines that capacity building is very important across the board, particularly for more complex measures.

More specifically, for five out of the seven aggregate topics for which data are available, three are ranked as "very important" by above 50 per cent of the respondents, and the other topic areas by between 39 and 48 per cent (see table 1); however, when "important" responses are added, 85 per cent or more of the respondents considered capacity building to be "very important" or "important" (see tables 2-7 and table 9). In declining order, these are: one-stop shop services and visa measures (97 per cent), e-government services (94 per cent), stakeholder-government consultations (94 per cent), information and transparency (93 per cent), and streamlining administrative procedures (91 per cent). In addition, 85 per cent of the respondents indicated the need for capacity building regarding the role of IPAs and 89 per cent for outward FDI facilitation as either "very important" or "important". Generally, there is a correlation between the extent to which a topic area was ranked as "very important" and the need for capacity building, meaning that the higher the importance of a measure is for investors, the higher typically also the need for capacity building (see figure 1).

**Figure 1: Correlation between importance of a topic and the need for capacity building**



Source: Authors visualisation based on IDB/ITC/DIE investor survey.

## Conclusion and policy recommendations

This report presents and discusses the results of a survey on the importance foreign investors attach to a range of investment facilitation measures, focussed on the Latin America and Caribbean region. The survey results are of importance for the ongoing negotiations of a WTO IFD Agreement, as well as for other negotiations of international investment agreements that address issues of investment facilitation. The survey shows which investment facilitation measures are of particular importance to investors and in which areas they see the need to strengthen governmental capacity to provide such measures. To increase the usefulness of the analysis for negotiators, the survey results are put into perspective by highlighting consistencies as well as gaps in relation to the current state of the WTO IFD negotiations



and the actual adoption of investment facilitation measures at the national level (for an overview, see annex 1).

Overall, the results of the survey indicated that all investment facilitation measures covered in this survey provide great value to investors. Since a number of these measures already seem to be included in the Agreement, this should give comfort to negotiators.

More specifically, among the measures that *indirectly* contribute to development, i.e., those that help to increase the volume of FDI (which subsequently contributes to development), the following measures were considered most important by investors: advance opportunity to comment on proposed changes in laws and regulations, availability of e-government services and the ability to track status of applications online.

There are, however, a number of this type of measures that were covered in this survey and that are of high importance to investors, but that do not yet seem to be included in the consensus text of the IFD negotiations. These measures are:<sup>149</sup>

- the ability to track the status of applications online;
- the provision of multiple entry visas for investors or other visa and work permit support services;
- fast-track approval for reinvestments;
- "silent yes" for administrative procedures;
- regular government-investor roundtables to discuss relevant issues;
- support with recruiting or training needs.

It appears that negotiators are still seeking common ground on a measure providing for the availability of an ombudsperson-type mechanism to handle investment grievances; in view of the fact that this measure is "very important" or "important" for 85 per cent of the investors in this survey, negotiators may want to include it in the consensus text of the IFD Agreement. Furthermore, home country measures, i.e., measures that increase the transparency of support measures for outward investors, were also of substantial importance to investors.

The survey also showed that there is broad support for measures that *directly* increase the development contribution of FDI and that seem to be supported by negotiators, namely the acceptance of international standards for responsible business conduct and/or CSR guidelines, 'Red carpet' service for investments having a significant positive sustainable development impact and the availability of a CSR coordinator in IPAs to facilitate investor relations with local communities and stakeholders.

A number of measures directly contributing to development are of great importance to investors, but do not yet seem to be part of the consensus text of the IFD draft agreement. These measures are:

- "red carpet" service for investments having a significant positive sustainable development impact;
- the availability of a CSR coordinator in IPAs to facilitate investor relations with local communities and stakeholders;
- the availability of supplier development programmes to support local suppliers to upgrade to meet standards of international investors.

In a number of topic areas (e.g., information and transparency, IPAs as focal points), investor perceptions, the WTO IFD Agreement negotiation agenda and the actual level of adoption at the national level as measured by the Investment Facilitation Index seem to be aligned. However, even in these areas, many respondents stated that it is necessary to increase government capacity, indicating that the quality of investment facilitation can be improved substantially. Moreover, there are also a number of topic areas of importance to investors (and apparently already dealt with in the IFD Agreement negotiations) that are *not* already widely implemented at the national level as indicated by the Index (e.g., the availability of e-government services, one-stop-shop services) and for which government capacity is ruefully lacking.

This leads to a final strong message that the responding company representatives sent, namely the importance of strengthening the capacity of developing countries in the area of investment facilitation. The survey results make it very clear that there is a great need for technical assistance and capacity building on the part of developing countries to implement virtually all investment facilitation measures

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<sup>149</sup> It appears that some of these have been discussed in the negotiations but appear not to be included in the main text of the IFD Agreement.

covered in the survey, improve their investment facilitation frameworks and put them in a position to benefit as much as possible from a WTO Investment Facilitation for Development Agreement. Accordingly, such an Agreement needs to include, centrally, a firm and substantial commitment to provide technical assistance and capacity building to developing and least developed WTO Members requesting such support.

In sum, the results of the survey — although based on a small sample — should give comfort to negotiators that they have dealt with investment facilitation measures that are important for investors. The results should give them confidence to include further investment facilitation measures in the IFD Agreement, including especially measures that directly increase the development contribution of FDI and measures that make home country support for outward investors more transparent. And the results should encourage them to commit themselves to provide substantial technical assistance and capacity building to developing countries to help them improve their ability to facilitate development-enhancing FDI.

## Annexes

### Annex 1: Overview of findings by measure, ranked by importance (per cent)

Investment facilitation measure	Important <sup>150</sup>	Investment Facilitation Index (share of countries that has already adopted the measure out of 86 countries)	Inclusion in current IFD Agreement consensus text
Advance opportunity to comment on proposed changes in laws and regulations	98	71	Included
Availability of e-government services (i.e., use of electronic forms and online submission of applications and payment of fees and charges)	98	43	Included
Ability to track status of applications online	98	56	Not included
Provision of multiple entry visas for investors or other visa and work permit support services	96	85	Not included
Availability of one-stop-shop services to file all relevant applications simultaneously	96	31	Included
Availability of a government focal point to provide information and address enquires related to an investment project	96	94	Included

<sup>150</sup> Share of respondents that considered the measure either “very important” or “important”.

<b>Investment facilitation measure</b>	<b>Important<sup>150</sup></b>	<b>Investment Facilitation Index (share of countries that has already adopted the measure out of 86 countries)</b>	<b>Inclusion in current IFD Agreement consensus text</b>
Fast-track approval for reinvestments	95	Not included	Not included
Publication of relevant laws and regulations affecting FDI, e.g., on the IPA website	94	97	Included
Publication of timeframes and fees of relevant investor application processes	94	97	Included
Acceptance of international standards for responsible business conduct and/or CSR guidelines	93	Not included	Included
List of support measures/incentives offered to inward investors	93	77	Included
Possibility to have a review of administrative decisions	93	100	Included
Transparency of support measures for outward investors, e.g., through online portals in home countries	92	28	Not included
Publication of information on requirements and procedures for outward investment, if any by home country	90	Not included	Not included
"Silent yes" for administrative procedures	89	3	Not included

<b>Investment facilitation measure</b>	<b>Important<sup>150</sup></b>	<b>Investment Facilitation Index (share of countries that has already adopted the measure out of 86 countries)</b>	<b>Inclusion in current IFD Agreement consensus text</b>
'Red carpet' service for investments having a significant positive sustainable development impact	89	Not included	Not included
Regular government-investor roundtables to discuss relevant issues	86	94	Not included
Availability of a CSR coordinator in IPAs to facilitate investor relations with local communities and stakeholders	85	Not included	Not included
Availability of an ombudsperson-type mechanism to handle investment grievances	85	52	Not included <sup>151</sup>
Availability of supplier development programmes to support local suppliers to upgrade to meet standards of international investors	78	Not included	Not included
Accepting copies of documents in place of originals necessary for applications	76	86	Included
Availability of a supplier database to increase opportunities for local sourcing	75	Not included	Included

<sup>151</sup> It appears that negotiators are still seeking common ground on a measure providing for the availability of an ombudsperson-type mechanism to handle investment grievances.

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<b>Investment facilitation measure</b>	<b>Important<sup>150</sup></b>	<b>Investment Facilitation Index (share of countries that has already adopted the measure out of 86 countries)</b>	<b>Inclusion in current IFD Agreement consensus text</b>
Support with your recruiting or training needs	61	Not included	Not included

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*Source: IDB/ITC/DIE investor survey.*



**Annex 2: Share that ranked measure as “very important” according to respondent characteristics**

Measure	Position		Home country		Firm size (turnover)		Sector		
	Gov. relations	FDI manager	developed	developing	> 1bn USD	< 1bn USD	Extractives	Manufacturing	Services
Publication of relevant laws and regulations affecting FDI, e.g., on the IPA website	81	71	68	84	81	79	50	71	86
Publication of timeframes and fees of relevant investor application processes	75	54	55	68	71	59	25	67	67
<i>How important is increasing government capacity in this field?</i>	63	57	73	55	62	56	25	57	64
Availability of a government focal point to provide information and address enquires related to an investment project	72	54	77	59	71	53	50	62	67
List of support measures/incentives offered to inward investors	63	54	55	64	48	59	50	52	64

Measure	Position		Home country		Firm size (turnover)		Sector		
	Gov. relations	FDI manager	developed	developing	> 1bn USD	< 1bn USD	Extractives	Manufacturing	Services
“Red carpet” service for investments having a significant positive sustainable development impact	72	50	77	50	67	47	50	67	57
Support with your recruiting or training needs	25	29	18	30	14	26	0	24	29
Availability of a supplier data base to increase opportunities for local sourcing	28	46	36	36	29	32	25	38	36
Availability of supplier development programs to support local suppliers to upgrade to meet standards of international investors	34	36	36	34	33	24	0	43	33
<i>How important is increasing government capacity in this field?</i>	50	29	64	27	52	21	0	33	45

Measure	Position		Home country		Firm size (turnover)		Sector		
	Gov. relations	FDI manager	developed	developing	> 1bn USD	< 1bn USD	Extractives	Manufacturing	Services
Accepting copies of documents in place of originals necessary for applications	56	32	50	41	43	44	25	48	45
"Silent yes" for administrative procedures-- meaning that, if no response is received till the stated deadline, the investor's application is automatically approved, unless otherwise notified	56	50	64	48	67	44	50	62	50
Availability of an ombudsperson-type mechanism to handle investment grievances	44	32	36	39	33	38	50	38	38
Fast-track approval for reinvestments	66	54	59	55	57	50	75	57	55
Possibility to have a review of administrative decisions	69	46	64	50	71	44	25	62	55

Measure	Position		Home country		Firm size (turnover)		Sector		
	Gov. relations	FDI manager	developed	developing	> 1bn USD	< 1bn USD	Extractives	Manufacturing	Services
<i>How important is increasing government capacity in this field?</i>	56	54	50	55	52	50	25	38	64
Regular government-investor-roundtables to discuss relevant issues	56	54	73	45	62	47	50	62	52
Advance opportunity to comment on proposed changes in laws and regulations	75	50	59	64	81	44	50	67	62
Availability of a CSR coordinator in Investment Promotion Agencies to facilitate investor relations with local communities and stakeholders	44	46	45	41	38	41	0	48	45
Acceptance of international standards for responsible business conduct and/or guidelines for	75	54	82	55	71	56	25	67	67

Measure	Position		Home country		Firm size (turnover)		Sector		
	Gov. relations	FDI manager	developed	developing	> 1bn USD	< 1bn USD	Extractives	Manufacturing	Services
corporate social responsibility									
<i>How important is increasing government capacity in this field?</i>	63	32	59	41	38	47	25	48	50
Availability of e-government services (i.e., use of electronic forms and online submission of applications and payment of fees and charges)	75	68	68	70	67	68	50	62	76
Ability to track status of applications online	69	68	64	68	67	62	50	57	74
<i>How important is increasing government capacity in this field?</i>	66	57	55	64	52	59	25	48	71
Availability of one-stop-shop service to file all relevant applications simultaneously	78	54	64	68	57	68	75	52	74

Measure	Position		Home country		Firm size (turnover)		Sector		
	Gov. relations	FDI manager	developed	developing	> 1bn USD	< 1bn USD	Extractives	Manufacturing	Services
Provision of multiple entry visas for investors or other visa and work permit support services	72	64	64	73	67	71	75	62	74
<i>How important is increasing government capacity in this field?</i>	81	50	59	68	62	65	50	57	71
Transparency of support measures for outward investors, e.g., through online portals in home countries	69	50	64	61	71	53	0	67	64
Publication of information on requirements and procedures for outward investment, if any by home country	56	46	59	48	48	50	25	52	52
<i>How important is increasing government</i>	56	39	55	43	38	47	25	38	52



Measure	Position		Home country		Firm size (turnover)		Sector		
	Gov. relations	FDI manager	developed	developing	> 1bn USD	< 1bn USD	Extractives	Manufacturing	Services
<i>capacity in this field?</i>									
Average	61	49	58	53	56	50	35	53	58

Source: IDB/ITC/DIE investor survey.

### Annex 3: Methodology

The survey conducted among representatives of international companies operating in the Latin America and Caribbean region used a standardized online survey. The survey was sent to 550 company representatives and yielded 67 full responses, indicating a response rate of 12 per cent. The response rate was likely negatively impacted by the survey being conducted in part during the common holiday period when corporate staff are on leave. Furthermore, the impact of the Covid-19 pandemic on companies may be another explanation for the low response rate.

The questionnaire sought to cover a broad range of investment facilitation measures (see annex 4). The questions were centred on the investment facilitation measures that were apparently under discussion in the WTO IFD Agreement negotiations and additional measures from the ITC-DIE inventory (Sauvant et al. 2021). The questionnaire comprised a dozen questions and a final open-ended query on any additional measures the respondents may wish to mention. The five initial questions solicited background information. In the main part of the survey, respondents ranked the importance of measures on a scale of 1 (“unimportant”) to 4 (“very important”). The measures were grouped into the following seven topic areas:

- information and transparency
- investment promotion agency
- streamlining administrative procedures
- stakeholder-government consultations
- e-investment and online services
- one-stop-shop services
- outward FDI support services (by home countries)

Additionally, for each of the above categories, respondents were asked to indicate the extent to which government capacity needed to be strengthened. This question was designed to estimate the need for technical assistance and capacity building for implementing these measures.

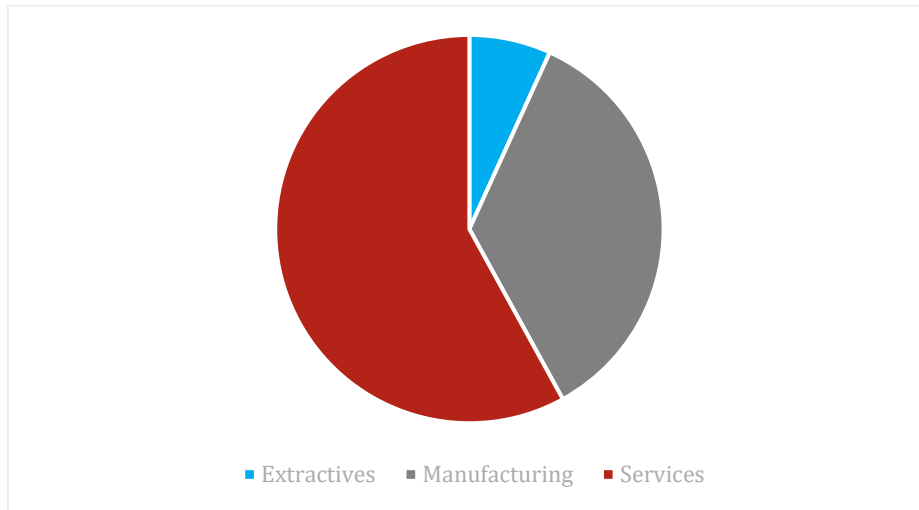
The survey was designed to respect the anonymity of respondents. For each question, the option “choose not to answer/not applicable” was provided to allow respondents to complete and submit the survey even if they did not have all information necessary or did not want to provide information on a certain topic.

The survey was conducted through the Americas Business Dialogue, a private sector initiative facilitated by the IDB. Companies were contacted by e-mail and invited to access and submit the questionnaire directly via an online survey platform. The survey commenced mid-June 2021, and the respondents were given six weeks to reply. During this time, reminders and follow-up emails were sent by IDB to encourage a higher response rate.

Interestingly, firms in the manufacturing sector participated actively (see figure 2). Unexpectedly, Central America is overrepresented in the distribution of companies by home country (see figure 3). This is due to a relatively high response rate of member firms of local industry associations. This indicates that the sample might exhibit a slight bias towards firms from developing countries investing in other developing countries. The analysis accounts for differences in headquarter location (developing vs. developed countries). Also, prominent are companies with annual turnover of less than USD 50 million (see figure 4). This would suggest that investment facilitation is an important issue for smaller enterprises.

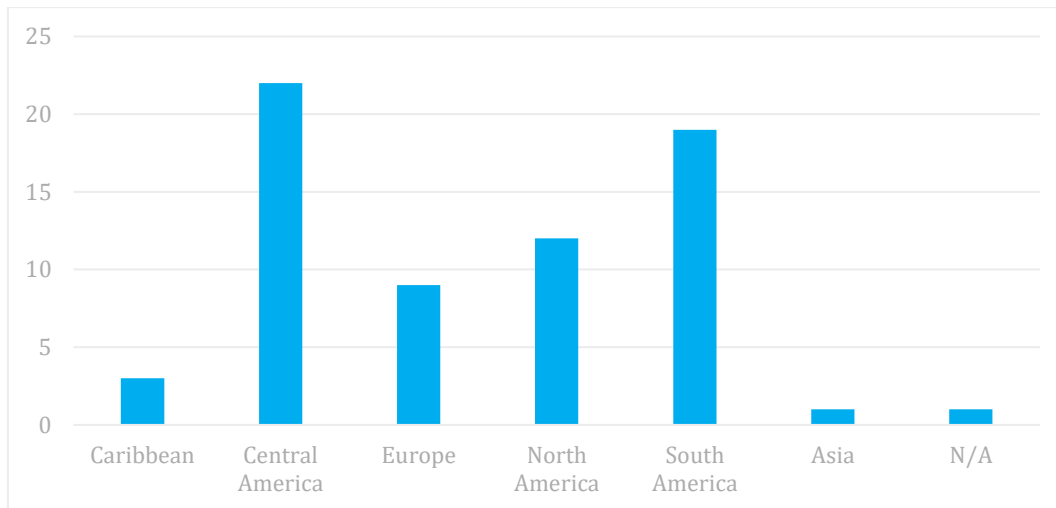
The individuals completing the questionnaire within the respondent firms were evenly divided between government or public relations departments, on the one hand, and operational positions with direct exposure to FDI projects, on the other. It is conceivable that responses differed among respondents with FDI experience compared to respondents whose job it is to represent a company’s interests to the outside. The findings section of this paper controls for the hypothesis that personal exposure to the FDI process influences the reported importance of the different measures.

**Figure 2: Respondents by sector**



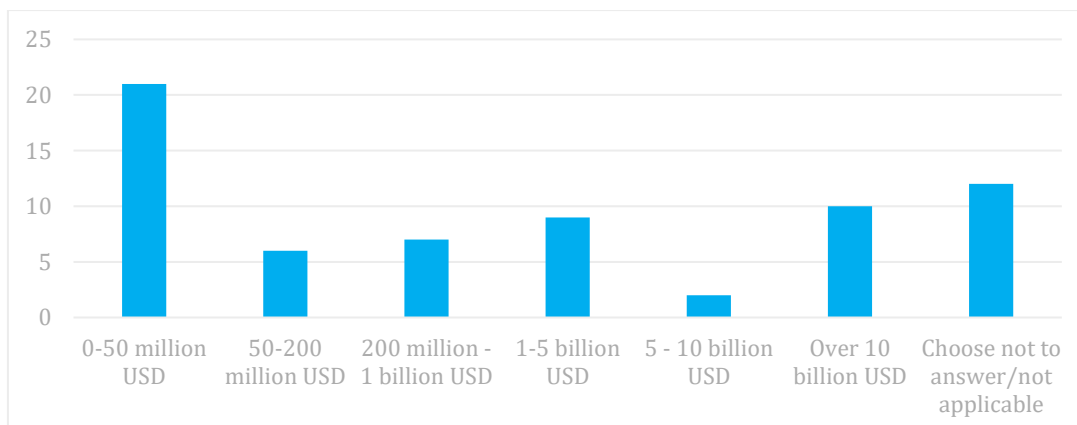
Source: Authors' visualisation based on IDB/ITC/DIE investor survey.

**Figure 3: Respondents by geography**



Source: Authors' visualisation based on IDB/ITC/DIE investor survey.

**Figure 4: Number of respondent firms by annual turnover (USD)**



Source: Authors' visualisation based on IDB/ITC/DIE investor survey.

## **Annex 4: Questionnaire**

### **Cover email**

#### **Subject: Survey on the importance of investment measures for foreign direct investors**

Dear Corporate Executive,

You are invited to participate in a [survey](#) of leading companies with foreign direct investment (FDI) in Latin America and the Caribbean.

This survey on investment facilitation is a joint activity of the Inter-American Development Bank, the United Nations International Trade Centre and the German Development Institute. The aim is to better understand what government measures to facilitate investment are important for investors and in which areas there may be a need for multilateral support to increase a host country's capacity to implement investment facilitation measures.

Investment facilitation involves practical measures to improve the transparency and predictability of regulatory frameworks, streamline administrative procedures, and enhance coordination and cooperation among governments, investors and related stakeholders, with a view towards enhancing the development impact of FDI. It is important to note that investment facilitation does not cover national policy or matters related to investor protection, market access or investor state dispute settlement — it is strictly focused on the implementation of policies (for more information on investment facilitation see [here](#)). Irrespective of policy, implementation can be facilitated with appropriate measures.

The results of this survey will provide valuable input for policy makers, especially for the ongoing negotiations in the World Trade Organization (WTO) on an agreement on investment facilitation for development (for more information on the negotiations see [here](#)).

Given your professional involvement and your company's status as a foreign investor, we would greatly appreciate your insights on this topic. Throughout the survey, we are particularly interested in the value you attach to various investment facilitation measures in undertaking FDI projects across Latin America and the Caribbean.

**Please start the survey [here](#).**

The survey will take approximately 10 minutes to complete. Please submit the completed survey at your earliest convenience. It would be great if you could answer by 27 June 2021.

Your response will be treated with the highest confidentiality and will be used only in aggregate and without disclosing the names of any participants or companies.

In case of any questions or if you require assistance please contact: [americasbd@iadb.org](mailto:americasbd@iadb.org)

Kind regards,

Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, International Trade Centre

Axel Berger, Senior Researcher, German Development Institute

Fabrizio Opertti, Manager, Integration and Trade Sector, Inter-American Development Bank

## Company perspectives on investment facilitation measures

### Introduction

The aim of this survey is to better understand what government measures to facilitate foreign direct investment are important for investors and in which areas there may be need for multilateral support to increase host country capacity.

Given your professional involvement and your company's status as a foreign investor, we would greatly appreciate your insights on this topic. Throughout the survey, we are particularly interested in the value you attach to various investment facilitation measures in undertaking FDI projects across Latin America and the Caribbean.

The results of this survey will provide valuable input for policy makers, especially for the ongoing negotiations in the World Trade Organization (WTO) on an agreement on investment facilitation for development (for more information on the negotiations see [here](#)).

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## Company perspectives on investment facilitation measures

### YOUR BACKGROUND

In this section we ask you to provide some basic information about you and your company. This information is used only to tabulate the responses in analytical categories for a consolidated reporting of the survey results. Your response will be treated with the highest confidentiality.

1. What is your position in the firm? (please select one option)

- Government relations or public relations
- Expansion/corporate development manager (or other position directly operationally involved in setting up FDI projects)
- Choose not to answer/not applicable

2. In which country is your company headquartered? (please insert name of country)

3. How high is your company's annual turnover? (select an option)

- 0-50 million USD
- 50-200 million USD
- 200 million - 1 billion USD
- 1-5 billion USD
- 5 - 10 billion USD
- Over 10 billion USD
- Choose not to answer/not applicable

4. In which industry is your company mainly active? (select one option)

- Extractives
- Manufacturing
- Services

5. Do you usually have contact with the investment promotion agencies of the countries in which you have FDI projects?

- Yes
- No
- Choose not to answer/not applicable

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## Company perspectives on investment facilitation measures

### IMPORTANCE OF INVESTMENT FACILITATION MEASURES AND GOVERNMENT CAPACITY

In this section, we want to know the importance you place on specific investment facilitation measures used by governments or government-related agencies (such as investment promotion agencies). For your convenience, we've clustered these measures according to substantively similar categories.

In addition, we would also like your recommendations on areas you think that the capacity of host country governments in Latin America and the Caribbean to facilitate foreign investors' needs to be strengthened. For your convenience, after the specific questions on each category, we will ask you on your views on the need to increase government capacity in the respective field.

Please let us know how important the following measures/services are for your FDI projects on an increasing scale of importance from 1 to 4 where:

1. unimportant
2. somewhat important
3. important
4. very important

We have also included the option 5. "choose not to answer/not applicable" in case you are not able to answer the question. We would, however, ask you to use this option as seldom as possible.

## 6. INFORMATION AND TRANSPARENCY

\*

	1. unimportant	2. somewhat important	3. important	4. very important	5. choose not to answer/not applicable
Publication of relevant laws and regulations affecting FDI, e.g. on the IPA website	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Publication of timeframes and fees of relevant investor application processes	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
How important is increasing government capacity in this field?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

## 7. INVESTMENT PROMOTION AGENCY (IPA)

\*

	1. unimportant	2. somewhat important	3. important	4. very important	5. choose not to answer/not applicable
Availability of a government focal point to provide information and address enquires related to an investment project	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
List of support measures/incentives offered to inward investors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
'Red Carpet' service for investments having a significant positive sustainable development impact	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Support with your recruiting or training needs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Availability of a supplier data base to increase the opportunities for local sourcing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Availability of supplier development programs to support local suppliers to upgrade to meet standards of international investors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
How important is increasing government capacity in this field?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

## 8. STREAMLINING ADMINISTRATIVE PROCEDURES \*

	1. unimportant	2. somewhat important	3. important	4. very important	5. choose not to answer/not applicable
Accepting copies of documents in place of originals necessary for applications	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
"Silent yes" for administrative procedures--meaning that, if no response is received till the stated deadline, the investor's application is automatically approved, unless otherwise notified	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Availability of an ombudsperson-type mechanism to handle investment grievances	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Fast-track approvals for reinvestments	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Possibility to have a review of administrative decisions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
How important is increasing government capacity in this field?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



9. STAKEHOLDER-GOVERNMENT CONSULTATIONS \*

	1. unimportant	2. somewhat important	3. important	4. very important	5. choose not to answer/not applicable
Regular government- investor-roundtables to discuss relevant issues	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Advance opportunity to comment on proposed changes in laws and regulations	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Availability of a CSR coordinator in Investment Promotion Agencies to facilitate investor relations with local communities and stakeholders	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Acceptance of international standards for responsible business conduct and/or guidelines for corporate social responsibility	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
How important is increasing government capacity in this field?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

10. E-INVESTMENT AND ONLINE SERVICES \*

	1. unimportant	2. somewhat important	3. important	4. very important	5. choose not to answer/not applicable
Availability of e-government services to submit necessary applications for e.g., online submission of applications, use of electronic forms, documents, payment of fees and charges	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ability to track status of applications online	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
How important is increasing government capacity in this field?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

11. ONE-STOP-SHOP SERVICES \*

	1. unimportant	2. somewhat important	3. important	4. very important	5. choose not to answer/not applicable
Availability of single window/One-Stop-Shop service to file all relevant applications simultaneously	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provision of multiple entry visas for investors or other visa and work permit support services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
How important is increasing government capacity in this field?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

## 12. OUTWARD FDI SUPPORT SERVICES (BY HOME COUNTRY) \*

	1. unimportant	2. somewhat important	3. important	4. very important	5. choose not to answer/not applicable
Transparency of support measures for outward investors, e.g., through online portals in home countries	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Publication of information on requirements and procedures for outward investment, if any by home country	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
How important is increasing government capacity in this field?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

13. If there are any other specific investment facilitation measures that would be particularly useful for you as an investor but were not mentioned in the questionnaire, please list them in the box below:

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## Chapter 6 An Inventory of Measures to Facilitate the Flow of Sustainable FDI, Second Edition

Contributed by Karl P. Sauvart, Matthew Stephenson, Khalil Hamdani and Yardenne Kagan

The WTO Structured Discussions and negotiations on an Investment Facilitation for Development (IFD) Agreement generated a wealth of insights and information and spawned regional dialogues, national workshops, and stakeholder meetings. There has been an outpouring of contributions, including submissions from delegates, presentations by international organizations, perspectives of the private sector and nongovernmental organizations, and various academic papers.

The Structured Discussions – which were upgraded to negotiations in September 2020 – aim at developing the elements and specific provisions of a multilateral framework on investment facilitation for development, with a view towards achieving a concrete outcome resulting from the negotiations. As the negotiations evolve to include a larger constituency, new entrants need to get up to speed with the measures under consideration, as well as others that could be considered, so as to effectively participate in the negotiation.

This *Inventory* of measures is a capacity-building tool to help participants engage in the negotiations; it is an updated edition of the text published in February 2021.

The *Inventory* does not advocate that any particular measure be included in an eventual framework. It is an informal and unofficial compilation of investment facilitation measures, their rationale and ways in which these measures are – or can be – implemented in practice. However, following the agreed scope of the WTO negotiations, it does not include measures related to investment protection, ISDS and market access. Moreover, the *Inventory* does not address the conceptual distinction between investment promotion and investment facilitation measures; hence, some measures in the *Inventory* may be categorised by some as investment promotion measures.

Independently of the WTO IFD Agreement negotiations, the *Inventory* may also be of interest to IPAs seeking to facilitate FDI and government officials negotiating international investment agreements containing provisions on investment facilitation.

This listing of measures starts from the recognition that FDI can make a contribution to development, and that this is the reason for which countries seek to facilitate it. Such facilitation can take the form of measures (e.g., strengthening transparency, simplifying procedures) that help increase the flow of FDI which, in turn, can then contribute to development; or it can take the form of facilitation measures that not only can help increase the flow of FDI but also specifically seek to advance the development of host countries (e.g., by creating linkages between foreign affiliates and domestic firms, or by furthering corporate social responsibility commitments). Given that the IFD negotiations are geared towards reaching a multilateral framework on investment facilitation *for development*, this *Inventory* pays special attention – and singles out (in section V) – those measures that directly help to increase the development contribution of FDI.

The *Inventory* provides a menu from which to draw, depending on particular contexts and needs. Consequently, not all measures will be relevant for every country at all times. Many measures require implementation capacity; weak applications may obstruct rather than facilitate investment. However, when applied well, with appropriate technical assistance, and in a holistic manner in tandem with other investment-related actions, the measures can help accelerate the flows of foreign direct investment, including sustainable foreign direct investment for sustainable development.

The *Inventory* is culled from various sources, including the many contributions that have been made in the course of the past three years of Structured Discussions and negotiations; various publications; in-country sustainable investment facilitation projects and discussions with the private sector organized by the World Economic Forum; and the discussions conducted in the (mostly virtual) meetings of the Commentary and Expert Groups on a Multilateral Framework on Investment Facilitation for Development, general webinars and in-person and virtual workshops organized for WTO delegates and government officials.<sup>152</sup> These events

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<sup>152</sup> The reports on these events are available at: <http://www.intracen.org/itc/Investment-Facilitation-for-Development/>.

were organized by ITC-DIE and, in the case of the Commentary Group and a number of workshops, together with the World Economic Forum and the World Association of Investment Promotion Agencies (WAIPA).

Moreover, feedback on an earlier draft of the *Inventory* was sought from international organizations with substantial FDI programmes. Very helpful feedback was received – and is gratefully acknowledged – from the World Bank Group, the Economic and Social Commission for Asia and the Pacific, the Interamerican Development Bank, the Organisation for Economic Co-operation and Development, the World Economic Forum, and WAIPA.

The presentation is tabular, and the description is in brief annotations. For some measures, potential text formulations are provided in the sample texts to this chapter – but these are for illustrative purposes only and, if considered by negotiators, are certainly subject to change.

## Selected new FDI facilitation measures<sup>153</sup>

### General measures

This section lists concrete, actionable investment facilitation measures that may not yet have been considered in the WTO Structured Discussions and negotiations and that may be particularly useful for investment facilitation.<sup>154</sup> Draft treaty text formulations for some of them are provided in the sample texts to this chapter.

- Maintain a list of support measures offered to inward investors, through online portals and notification to the WTO. This can be done through client charters, indicating services delivered and timelines, and an “inward investment support registry”.
- Expedite customs clearance and ease of securing work permits for skilled expats by making available e-visas or “green channels”.
- Enable “lite processing” for SME applications for establishment.
- Grant permits or licenses automatically if no government action is taken within statutory time limits: “silence is consent”.
- Establish aftercare mechanisms to facilitate investments, ensure that investments operate smoothly and deal with any issues that may arise.
- Provide for risk-based approvals as part of authorisation procedures.
- Allow fast-track approvals for reinvestments and build and maintain a comprehensive database of existing investors.
- Enable the payment of fees and charges online, and online receipts; use new technology to facilitate investment (e.g., digital single window).
- Track complaints through an investment grievance mechanism or an “early warning system” and establish timeframes for addressing grievances.
- Establish a mechanism for public-private dialogues to inform regulation and implementation, such as regular quarterly meetings or on-line portals.
- Facilitate cooperation among sub-national IPAs.
- Make publicly available lists of support measures for outward investors, through online portals and notification to the WTO.
- Publish information on requirements and procedures for outward investment, if any, to assist interested parties.

### Measures that directly increase investment’s development contribution

This section singles out facilitation measures that directly help to increase the development impact of FDI. Formulations for some of them are provided in the sample texts to this chapter.

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<sup>153</sup> These measures were identified in the second edition of the *Inventory* and were updated for this volume as reflected in the executive summary on page xiii.

<sup>154</sup> As mentioned in an earlier footnote, this list was developed before the *Inventory* was formally made available to the WTO Structured Discussions in September 2020, and a number of the measures included here have since been taken up, proposed and discussed by delegates.

- Publish internationally recognized guidelines/standards of responsible business conduct and strongly encourage investors to observe these guidelines through, e.g., requesting in application forms to acknowledge that these guidelines have been read and understood.
- Create a special category of “Recognized Sustainable Investor” (RSI) to incentivize investors to invest sustainably. RSIs receive additional benefits if they meet certain publicly available conditions.
- Designate a corporate social responsibility (CSR) coordinator to facilitate investor relations with local communities, stakeholder associations and civil society.
- Develop targeted marketing strategies facilitating sustainable FDI, e.g., “red carpet” service for investments having a significant positive sustainable development impact.
- Assess the potential development impact of large FDI projects through ex ante impact assessments, to ensure they align with sustainable development goals.
- Establish supplier-development programmes to increase the number and capacity of qualified local enterprises that can contract with foreign affiliates.
- Build and maintain a database of local enterprises to help investors identify potential subcontractors, with the information freely available to all.
- Encourage partnerships between foreign affiliates and local suppliers to help upgrade the latter, through regular workshops hosted by a CSR coordinator.
- Foster partnerships between foreign affiliates and local universities or other bodies to create centres of excellence for training or research and development.
- Provide technical assistance to developing countries’ IPAs to enhance their ability to facilitate sustainable FDI, based on need assessments.
- Provide clear guidelines on CSR and responsible business conduct to outward investors. For sectors with high development and environmental sensitivities, such investor education could be made mandatory.
- Establish clear criteria linking home-country support measures to the observation of internationally recognised standards of responsible business conduct, the acceptance and observance of corporate CSR policies and (in the case of projects with substantial impacts), ex ante developmental, environmental and social impact assessments.
- Facilitate sustainable FDI projects through partnerships between investment authorities in host and home economies, including to help investors find bankable projects quickly.

## The Sustainable Investment Facilitation Inventory

### I. General principles

I.1 Sustainable development	
Rationale	Investment is important for economic growth, poverty reduction, job creation, expansion of productive capacity, innovation, improving transfer of technology, the carbon footprint and trade.
Implementation	Advance objectives and targets of the 2030 Agenda for Sustainable Development of the United Nations.
I.2 Facilitate investment activity of micro, small and medium-sized enterprises (MSMEs)	
Rationale	<p>SMEs make innovative investments but lack the ‘deep pockets’ of large corporations.</p> <p>Effective facilitation is very important when investors need to secure permits, licenses and approvals to establish operations in a country. Typically, developing countries have many more procedures for investors than developed countries, and IPAs play a key role in assisting investors to facilitate their projects.</p>

Implementation	Administrative procedures and requirements should be SME-friendly. Provide access to finance.
I.3 Central, regional, local authorities and delegated non-governmental bodies	
Rationale	Coherent application of investment measures countrywide avoids duplication, overlap, discrepancy, and unpredictability.
Implementation	Align investment measures and procedures within an economy, clarifying roles, responsibilities and accountabilities across different levels of government.

## II. Transparency of investment measures

II.1 Publication and information on investment measures	
Rationale	<p>Deepens understanding, and aids compliance with investment measures.</p> <p>Laws and regulations are generally published but can be dispersed in various instruments (e.g., constitution, sectoral codes, and treaties).</p> <p>Laws and regulation are familiar to nationals, but not to foreigners, and many times they are written only in the official language of the country.</p> <p>Compilation and guidance help clarify investment requirements and procedures for officials, investors and other governments.</p> <p>While general emphasis is on inward investment, a companion publication on measures for outward investment is also desirable.</p>
Implementation	<p>Publish laws, regulations, judicial decisions, and administrative rulings of general application to investment related policies, including revisions and updates.</p> <p><i>Example: The State Council of the People's Republic of China put forward 20 opinions, that included promoting investment, deepening reforms to facilitate investment and protecting legitimate interests of foreign investors to safeguard a more “fair, transparent and predictable” business environment for foreign affiliates.</i></p>
	<p>Make available all investment related regulations in clear simple language, preferably in languages commonly used by businesses.</p> <p><i>Example: Viet Nam clarified the definition of foreign affiliates.</i></p>
	<p>Establish and strengthen the IPA as the main focal point for investors and ensure it provides and manages official information on investment measures and lead a single window for investment. Make the existence of IPAs widely known. (For international good practice principles for an IPA, see sample text 1.)</p>
	<p>Maintain an investment website, which serves as a focal point for investors. A website</p>

	<p>is one of the most effective techniques to market a location according to both investors and IPAs.</p> <p><i>Example: Uzbekistan developed an information portal, available in several languages, to provide information on visas, residence permits, registrations, and tax mechanisms.</i></p> <p><i>Example: The Netherlands Foreign Investment Agency has developed a new, innovative website for attracting FDI. Key innovative and best practice features of the <a href="http://www.investinholland.com">www.investinholland.com</a> website include: adaptive content based on IP address; focus on lead generation; propositions for key activities and sectors; effective use of info-graphics; use of high impact investor case studies; and access to resources and tools for investors.</i></p>
	<p>Publish, electronically, a practical and easy-to-read Investment Guide. It should provide a clear, concise and up-to-date picture of the investment regime, be downloadable from the investment website and be distributed at events. Ideally available in multiple languages for free. Periodic guides on specific topics can also be useful, especially in cases of extreme events that affect the investment regime in the country (such as COVID-19).</p> <p><i>Example: The downloadable 2020 Guide on the website of Scottish Development International (Scotland's trade and investment promotion agency) provides information on setting up a company, choosing a business location, employment law, regulations and policies, accessing talent, immigration, financial and tax incentives, and cost of living.</i></p> <p><i>Example: The Ministry of Investment of Saudi Arabia has established a COVID-19 Response Centre. It includes information about initiatives and services introduced by the Government to support businesses, as well as a guidebook and a list of investors' frequently asked questions.</i></p> <p><i>Example: The Indian Ministry of Commerce and Industry routinely consolidates all policies related to the foreign investment regime into a single document to make it easy for foreign investors to understand.</i></p>
	<p>Other information sources include:</p> <ul style="list-style-type: none"> <li>● Handbooks of basic laws. Used by professionals. Published by private sector, including in English. For sale.</li> <li>● Directories of official records. Gazettes are used to reference legal archives in national language. Sometimes available on-line but rarely on a single portal. Free.</li> <li>● Advisory services provided to investors by management and accounting firms, and accredited national consultants. These include interpretation of legal rulings. The services are provided by private sector. For a fee.</li> <li>● Lists of certifies and accredited consultants and attorneys.</li> </ul>
	<p>Maintain a list of support measures offered to inward investors, published online for transparency and efficiency, through online portals and notification to the WTO. This can be done through client charters, indicating services delivered and timelines, and an "inward investment support registry". It can outline both IPA services and investment incentives such as through an "incentives inventory" and a calculator of incentives. (See sample text 2.)</p> <p><i>Example: Between 2015 and 2018, Jordan, Iraq, Ethiopia, Pakistan, Bosnia and Herzegovina, Armenia, Tajikistan Moldova, and Kyrgyz Republic published investment incentives inventories.</i></p>



	<p><i>Example: Invest in Spain publishes a comprehensive guide to incentives and state aid in Spain. The guide provides an extensive compilation of incentives and aid available in the national market, provided by a very broad range of entities at the national, regional and European levels, including grants and funding channels for all sectors of activity.</i></p>
	<p>Maintain a list of support measures provided to outward investors, published online for transparency and efficiency. This can outline both financial and non-financial support, such as through a “support inventory”.</p>
	<p>Maintain an information page on the application process for special economic zones in the country, including a list of special economic zones, industrial and technological parks and clusters. Include a map to geo-localize the zones and through virtual intelligence visualize the lot/zone and provide access to the cost, facilities and contact person. Such database shall also list relevant domestic suppliers in specific sectors, especially those supporting the specific developmental goals of a Member.</p> <p><i>Example: Lao PDR investment promotion website includes an information page including a list of special economic zones in the country.</i></p>
	<p>Publish and regularly update lists of national priority sectors.</p>
	<p>Benchmark, monitor and publish information of key performance indicators for IPAs and other institutions involved in facilitating investment. Such monitoring should include the tracking of investments facilitated and retained. The information should be published, to show investors successful track records; it should also pay particular attention to sustainable investment, to show policymakers the contribution of FDI flows to meet development objectives.</p> <p><i>Example: IDA Ireland’s Annual Business Survey of Economic Impact that gathers detailed information on net jobs created, payroll, investment, exports, R&amp;D activity, and other metrics, including by region.</i></p>
	<p>Encourage collaboration between public and private agencies that provide complementary services; this can be facilitated through accreditation and publication of codes of conduct to ensure quality and accuracy.</p>
	<p>Establish a platform to search for grants and incentives, fill out forms by keywords or the specifics of a business project.</p>
	<p>Maintain a mechanism for the regular evaluation of investment procedures, ensuring they are simple, transparent, streamlined to fewest steps needed to achieve the objective and at lowest possible cost.</p> <p>Publicise outcomes of periodic reviews of the investment regime.</p>

II.2 Publication of information on authorization requirements and procedures	
Rationale	<p>Countries screen for various reasons, including development benefits or security risks. Even when there is no need for permission, there is often a need for registration, licenses, permits, applications for exemptions, or incentives.</p> <p>There may also be a need for approval by regional and local authorities. Investment in “sensitive sectors” may require prior authorization.</p> <p>Information is helpful for compliance and to improve the business climate.</p>
Implementation	<p>Establish, disseminate widely and maintain up-to-date, easily accessible information on authorization requirements, procedures, including clear definitions on criteria for the assessment of investment proposals.</p> <p><i>Example: KenInvest, Kenya’s IPA, has an e-regulations portal on laws, regulations, visas and permits, sectoral licenses, and property certificates. Procedures are explained step-by-step from the investor’s perspective: where to go, what requirements to fulfil and forms to complete, associated costs, relevant legal justifications, and contact details of officials in case of a problem. The e-regulations portal was set up in partnership with UNCTAD.</i></p> <hr/> <p>Where specific authorization requirements and procedures are set at the level of the responsible department (e.g., mining, industry, labour, immigration, customs, environment, export processing zone) or regional investment authority, publication on a single electronic portal, with links to the responsible department, would facilitate investment.</p> <hr/> <p>Include information on authorization requirements and procedures in investment guides and on the websites of the national and regional investment agencies.</p> <p><i>Example: China utilizes its “One Network Service System” to provide dedicated foreign-related services such as administrative procedure guides and item lists in English.</i></p> <hr/> <p>Publish investor evaluation criteria; these may include environmental and/or social impacts and potential positive impacts on the economy, before deciding to provide some services (or recommend/grant approvals).</p> <hr/> <p>Any FDI screening mechanism should transparently communicate processes and requirements.</p> <hr/> <p>Publish information on practical steps to make an investment (e.g., how to register a business, access infrastructure, acquire permits, observe public ordinances, pay taxes).</p> <hr/> <p>Publish information on requirements and procedures for outward investment.</p> <hr/> <p>Publish an online checklist to assist applicants to complete applications.</p>

	Publish lists or catalogues indicating which sectors are allowed, restricted or prohibited for foreign investment.
	Publish a list of international agreements pertaining to FDI.
	Publish judicial decisions on investment matters.
	Publish penalty provisions for breaches of investment procedures and regulation.
	Ensure that the right to non-disclosure of confidential information is reserved.
<b>II.3 Update on new rules and procedures</b>	
Rationale	<p>Investors desire stability, transparency and predictability of investment measures.</p> <p>Smooth introduction of new rules and procedures minimizes confusion among officials and risk to investors.</p> <p>Without proper preparation, even changes that aim at simplification may complicate and delay.</p>
Implementation	<p>Maintain a mechanism to provide timely and relevant advice of changes in procedures, applicable standards, technical regulations, and conformance requirements.</p> <p>Ensure predictability: provide reasonable advance notice of proposed changes to laws and regulations and provide opportunities for public comment.</p> <p>Avoid uncertainty: indicate when changes take effect, to what they apply and which rules and procedures they replace.</p> <p>Publish updates on IPA websites.</p> <p><i>Example: Given regulatory changes, Rwanda Development Board published on its website guidelines for the re-opening of businesses during the pandemic.</i></p> <p>Update investment guides.</p> <p>Updates can also feature as part of regular aftercare outreach to existing investors.</p> <p>Expunge earlier, outdated rules and procedures from forms, documents, publications, and websites to avoid contradictory instructions.</p> <p>Note: Often, new rules supersede old rules, but the earlier rules remain on the books, creating unnecessary confusion.</p> <p><i>Example: The Republic of Korea, under the Revision on the Special Tax Treatment Control Law (December 2018), abolished certain tax incentives available for foreign investments. However, investments that occurred before the end of 2018, can still enjoy the tax benefits.</i></p>

II.4 Proposed measures	
Rationale	<p>Proposed measures emanating from legislative bodies are generally vetted in debate and media.</p> <p>Feedback and consultation clarify policy objectives, allow stakeholders to provide input into the process, and allay investor and stakeholder concerns.</p>
Implementation	<p>Solicit feedback from constituents, investors and the public at large, to understand priorities and needs, as well as unforeseen and unintended impacts.</p> <hr/> <p>Engage in wider stakeholder consultation on proposed reforms and measures. <i>Example: Finland developed in 2001 an online platform—otakantaa.fiis “Have your say”—for consultation on proposed regulations.</i></p> <hr/> <p>Carry out frequent surveys and focus groups with current investors located in the host country and also overseas, as well as with investment service providers.</p> <hr/> <p>Boards, with private sector representation, can advise IPAs on new measures and other reforms.</p> <hr/> <p>Hold closed consultations and also conduct public hearings open to media. <i>Example: The Ethiopian Investment Commission revises investment measures on an ongoing basis, in consultation with relevant stakeholders.</i></p> <hr/> <p>Retain goodwill and sustain a welcoming attitude.</p> <hr/> <p>Note: Spontaneous executive orders may appear arbitrary, confuse implementation, and erode goodwill.</p>
II.5 Focal points	
Rationale	<p>Focal points are particularly helpful for SMEs, including especially women-led SMEs, which often face additional challenges.</p> <p>Ideally, measures and procedures should be self-explanatory.</p> <p>Focal points are a safety net when there is investor confusion or to capture outlier requests.</p> <p>Note: Too many queries may indicate the need for an upstream clarification in the presentation of measures.</p>
Implementation	<p>A lead agency should be mandated as focal point with adequate autonomy and independence, to address investment queries in a timely, relevant and prompt manner. This can be an IPA. The focal point provides guidance concerning legislation, institutions, processes, and responsible agencies.</p>

	<p><i>Example: Bolivia and Uzbekistan established new government agencies to attract more investment.</i></p> <p><i>Example: Panama established the legal basis for creating a new Export and Investment Promotion Agency, which will have autonomous legal personality under public law, with its own assets and independence in the exercise of its functions.</i></p> <p><i>Example: Benin's Agency for the Promotion of Investments and Exports replaced three structures as the focal contact point for investment queries.</i></p> <p><i>Example: JAMPRO is an Agency of Jamaica's Ministry of Economic Growth and Job Creation that promotes business opportunities in export and investment to the local and international private sector. In facilitating the implementation of investment and export projects, the organization is a key policy advocate and advisor to the government in matters pertaining to the improvement of Jamaica's business environment and the development of new industries.</i></p> <p><i>Example: PROESA is the Exports and Investment Promotion Agency of El Salvador. It is a government agency under the country's presidency. Its mission is to build and coordinate the interagency system for the promotion of exports, investment and public-private partnerships, to help increase production and national productivity and create more employment opportunities and national development.</i></p>
	<p>IPAs should be funded adequately and in a stable manner (ideally from a central budget and not fees for service) to allow for operational independence and quick reaction to changing conditions and opportunities.</p>
	<p>IPAs should take on the role of consultant advisors to investors and facilitate the whole investment process. They know how to successfully operate in the economy and provide such advice from official channels, complementary to any advice by other consultants.</p>
	<p>Encourage on-line enquiries and on-line information on all FDI issues. Routine enquiries are commonly addressed with frequently asked questions (FAQs), commonly named as chatbots. These provide on-line responses in simple language — preferably in English- with links to relevant forms and documents.</p> <p><i>Example: The Estonian Investment Agency website greets users with a FAQs popup interface: "Hi, I'm Suve! I am a robot and I'm here to help you find information".</i></p> <p>In the absence of a bot, add the online searchable library with downloadable documents per key topic.</p>
	<p>All FAQs should ask if the information is useful, thus providing feedback.</p>
	<p>All queries should be promptly acknowledged, even if the requisite information is not immediately at hand.</p>
	<p>There should be alignment of focal points' operating hours to commercial needs.</p>
	<p>Provide an investor inquiry protocol, with timeframes, which explains how to deal with inquiries and list the mechanisms that should be in place.</p>

	Answers to queries can also be provided by the private sector (e.g., on tax matters). For a fee.
	Anticipate enquiries from civil society and facilitate investor-stakeholder relations.
	The focal point should carry out policy advocacy, recommending to the competent authorities measures to improve the investment environment.
	The focal point should make corrective recommendations and express an opinion regarding questionable administrative measures.
	The focal point should forward complaints, supporting the implementation of solutions for such complaints.
	Focal points should provide parties with alternative forms of dispute resolution.
	IPAs typically handle enquiries as part of bespoke 'hand holding' and 'red carpet treatment' services.
	IPAs can publish an interactive roadmap for navigating procedures and making investment applications, and create call centres for questions and answers.
	IPAs should consider developing a skill and training programme. Raise the importance of policy advocacy, to facilitate more strategic engagement with both key existing investors and government policymakers to improve the country's business environment and location competitiveness.
	IPAs might have a role in assisting investors to divest more easily and to finding new investors to step in. IPAs could conduct an exit interview to understand investors' divestment decisions, and to ensure that the exit process is as user friendly as possible. This makes it more likely these investors return, as well as producing a good reputation for the investment climate to attract other investors.
	The contact information of the focal point should be provided to the WTO Investment Facilitation Committee.
	Note: Focal points provide information, clarification and referral but do not resolve disputes. Investor complaints are best handled by a separate grievance mechanism, involving line departments or an ombudsperson.
II.6 Clarity of regulations	
Rationale	Issues that could lead to potential disputes should be clarified to help avoid disputes, increase compliance and provide predictability to investors.

	Clarity of the roles of investors, suppliers and government agencies in implementing safety and control standards would prevent mistreatment of labour and enhance the safety of working conditions.
Implementation	<p>Economies should have in place a clear regulatory framework, including concerning land issues.</p> <p>It is important to have in place an objective and functional regulatory framework addressing cases of bankruptcy or insolvency, or judicial liquidation.</p> <p>Countries should aim to clarify and simplify regulations, laws and procedures.</p> <p>Countries could increase the use of legislative simplification and restatements of laws to enhance clarity and identify and eliminate inconsistencies.</p> <p>Good governance laws and mechanisms should be implemented to increase transparency and avoid the risk of corruption when investors and government officials are interacting.</p> <p><i>Example: Ecuador introduced new regulations to clarify the Productive Development Law and to simplify environmental rules.</i></p> <p><i>Example: China passed a new Foreign Investment Law that replaced three previous laws and aimed to provide clarity on FDI policies and investment protection.</i></p> <p><i>Example: India clarified in February 2020 that single-brand retailers, owned by foreign companies, can fulfil their local sourcing requirements by procuring goods produced in units based in special economic zones.</i></p>

### III. Simplification of administrative procedures and requirements

III.1 Consistent administration	
Rationale	Standardized administrative procedures ensure uniformity, while reducing <i>ad hoc</i> decisions and miscommunication.
Implementation	<p>Establish standard operating procedures (SOPs), investor roadmaps, investment entry/registration/establishment flowcharts, in order to avoid discriminatory use of bureaucratic discretion in the application of laws and regulations.</p> <p><i>Example: India established a Foreign Investment Facilitation Portal and issued standard operating procedures for handling FDI applications, designating competent authorities and time frames for processing applications.</i></p> <hr/> <p>SOPs should include stepwise guidelines for each task or activity. The guidelines should be clear and easy to follow.</p> <hr/> <p>Display client charters, indicating the investment services delivered and timelines.</p> <hr/> <p>Note: The stereotypical bureaucrat “plays it by the book”, but the book or manual may not exist or may be outdated and need revising.</p> <hr/> <p>Note: The shift from old procedures to new procedures may require training.</p>



III.2 Single window mechanism	
Rationale	<p>Investment agencies operate “one-stop shops” to help investors interface with government departments.</p> <p>One-stop shops, or investment single windows, are a useful instrument, as long as they replace multiple steps and do not become additional steps (achieve a true “one-stop-shop”, rather than a “one-more-stop”).</p> <p>An institutional single point of entry for foreign investors helps to bypass or accelerate dysfunctional procedures. The ideal is investors contacting only one entity to obtain all the necessary paperwork in one streamlined, online and coordinated process.</p> <p>Efficient single-window mechanisms can make a difference to the ability of firms to easily invest, and are thus likely to increase investor interest and successful establishment.</p>
Implementation	<p>In its simplest form, IPAs provide forms, documentation and supporting information on relevant procedures and institutions.</p> <p>A robust one-stop shop exercises a coordination function in which investment agencies interact with the various line departments and regional offices to expedite the processing of applications, provide all mandatory registrations (e.g., business registry, national and/or state/municipal tax identification numbers, social security, pension schemes), and pay all fees corresponding to the mandatory registrations.</p> <p><i>Example: Kazakhstan introduced a one-stop shop, enabling investors to apply for more than 360 types of permits and licenses without the need to visit multiple ministries or government agencies.</i></p> <p><i>Example: Angola created a single contact mechanism for investors to obtain all necessary authorizations.</i></p> <p><i>Example: Egypt’s Investor Service Centres gather representatives from 47 ministries and government agencies authorized to provide all necessary licenses and approvals required for the establishment of businesses.</i></p> <hr/> <p>The single window website should provide contact information for complaints, for each mandatory registration.</p> <hr/> <p>Note: Often economies put in place a one-stop shop to try to simplify a process that is overly complex, while it may be better to streamline and simplify procedures and requirements themselves, and which should be done prior to putting in place a one-stop shop.</p>
III.3 Clear criteria for administrative procedures	
Rationale	Having clear criteria expedites review and also guards against predispositions.
Implementation	<p>Establish clear criteria for administrative decisions on investment appraisal and approval.</p> <hr/> <p>Provide explanations for administrative decisions.</p>

	Note: Pursuit of attractive investments should not neglect other potential investments.
III.4 Clear criteria for investment incentives	
Rationale	<p>Incentives are offered to induce particular investment activity. Clear criteria can help ensure that policy objectives are realized in practice.</p> <p>Clear criteria underpin ‘smart incentives’ that achieve policy objectives in an efficient manner.</p> <p>Lack of clear criteria can result in ‘icing on the cake’ for all investments, regardless of the actual need of incentives to facilitate investment or stated policy objectives.</p> <p>Lack of clear criteria is vulnerable to corruption.</p>
Implementation	<p>Publish investment incentives and criteria to qualify. (For the elements of an “incentives inventory”, see sample text 2.)</p> <p><i>Example: Oman published regulations clarifying the conditions for granting incentives and benefits to foreign investment projects.</i></p> <p><i>Example: Turkey changed its investment incentive regimes by abolishing large-scale investment incentive and enacting a new "Technology Focused Industry Move Program" that promotes investment in the Priority Products List determined by the Ministry of Industry and Technology.</i></p> <p>Criteria should indicate policy objective (e.g., employment creation, export development, priority industry, regional development), incentive offered (e.g., tax holiday, import duty exemption or drawback, infrastructure or zone facility) and fulfilment requirement (e.g., monitoring or reporting of results achieved).</p> <p><i>Example: Nigeria, in granting a “Pioneer Status” incentive, published a list of industries eligible to enjoy the incentive.</i></p> <p><i>Example: Italy reduced its tax rate for profits reinvested to acquire assets or increase employment.</i></p> <p><i>Example: Cameroon has several tax incentives for the rehabilitation of an economic disaster area.</i></p> <p><i>Example: Guatemala established fiscal incentives for companies operating in its special public economic development zones including an exemption for 10 years from income tax and a temporary suspension of taxes associated with imports.</i></p> <p><i>Example: Colombia established a preferential corporate tax regime for investment projects that aims to grow taxable income and create jobs.</i></p> <p><i>Example: The United States clarified its tax incentive programme in “Opportunity Zones” that are created by the Tax Cuts and Jobs Act.</i></p> <p><i>Example: North Macedonia adopted the Law on Strategic Investment to create more favourable conditions for selected investments in the following sectors: energy, transport, telecommunication, tourism, manufacturing, agriculture and food, forestry and water economy, health, industrial and technological parks, wastewater and waste management, sport, science and education.</i></p> <p><i>Example: Sri Lanka is promoting the establishment of a pharmaceutical manufacturing zone for global pharmaceutical companies. All infrastructure facilities will be supplied by the Sri Lanka Board of Investment. In addition, Sri Lanka adopted the Inland</i></p>

	<p><i>Revenue Act in 2017 that helped improve tax transparency and administration and eliminated all tax holidays in favour of performance-based investment incentives.</i></p>
	<p>Governmental incentive policy should establish clear and specific criteria to target the kind of investment it seeks for the economy. IPAs should use investment incentives to target such investments. (See sample text 3.)</p> <p><i>Example: The Law on Strategic Investment in Albania provides special benefits for investments in specific sectors, including urban waste management, transport, electronic communications infrastructure and large-scale farms. They include special and assisted procedures, assistive infrastructure and preferential access to land.</i></p> <p><i>Example: Under the Law on Investment Promotion of the Lao People’s Democratic Republic, special economic zones are established with a specific administrative mechanism to create favourable conditions to investment that uses innovation in the production of agricultural products to save natural resources and energy.</i></p> <p><i>Example: Viet Nam expanded the list of business lines eligible for investment incentives. It also published a detailed list of conditions that apply for businesses to be considered as high-tech enterprises eligible for tax incentives.</i></p> <p><i>Example: Ukraine began to provide fiscal incentives such as tax exemptions, import duty exemptions, preferential land access and construction of necessary infrastructure for large investment projects.</i></p>
	<p>Public-private dialogue and stakeholder consultation can be used to develop clear criteria for investment incentives that are aligned with sustainability principles and development goals.</p>
<b>III.5 Simplification of procedures and reduction of documentation requirements</b>	
<p>Rationale</p>	<p>Simplification can lead to a reduction in the cost of doing business (in terms of time and resources).</p> <p>The aim is to reduce administrative steps to speed up the procedural process without diluting its integrity or avoiding necessary due diligence tasks, such as environmental impact assessments.</p> <p>Government departments tend to duplicate the procedures of others, as do different units within departments. Redundancies can be eliminated without loss of appraisal or effectiveness.</p>
<p>Implementation</p>	<p>Governments should seek to simplify procedures and authorisation requirements, by for example reducing the need for multiple authorisations from various government authorities. Such measures are usually achieved through departmental task forces or parliamentary sub-committees. IPAs can influence the streamlining of procedures (among other investment facilitation measures) through policy advocacy.</p> <p>Simple procedures can include business visa requirements (which should be available online as e-visas and include multiple-entry visas for business visitors), green channels to expedite customs clearance and ease of securing work permits for skilled non-nationals. (See sample text 4.)</p> <p><i>Example: Argentina published a decree with 170 measures to eliminate rules and regulations that reduced the country’s competitiveness.</i></p>

	<p><i>Example: Brazil simplified the entry procedures for foreign financial institutions and foreign investors and abolished the different treatment of foreign and domestic investors in the licensing process.</i></p> <p><i>Example: Kazakhstan simplified public procurement procedures with entities having concluded investment agreements.</i></p> <p><i>Example: Mexico simplified the criteria for foreign companies to conduct commercial activities by expanding the list of countries whose companies do not need to obtain an authorisation from the Ministry of Economy.</i></p> <p><i>Example: The Visa TechChile programme seeks to streamline the process of obtaining a work visa to make it easier for local and overseas companies in the technology services sector and enterprises related to Start-Up Chile to hire professional and technical personnel specialized in the area of technology services that are not available in the country. Under this initiative's streamlined process, it is possible to obtain a work visa within a maximum period of 15 working days.</i></p> <p><i>Example: Thailand introduced a new visa system (Smart Visa) to attract foreign highly skilled talent.</i></p> <p><i>Example: China increased the quota for foreign technical personnel in foreign invested construction and engineering design enterprises. In addition, China relaxed restrictions on recruitment agencies.</i></p> <p><i>Example: Uzbekistan increased its quota for the issuance of work permits for highly qualified foreign specialists.</i></p> <p><i>Example: Spain (INCEX-Invest in Spain) supports added-value investors with immigration services.</i></p> <p><i>Example: The Philippines relaxed the mandatory local employment requirement for foreign investors.</i></p> <p><i>Example: Indonesia enacted an omnibus law to facilitate doing business by simplifying licensing processes, amending labour law regulations, relaxing immigration rules and harmonizing various sector-specific laws and regulations.</i></p>
	<p>Clear criteria for decisions to carry out audits, as well as potential penalties should be established. Where warranted, reduction in the frequency and content of audits.</p>
	<p>Simplify and expedite, where possible, the issuing of approvals, licenses and registration requirements (e.g., patent, trademark, and copyright registration), as well as documentation. Emphasis on core documentation requirements lessens the burden on applicants and administrators.</p> <p><i>Example: Indonesia replaced the license requirement for establishing a business with a registration procedure.</i></p> <p><i>Example: Angola enacted legislation for the admission of eligible investments by creating a "fast lane" to speed up procedures and technical support units in each ministry.</i></p> <p><i>Example: Myanmar amended its investment law, simplifying investment approval and authorization procedures for foreign and domestic investors.</i></p> <p><i>Example: Mauritius adopted the Business Facilitation Act of 2017 to eliminate regulatory and administrative bottlenecks to investment.</i></p> <p><i>Example: Saudi Arabia expedited the licensing procedures for foreign investors by reducing the number of required documents and shortening the review period.</i></p>

	<p><i>Example: The State Administration of Foreign Exchange of China issued the Circular on Further Promoting the Facilitation of Cross-border Trade and Investment (Hui Fa [2019] No.28). This Circular simplifies the foreign exchange control requirements under current and capital accounts and relaxes domestic equity investment restrictions imposed on foreign-invested enterprises.</i></p>
	<p>Streamlined forms are easier to fill and to process.</p> <p><i>Example: In Tanzania, an enterprise can be created with one form and two steps online within 10 days. Prior to the implementation of the system, businesses had to go through 20 steps and complete 9 forms within 30 days.</i></p>
	<p>Where multiple approvals are necessary, the process may be facilitated with the use of a common format across departments (e.g., details on contacts, forms and documentation; set time frames for processing; standard fees; and opportunity for review of decisions).</p> <p><i>Example: In El Salvador, the process to register a company has been reduced from 16 to 3 steps, 10 forms from different administrative institutions were merged into one form and the duration of the entire process dropped to a maximum of three days.</i></p>
	<p>Maintain a periodic review of documentation requirements with a view to ensuring that requirements are still relevant and simplifying/removing those that are not.</p>
	<p>Simplify the process for connecting to essential infrastructures such as electricity and water supply. Such simplification can be done by following the “Plug and play model”, which refers to ready facilities provided by the government in terms of infrastructure (e.g., buildings), power-water-sewage connectivity, road connectivity, as well as approvals required to connect to the necessary utilities within a specified and short timeframe so that investing companies can commence operations smoothly and quickly.</p> <p><i>Example: India is promoting a “plug and play” scheme to fast-track large investment proposals.</i></p>
III.6 Processing of applications	
Rationale	Different categories of investment may call for particular types of assessment.
Implementation	<p>Processing of applications should be carried out in a timely and consistent manner.</p> <p><i>Example: Indonesia’s fast-licensing process allows certain categories of prospective investors to have their preliminary permits within 3 hours.</i></p> <p><i>Example: Colombia streamlined its foreign investment registration scheme, in particular by eliminating registration deadlines.</i></p> <p><i>Example: Jamaica established a programme for fast-tracking development and planning approvals for high-potential projects. Under the programme, all planning authorities and agencies are mandated to give a 10-day review of applications, thus significantly shortening the development approval timeline.</i></p>

	<p>Mining and infrastructure investments often involve negotiations, which could be minimized by clear rules and procedures.</p>
	<p>Export-oriented investments are processed by export processing zone authorities when in those zones, which should work closely with investment agencies.</p>
	<p>Special economic zones operate incentive schemes that should have monitoring mechanisms to ensure the implementation of requirements.</p>
	<p>Policymakers may consider risk-based assessment, whereby low-risk investment projects are approved with more limited, if any, need for assessment, while high-risk projects receive careful assessment. Consider limiting the requirement of obtaining authorization to categories associated with higher risk. (See sample text 5.)</p> <p>Applications of SMEs, especially managed by women, may qualify for 'lite processing'.</p>
	<p>Conditional approval: Consider authorising micro, small and medium-size enterprises (MSMEs) to start operations without the requirement of approvals from the government for an initial period of time.</p> <p><i>Example: Many state governments in India authorise MSMEs to start operations without the requirement of approvals from the government for the first 36 months of operation.</i></p>
	<p>Note: Processing procedures should safeguard confidential information.</p>
	<p>Note: The public policy goals should be clear and the decision process should be transparent.</p>
<b>III.7 Time limits</b>	
<b>Rationale</b>	<p>Reasonable time limits can, like a metronome, set a steady pace to advance the process, making for more productive and efficient administration while also increasing predictability for investors.</p>
<b>Implementation</b>	<p>Adopt diagnostic tools and indicators on the efficiency of administrative procedures, and benchmark performance relative to international best practice.</p>
	<p>Enact and publish time limits for the processing of applications for investment screening, admission, licensing, visa processes and deciding judicial appeals.</p> <p><i>Example: In Malaysia, there is a commitment that a license will be approved within four weeks from the date of complete information received.</i></p> <p><i>Example: In Jamaica, agencies are mandated to give a 10-day review of applications, thus significantly shortening the approval timeline.</i></p>
	<p>Some protocols grant automatic approval if the process is not completed within the time limit and provided there is no notification of an extension of deadline.</p> <p><i>Example: In the country of Georgia, "Silence is consent" – a permit or license is automatically granted if no government action is taken within statutory time limits.</i></p> <p><i>Example: Telangana government's industrial policy establishes a Right to Clearance for industrial projects. The Right to Clearance recognises that businesses have the right to know why project proposals are being delayed and to demand redress for</i></p>

	<p><i>unnecessary delay. The Right to Clearance involves a provision to impose a fine of Rs. 1,000 on officials for each day of delay in granting clearance to a project. It also lays down a 15-day time limit for the clearance of mega-projects involving over Rs.200 crore, and of one month for smaller projects. If government departments miss the deadline, the project will automatically be deemed approved.</i></p> <p>Note: automatic approvals should be clearly stated in the law and if possible, confirmed with a written approval or waiver. The aim is to avoid placing the investor in a grey zone, which could give rise to later disagreement. (See sample text 6.)</p>
III.8 Communication with potential investors	
Rationale	<p>Regular communication allows for two-way exchange on incomplete information, clarification of details, and informal review of appraisals.</p> <p>Continuous contact permits fast notification of authorization and for its entry into effect without delay.</p>
Implementation	<p>Applicants should be encouraged to stay in contact with a designated case officer on the application status.</p>
	<p>Communication does not end with approval, but shifts to the next steps for implementation.</p>
	<p>The creation of national IPAs centralises and consolidates efforts of identifying and communicating with investors.</p> <p><i>Example: Qatar created an investment promotion agency to attract FDI.</i></p> <p><i>Example: The United Arab Emirates established the Abu Dhabi Investment Office to increase FDI in the emirate.</i></p>
	<p>The creation of sub-national (region/city level) IPAs and enhancing their capacity can help facilitate investment to other regions in an economy.</p> <p>There must be clear roles and responsibilities and good coordination between national and sub-national IPAs.</p> <p><i>Example: GTAI, Germany's national trade and investment promotion agency, works closely with all sub-national IPAs from the 16 federal states of Germany, helping them by operating a list of potential qualified partnering organizations for target industries or sectors; creating initial business contacts and matchmaking; and arranging meetings with experts and interested parties.</i></p> <p>Platforms can be created to share information among different levels of IPAs and also the overseas network of trade commissioners.</p> <p><i>Example: ICEX-Invest in Spain uses a platform (Interactua) to share projects, documents and information.</i></p>
III.9 Acceptance of applications	
Rationale	<p>It is important to sustain the interest of investors and encourage follow through.</p>



Implementation	<p>Authorizations should be based on clear criteria and transparent procedures and, once granted, should be transmitted in a forthcoming manner.</p> <p>Applications should be reviewed by an experienced professional committee, to ensure a professional review of the applications.</p> <p><i>Example: Côte d'Ivoire adopted a decree that organizes the functions of the Accreditation Committee responsible for examining the applications for the approval of investors. The Committee includes four national experts from the Administration of the Promotion Industry, Investments, Budget and Finance.</i></p>
	Authorizations may be time bound to discourage undue delay in implementation.
	Once projects are formally authorized and registered, work and residence permits, for the purposes of implementing these projects, could be issued in a systematic manner to prevent inefficiencies caused by immigration authorities checking the “seriousness” of projects.
	Note: Many approvals are not implemented, i.e., investments do not take place.
III.10 Rejection of applications	
Rationale	Rejection should be based on clear criteria and transparent procedures.
Implementation	<p>A rejection of applications should not foreclose the possibility of future applications.</p> <p>Rejections should be officially communicated. A “Silent No” is unprofessional, and damages goodwill in the larger investor community.</p> <p>An explanation should be provided if a decision is due to incomplete documentation, although this shortcoming may be prevented through prior communication to the applicant with an invitation to complete the application.</p> <p>An explanation should be provided if the decision is due to unfulfillment of stated administrative criteria, as the criteria might change in the future thereby allowing for the possibility of resubmission.</p> <p>Establish accessible and effective administration decision appeal mechanisms. Appeal mechanisms, where appropriate, may include impartial “fast-track” review procedures.</p> <p>Note: incomplete documentation or procedure should not in itself prevent fulfilment of requirements. A possible safeguard is to allow for appeal and review of the decision.</p> <p>Note: There are instances where laws and policies change over time (e.g., on equity ownership), thereby allowing for reconsideration anew of earlier decisions.</p>

III.11 Fees and charges	
Rationale	Fees to cover the cost of processing applications are standard practice. Applicants may be prepared to pay higher fees for urgent processing (e.g., courier mail service).
Implementation	Reduce the number and complexity of fees and charges, which should not be set at a level as to deter applications. <i>Example: Australia has an on-line “Fee estimator”.</i> <i>Example: Oman introduced an exemption from certain fees for investment projects in the country’s less-developed regions.</i>
	Payment in foreign currency is encouraged by use of official accounts of a country’s consular offices worldwide.
	Fees and charges should be periodically reviewed to ensure they are still appropriate and relevant, and there should be an adequate time period between the publication of new or amended fees and charges and their entry into force. <i>Example: Ukraine simplified and lowered the costs of the registration procedure for representative offices of foreign business entities.</i>
III.12 Aftercare	
Rationale	Aftercare refers to the post-investment services provided to investors to encourage them to expand and deepen their operations in the host country. Post-establishment services make it more likely that investments will be successful, and that investors will therefore remain and also expand investment. A significant amount of investment is reinvestment by existing investors. Satisfied investors are also a confirmation of a country’s investment climate and the best publicity for a country. <sup>155</sup> Aftercare processes allow regular contact with investors to address ongoing needs of stakeholders.
Implementation	IPA’s aftercare services should include information and assistance to investors starting from investment decision/announcement, during entry, establishment, retention,

<sup>155</sup> Maintain a scorecard for good practices in aftercare covering policy, techniques and resources:

A. Aftercare policy	<ol style="list-style-type: none"> <li>1. Is there an aftercare strategy for keeping in contact with investors once they make the investment?</li> <li>2. What are the objectives of aftercare (expansions, marketing, supply chain linkages, upgrading of plants etc.)?</li> </ol>
B. Aftercare techniques	<ol style="list-style-type: none"> <li>1. What aftercare techniques are used?</li> <li>2. Do these meet objectives?</li> <li>3. Who are the stakeholders in aftercare?</li> </ol>
C. Resources	<ol style="list-style-type: none"> <li>1. Are adequate resources and skills available for aftercare?</li> <li>2. Is there a dedicated aftercare team?</li> <li>3. Are resources used effectively?</li> </ol>

	<p>expansion and possibly beyond. Well-connected IPAs help investors have clarity of what needs to be done, by when, for how much, and sort out any issues/delays in the process of establishment or operations. In crisis, they should be in the front lines providing updated information and assistance to help investors sort out issues and keep operating.</p> <p><i>Example: Invest India launched the Business Immunity Platform to help investors with aftercare in the COVID-19 context (<a href="https://www.investindia.gov.in/bip">https://www.investindia.gov.in/bip</a>)</i></p> <p><i>Example: KenInvest provides post implementation services, such as following up with investors at regular intervals to assist in smooth project implementation and addressing any concerns established investors may have.</i></p> <p><i>Example: APEX-Brasil has developed a platform with tools to support exporters and investors during the COVID-19 crisis. It developed an online market tool that provides economic and trade updates by sector, and organised a webinar to familiarize users. It also developed a model action plan for businesses in crisis management, a support guide for suppliers and checklists for exporters. In addition, there is an area on the platform with pandemic-related information for foreign investors, in English. It includes an online questionnaire on how the agency and the federal Government can assist foreign investors in investment facilitation and mitigation of pandemic impacts.</i></p> <p><i>Example: Mauritius provided additional investment allowances for capital expenditures on the acquisition of new plants and machinery for companies affected by the Covid-19 pandemic.</i></p>
	<p>Adopt tools for managing the relationship with existing investors. Have in place the following three internal systems to manage relationships with existing investors: (A) standard operating procedures; (B) investor information system; and (C) an investor relationship management system built on customer relationship management (CRM) software. These tools are also relevant for managing the relationship with potential investors.</p>
	<p>Assist investors in acquiring land, buildings, utilities, worker permits, and import licenses. SMEs may particularly value such 'start up' assistance. Alternatively, the IPA can refer investors to respective government agencies (when they deliver services without IPA involvement) or accredited service providers in the private sector.</p>
	<p>Facilitate investor relations within communities, stakeholder associations and civil society, nurturing corporate social responsibility.</p>
	<p>Fast-track approvals of sequential investment, the renegotiation of investment licenses, the certification of incentive privileges, and help ensure disbursement.</p>

Source: Loewendahl, Henry B. (2001), *Bargaining with Multinationals: The Investment of Siemens and Nissan in North-East England*. Houndsmills, United Kingdom: Palgrave.

	<p>Build and maintain a comprehensive database of existing investors with key contacts in every company.</p> <p>Develop with other agencies a database of bankable projects for possible sequential investments.</p> <p>IPA can guide the project sponsors/owners (ministries, private sector, communities, municipalities) in building project profiles/books that are bankable.</p> <p><i>Example: Invest India created an Investment GRID which provides information to investors on the investment opportunities prepared by states/communities.</i></p>
	<p>Help investors by seeking to build complete supply chains, often with a focus on creating an appropriate local ecosystem and establish supply-chain development aftercare programmes.</p> <p><i>Example: Japan has launched a Digital Transformation Partnership Programme that promotes linkages between Japanese and foreign companies operating in the country.</i></p> <p><i>Example: Morocco has a programme for constructing local ecosystems for investors, to help investors more easily obtain the resources needed to operate.</i></p>
	<p>Organize initiatives and events that provide recognition and networking opportunities in the local ecosystem (awards for the best performing investors by different criteria, or business-government networking events). These events recognize the contribution of existing investors, and can enhance retention and expansion of investments.</p>
	<p>The promotion of business linkages (through matchmaking events or suppliers' databases) may also support aftercare services. (See section V.2 on linkages with the host economy.)</p>
	<p>Train local talent that can be hired by foreign affiliates.</p> <p><i>Example: Uruguay XXI has developed (with the help of the IDB) a smart talent platform: a free-access website for companies specialized in the global services industry; it encourages strategic links among companies, educational institutions and potential employees. This tool allows global services companies to finance up to 70% of the costs of their training-on-demand plans, both in soft and technical skills. It is directed to companies with operations in Uruguay that export services in a number of sectors.</i></p> <p><i>Example: CINDE established an online education platform to provide capacity building for 50,000 people who have been affected by the Covid-19 pandemic in order to provide them with the skills needed for re-employment by foreign investors.</i></p>

## IV. Digitalization

IV.1 E-government	
Rationale	<p>E-services are user friendly, fast, accessible worldwide, and increase transparency.</p> <p>E-services are particularly suited for SMEs (local and foreign investors).</p>

Implementation	Implement a GLOBAL IPA “FDI MARKET” PLATFORM, where investors can come and look for benchmarking info, IPA contacts, sectors promoted, etc. IPAs can promote themselves in such a platform.
	Applications for business registrations, licenses, visas, work permits, and security and customs clearance should be provided by e-services. <i>Example: Uzbekistan set up a programme for further digitization and introduction of information systems in its public administration. It covers environmental permits, licenses in the health sector, ITC, and all matters relating to electricity, heating and water supply.</i>
	Establish a Chatbot guiding users.
	Provide explanatory videos.
	Enable digital identity, interoperability and electronic signature options.
	Establish electronic payment system for investors to pay all fees, charges and taxes associated to the admission, establishment, maintenance, acquisition and expansion of investments. <i>Example: Through Cambodia's online business registration system, all fees can be paid online through various e-payment channels.</i>
	Enable online tax registration and declaration to non-resident foreign investors.
	E-services aid in scoping sites for plant locations and sourcing of local contractors.
	E-services should help in jumpstarting preparatory activities following approvals and before full physical presence has been set up on the ground. <i>Example: Tanzania established an online registration system that simplifies investment registration processes, significantly reducing time and costs.</i> <i>Example: Benin launched an online tool (iGuide) for informing investors about operating costs, salaries, taxes, and relevant laws to build and develop their business plans. The iGuide was set up in partnership with UNCTAD and the International Chamber of Commerce (ICC).</i> <i>See also <a href="http://www.gateway.gov.uk">www.gateway.gov.uk</a> and <a href="http://www.Dubai.ae">www.Dubai.ae</a> .</i>
IV.2 Online single window	
Rationale	Facilitates interchange with investors and manages coordination within government.
Implementation	Develop an online single window, compatible with the Global Trade Single Window that some countries operate. The digitalised one-stop-shop portal should include online

	<p>information for investors, as well as enable the whole entry and establishment process for investors.</p> <p><i>Example: Malaysia has a single window for trade (DNeX).</i></p> <p><i>Example: Pakistan is set to implement by 2022 a single window system for trade to streamline the cross-border movement of goods and regulatory bottlenecks. The system includes the establishment of an ICT-based platform involving simplification, harmonisation and automation of regulatory processes related to cross-border trade.</i></p> <p><i>Example: Cuba enacted a Decree regulating the "single-window" service for foreign investors, an online platform with the aim of expediting and facilitating processes for local and foreign investors.</i></p>
	<p>Countries may adopt technologies such as blockchain and artificial intelligence, which may bring new opportunities to improve a single window's efficiency, transparency and interoperability.</p> <p><i>Example: Benin's online platform, made its business registration processes entirely digital, setting up an online single window for all regulatory processes needed to open a business.</i></p> <p><i>Example: Wesgro's business Support provides a virtual team of sectorial and communication experts who help businesses by providing guidelines and best practice. The team is made up of staff from the Department of Economic Development and Tourism (DEDAT), Wesgro (Cape Town and Western Cape Tourism, Trade and Investment Promotion Agency), City of Cape Town Metropolitan Municipality, GreenCape and private sector.</i></p>
	<p>Create an online business registration system.</p> <p><i>Example: Cambodia launched an online business registration system as a single window for providing all the services related to registering a business and keeping the business registration up-to-date.</i></p> <p><i>Example: Iraq established a new platform to simplify company registration allowing investors to create a company entirely online by filling one registration form and making one payment.</i></p> <p><i>Example: Cuba and Pakistan launched online platforms to help investors establish companies more efficiently.</i></p>
	<p>The web address of a digital single-window system should be provided to the WTO Investment Facilitation Committee.</p>
<b>IV.3 Improving organizational efficiency through the application of digital technologies</b>	
<p>Rationale</p>	<p>The use of digital technologies allows all government agencies dealing with business licences, permits and procedures to become more efficient in their internal processes, keep track of their established and potential investors, and in prospecting new investors.</p> <p>Leading agencies are increasingly innovating their services to anticipate the needs and plans of companies, which demand access to value-added information, personalized services, reduced bureaucracy and online procedures to facilitate the establishment process. All these activities contribute to improving the business climate and attracting investment and reinvestment. IPAs – mainly in the United States, Europe and Asia – are incorporating 4.0 technology into their investment services, although later than in</p>

	<p>other sectors. This trend is estimated to accelerate due to restrictions on movement and physical contact worldwide caused by COVID-19.</p>
Implementation	<p>Establish online platforms or portals to comply with administrative procedures for the submission and processing of applications, and the ability to track the status of applications online.</p>
	<p>Ensure availability of application forms and documentation on the official website of investment authorities. Electronic submissions are fast and can be readily stored on government servers for retrieval and processing by different administrative units.</p> <p>IPAs are implementing, among other tools: digital single windows for investment to simplify and streamline the registration and operational processes and processes of companies that incorporate blockchain; platforms with access to geographic information systems (combined with databases of investment/expansion projects of foreign companies); pro-tech applications, such as augmented reality and virtual reality tools incorporating the use of glasses, and drones that economize the production of location promotion videos; artificial intelligence systems, including predictive analysis to identify patterns and trends of investors and offer personalized information in a timely manner; and data-driven and open data solutions, so that investors can make strategic decisions based on data analysis and interpretation.</p> <p><i>Example: Azerbaijan established a single online portal for the issuance of business licences and permits.</i></p> <p><i>Example: The Mauritius Economic Development Board requires that applications for Occupation Permit or Residence Permit be submitted online through the National E-licensing System.</i></p> <p><i>Example: The Philippines launched a digital platform, the Philippine Business Data Bank, shortening the time needed for applying and renewing permits.</i></p>
	<p>A portable document form (PDF) is easy to create, fill and process using ordinary software. Forms are normally to be submitted in hard copy. However, the requirement for triplicates is outdated and can be replaced by a single electronic copy.</p>
	<p>Laws or regulations should allow for electronic signatures with the equivalent legal validity with handwritten signatures.</p>
	<p>Digital certificates and signatures should be available, as should IT systems capable of accepting and exchanging data electronically.</p>
	<p>IPAs can track investor relations through a customer relationship management (CRM) software that can help IPAs build stronger relations with investors, record their needs and issues, professionally deliver on service promises, renew contacts, set reminders for future encounters and report results to management and stakeholders.</p> <p>Beyond keeping companies, contacts and projects, a key feature of the most advanced CRMs is ticket management to allow IPA staff create an internal request and follow through until completion.</p>
	<p>IPAs can use data analytics to find potential investors.</p> <p><i>Example: InvestChile and Costa Rican CINDE use website analytics for measurement, collection, analysis and reporting of web data for purposes of understanding and</i></p>

	<p><i>optimizing web usage. Such information is used to assess and improve the effectiveness of their websites.</i></p>
	<p>Interconnectedness of systems is key for the best result of digitalization in IPAs. This is especially the case when the IPA is also a virtual portal for procedures others process and approve.</p>
	<p>Promote the adoption of new technology by IPAs, including through the training of officials at all levels of government.</p>
<b>IV.4 Digitalization of investor onboarding and aftercare</b>	
Rationale	<p>Digitalization offers new opportunities for IPAs for their operations and outward-facing activities.</p>
Implementation	<p>Establish and maintain national investment websites, applications and other social media platforms with up-to-date applicable information for investors, including legislation, regulations, investment guides and investment opportunities. Such a platform should be user friendly and enable investors to quickly and easily locate the information needed.</p> <p><i>Example: The online portal of KenInvest provides a comprehensive guide to the country's investment-related procedures. The portal presents all application steps for investment activities, including business creation, construction and taxation. The information is explained step-by-step, including what requirements to fulfil, forms that need to be completed, associated costs, legal justifications, and a contact person.</i></p> <p><i>Example: India established its national investment promotion platform, Invest India, with a "three-clicks rule", which means that in three clicks the investor gets to the information sought. The platform enables online Q&amp;A services, with responses within 72 hours. The platform also includes COVID-19 updates and relevant resources for business aid.</i></p> <p><i>Example: Germany's Trade and Invest developed a special pandemic website to assure the investment community that the IPA continues to work on their behalf. The website provides regular updates on various matters, including financial support for businesses, supply chains and economic developments. It also closely follows German industry-specific developments, highlighting information on sectors where the pandemic has generated increased demand such as digital solutions in education, logistics and health.</i></p> <p><i>Example: The Netherlands Enterprise Agency, together with a trade network of seven embassies and a consulate-general, provides support to Dutch entrepreneurs doing business in South-East Asia, including through an "NL exporsteert" app, which provides up-to-date information necessary for conducting international business.</i></p> <p><i>Example: A special section has been added in the Shanghai government web portal of One Network Service System and the official government app "Suishenban", to provide the latest updates and news on the COVID-19 epidemic in Shanghai. The city has also pushed notifications regarding various epidemic-related policies to targeted individuals and businesses.</i></p> <p><i>Example: The Investment Development Authority of Lebanon produced an online document on "Innovation Triggered by the Covid-19 Crisis: Lebanese Success Stories" that includes initiatives in critical sectors.</i></p>



	<p>Create LinkedIn, Twitter and Instagram profiles (for IPA or other entities) and use these platforms for identifying investors, gathering investor intelligence, getting meetings, and advertising/sharing investment opportunities with investors.</p> <p><i>Example: Ethiopia EIC uses WhatsApp and Twitter to communicate with investors during the COVID-19 crisis.</i></p> <p><i>Example: Various IPAs established focused social media accounts on the promotion of investment opportunities in healthcare following the Covid-19 pandemic, such as Germany's @gtai_health, the Netherlands' @invest in Holland life sciences and health team and France's @French healthcare On Twitter.</i></p>
	<p>Establish podcast series that include host country information relevant for investors.</p>
	<p>Host online investor conferences, IPA-IPA collaboration virtual roundtables, one-on-one meetings, webinars, online recruitment aftercare and information sessions, especially during COVID-19 times.</p> <p><i>Example: Germany's Trade and Invest has launched a series of webinars on topics, including latest pandemic-related regulatory changes, how companies have managed the crisis and what possible exit scenarios look like, novel fast track programmes for medical apps as the demand for digital solutions in the health care system continues to grow.</i></p> <p><i>Example: A virtual roundtable between Spain and Colombia took place and focused on business opportunities during and post-pandemic. It was jointly organized by the Colombian IPA, ProColombia, the city IPA of Bogota, together with the Colombian MFA, the chambers of commerce of Colombia and Madrid, and the municipality of Madrid.</i></p> <p><i>Example: A joint webinar on investment opportunities in Rwanda post-pandemic was held by the Rwandan IPA, the Rwanda Development Board and the Sweden Africa Chamber.</i></p>
	<p>IPAs could create promotional videos in the form of conversation and talk shows that discuss the investment environment and opportunities.</p> <p><i>Example: The Korea Trade-Investment Promotion Agency (KOTRA) is producing such content to facilitate and promote investment in the context of the COVID-19 pandemic.</i></p> <p><i>Example: Brazil's IPA, APEX, hosts online talks by its staff on investment opportunities in the context of the COVID-19 pandemic.</i></p>
	<p>IPAs may facilitate virtual site visits of potential investors (and others). This can be further enhanced through the use of virtual reality goggles and/or geographic information systems (GIS).</p> <p>Overseas offices (e.g., embassies and consulates) can also be used as a platform to facilitate virtual site visits by prospective investors from that economy.</p> <p><i>Example: Estonia and Costa Rica are offering virtual site visits, as does the Republic of Korea.</i></p>
	<p>Enable online negotiations and drone-based due diligence.</p> <p><i>Example: KOTRA is providing such services.</i></p>

	<p>Enable a virtual marketplace for workers and suppliers to facilitate the matching of local suppliers and workforce availability with foreign investors.</p> <p><i>Example: The India Investment Grid (IIG) provides an online platform that supports investment in India by showcasing investment opportunities across India. IIG connects potential investors to projects and key contacts. Most projects are government projects. There is a preliminary credibility check of the projects by the IPA, but afterwards it is left for the investors to do their own due diligence.</i></p> <p><i>Example: Pakistan launched an online portal, the Electronic Joint Venture, that allows enterprises to list their profiles on the website and provides information regarding new opportunities for investment.</i></p>
	<p>Use digital technologies to collect data on issues that concern stakeholders in order to improve investment facilitation services provided by IPAs.</p> <p><i>Example: Honduran holds online consultations with the private sector and hosts regular webinars on issues related to reformulating its investment promotion strategy.</i></p> <p><i>Example: Invest India engages in social media analytics, collecting information on what issues concern stakeholders through their engagement in social media.</i></p>
	<p>Establish online programmes and platforms to promote linkages between foreign investors and the local economy.</p> <p><i>Example: The Rwanda Development Board Launched a <u>public-private partnership</u> to provide language and training skills online.</i></p>

#### IV.5 Data protection issues

Rationale	The transfer of data systems may raise security and privacy issues. Computer systems must be equipped for secure transmission, virus protection and rapid uploads.
Implementation	<p>Establish regulations or administrative measures for the protection of personal information.</p> <p>Ensure the legal framework for protection of personal information takes into account principles and guidelines of relevant international bodies.</p> <p><i>Example: International bodies, such as the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013), can provide guidance.</i></p>

#### IV.6 Facilitating digital FDI (FDI in the digital economy)<sup>156</sup>

Rationale	Attracting FDI into the digital economy requires specific policies, regulations and measures vis-à-vis traditional FDI because digital firms operate with different business models. They rely heavily on data and technology, often involve platform economies and leverage non-traditional assets.
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<sup>156</sup> For detailed information, see Matthew Stephenson, "Digital FDI: Policies, Regulations and Measures to Attract FDI in the Digital Economy", *World Economic Forum White Paper*, September 2020, [https://www3.weforum.org/docs/WEF\\_Digital\\_FDI\\_2020.pdf](https://www3.weforum.org/docs/WEF_Digital_FDI_2020.pdf), from which much of this material is drawn.

Implementation	<p>Policies, regulations and measures (together known as ‘elements’) to attract and facilitate digital FDI fall in three categories: those that enable investment in new digital activities (e.g., ridesharing apps); those that enable investment in the adoption of digital services by existing firms (e.g., telemedicine or mobile banking); and those that enable investment in digital infrastructure.</p> <p>Governments may wish to identify and adopt priority measures to facilitate digital FDI across each of these pillars, given that the enabling measures may differ depending on the category. The top three elements that investors care about are: data security regulations; copyright laws to protect intellectual property; data privacy regulations.</p>
	<p>To facilitate digital FDI through the adoption of digital technologies, the top three elements that investors care about are: availability of e-payment services; support for starting digital businesses; support for local digital skills development.</p>
	<p>To facilitate digital FDI into digital infrastructure, the top four regulatory elements investors care about are: ease of receiving licenses for digital infrastructure; availability of skilled local engineers and other workers; use of international standards (tied for 3rd); regional coordination for infrastructure investment (tied for 3rd).</p>
	<p>To facilitate digital FDI into digital infrastructure, the top three physical elements investors care about are: international connectivity of digital infrastructure; national connectivity of digital infrastructure; urban connectivity of digital infrastructure</p>

## V. Measures that directly increase the development contribution of FDI

V.1 Responsible and sustainable investment	
Rationale	<p>All countries have policy objectives to advance sustainable development. Accordingly, investment facilitation measures should encourage the flow of sustainable FDI, i.e., commercially viable investment that is characterized by best efforts to make a reasonable contribution to the economic, social and environmental development of host countries and that takes place in the context of good governance mechanisms. Such “sustainable FDI” is characterized by direct corporate action that increases the development impact of FDI. Some of the most important FDI sustainability characteristics—and the benefits they imply—are listed in sample text 7.</p> <p>Investment facilitation measures should advance sustainable economic development.</p> <p>Investment facilitation measures should encourage social responsibility.</p> <p>Investment facilitation measures should be climate and environment-friendly.</p> <p>Investment facilitation measures should respect human rights.</p> <p>Investment facilitation measures should advance good governance.</p>
Implementation	<p>The United Nations, the ILO and the OECD have guidelines for responsible business practices: the UN Guiding Principles on Business and Human Rights, the UN Global Compact, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social policy and the OECD Guidelines for Multinational Enterprises</p>

	<p>and related OECD Due Diligence Guidance for Responsible Business Conduct. Governments and firms should ensure these guidelines are being observed.</p> <p>Investment measures and procedures should welcome applications from investors that affirm corporate social responsibility (CSR) and commit themselves to observing international standards of responsible business conduct. (For a possible formulation in an investment agreement, see sample text 8.)</p> <p>One way to implement this is by creating the special category of “Recognized Sustainable Investor,” which incentivizes and rewards investors to invest sustainably, possibly guided by an indicative list of FDI sustainability characteristics. (For a possible formulation, following the model of the Trade Facilitation Agreement, see sample text 9.)</p>
	<p>Country FDI Strategy and IPA Corporate Plan/strategies should include criteria towards SDGs, and key performance indicators reflect such criteria.</p>
	<p>Governments could create specific governmental bodies, focal points or representatives to facilitate sustainable FDI, such as the designation of a responsible business conduct coordinator to facilitate investor relations with local communities, stakeholder associations and civil society or establish an in-house IPA gender focal point.</p> <p><i>Example: Myanmar and Qatar established new government bodies to promote quality investment.</i></p> <p><i>Example: Germany Trade and Invest has a gender focal point and offers training to its staff on how to mainstream gender issues across its work, in line with objectives and policies at the national level.</i></p>
	<p>Governments can assess the potential development impact of FDI projects using the OECD FDI qualities indicators, which fall in five clusters (productivity and innovation, employment and job quality, skills, gender equality, and carbon footprint).</p>
	<p>All economies can encourage high standards of corporate governance and responsible business conduct by investors, both inward and outward.</p>
	<p>Governments can encourage facilitation measures that develop quality employment, such as training programmes especially focused on youth employment, and worker safety programmes.</p> <p><i>Example: Colombia introduced a special tax regime for mega-investments by providing tax breaks and other fiscal incentives. Among the covered investments are those generating at least 250 new jobs in the high technology and electronic commerce sector.</i></p> <p><i>Example: IPA Invest Lithuania targets companies in ICT, advanced manufacturing and life sciences, and has made skill development an integral part of its operations. Its efforts include proactive promotion to foreign companies that will train local workers.</i></p>
	<p>Governments can facilitate green FDI that assists economies to become carbon neutral or are ‘climate positive’, by facilitating environmental technologies, renewable energy and energy efficient investments.</p>

	<p><i>Example: India allows up to 100% FDI under an automatic route for renewable energy generation and distribution projects, subject to provisions of The Electricity Act, 2003. India also established a Renewable Energy Investment Promotion and Facilitation Board portal that provides one-stop assistance and facilitation for investors for development of projects in the renewable energy sector. The portal includes several elements, such as a unique account for each investor for all communications across government departments; a coordination facility for weekly meetings of investors and developers with the board; and a robust grievance redressal mechanism to resolve investor grievances.</i></p> <p><i>Example: The Board of Investment of Mauritius offers a comprehensive incentive package structured around the country's Smart City Scheme, including an 8-year 100% income tax holiday and VAT exemption on capital goods purchases, for companies investing in carbon and waste reduction, efficient transport, low-energy buildings, renewable energy production, and water management.</i></p> <p><i>Example: In South Africa, the government committed to purchase four gigawatts of electricity by 2016 from new, renewable and domestically generated capacity. By guaranteeing a market, the government stimulated interest from foreign investors, interest that InvestSA helped manage.</i></p> <p><i>Example: Netherlands introduced the "Investment Allowance" that provides a partial deduction of tax against investment in environmental technology. The environmental technologies eligible and the level of deduction applicable for each technology appear on an "Environmental Technologies List".</i></p>
	<p>Governments can facilitate development programmes, business partnerships and information networks that foster equal opportunities and participation of women and men in international investment.</p> <p><i>Example: CINDE in Costa Rica conducted a survey for MNEs to assess the impact of the pandemic on woman employed by foreign investors.</i></p> <p><i>Example: Cote d'Ivoire established an exchange platform with women entrepreneurs to identify the particular challenges that they face.</i></p> <p><i>Example: India's IPA established a dedicated development programme to address the specific challenges faced by women entrepreneurs. The programme, We Rise Together, aims to support 7,000 female-led start-ups and focuses on supporting women entrepreneurs to better negotiate with investors, develop their "go-to" market strategy and protect their ideas.</i></p>
	<p>Governments can acknowledge in international investment provisions gender-based inequalities including access and control of resources and power relationships that can be challenged or reinforced by FDI, and those that offer commitment, vision, strategies, or actions to challenge such inequalities.</p> <p><i>Example: The Dutch Model BIT (2019) Article 6(3) provides that 'The Contracting Parties emphasize the important contribution by women to economic growth through their participation in economic activity, including in international investment. They acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth. This includes removing barriers to women's participation in the economy and the key role that gender-responsive policies play in achieving sustainable development. The Contracting Parties commit to promote equal opportunities and participation for women and men in the economy. Where beneficial, the Contracting Parties shall carry out cooperation activities to improve the participation of women in the economy, including in international investment.</i></p>

	<p>Governments can include Articles in international investment agreements encouraging sustainable development goals such as climate-neutral and gender equal FDI. (For a possible formulation of such provisions see sample text 10.)</p>
	<p>Investors can sign and observe internationally recognized guidelines of responsible business conduct.</p>
	<p>Investors (above a certain size) could be encouraged to establish CSR committees and to dedicate a percentage of revenue to CSR activities.</p> <p><i>Example: The Indian Foreign Contribution (Regulation) Act.</i></p>
	<p>The ISO 26000:2010 standard provides guidance on social responsibility.</p>
	<p>Governments and specifically IPAs can adopt a number of specific, targeted investment measures in support of sustainable development goals. Aftercare services should be designed to enhance the support in sustainable FDI.</p> <p><i>Example: Egypt has investment facilitation measures for investors that contribute to sustainable development and implement responsible business conduct standards.</i></p> <p><i>Example: There are a number of city IPAs that have adopted specific strategies and measures for investment to contribute to sustainable development. Three notable examples include Invest in Bogota, Dubai FDI, and Wesgro (the tourism, trade and investment promotion agency for Cape Town and the Western Cape). Some of the targeted measures that these agencies have adopted include: providing information on key strengths in sectors with high sustainability impact; providing data to benchmark location competitiveness in FDI sectors with sustainable development potential; branding, public relations and media promotion of the location as a destination for FDI with sustainable development impact; developing investment brochures, flyers and presentations for promoting FDI in sectors and activities with sustainable development impact; establishing or designating a dedicated team to promote FDI in SDG-related sectors; providing clearly defined profiles of bankable projects in which foreigners can invest; building strategic investor target databases that identify specific target companies that will contribute to sustainable development; visiting trade shows and specialized industry events that focus on sustainable development sectors; and carrying out aftercare activities to encourage existing investors in the location to adopt sustainability standards or to increase their sustainability impact.</i></p> <p><i>Example: Cape Verde grants an income tax credit to investors for each employee hired for a minimum of 12 months, and a state allowance of up to 50% of the salary received by at least two employees, provided that the taxpayers create five jobs or more.</i></p>
	<p>IPAs should develop a marketing and investment facilitation strategy with clear goals and addressed to targeting sustainable FDI.</p> <p>Such strategy could include promoting green FDI, gender-inclusive linkages between MNEs and the local economy, and quality employment, by identifying opportunities where investment projects can have a positive impact on the environment, gender equality and employment.</p>

	<p>Governments should ensure that image-building activities reflect national commitments to SDGs.</p> <p><i>Example: Myanmar established a government body for promoting quality investment and now allows foreign companies and joint ventures to purchase shares on the Yangon Stock Exchange.</i></p> <p><i>Example: The Costa Rican Investment Promotion Agency (CINDE) includes sustainable development as part of its value proposition as an investment destination. The IPA engaged in an analysis of how its work could contribute to Costa Rica's SDG priorities and has started to integrate the SDGs into its investment impact evaluation strategy.</i></p>
	<p>Governments could offer “red carpet” service for investments that will have a significant positive sustainable development impact in host countries.</p> <p>Two models of “red carpet” service are possible. In the first model, an investor reports on a periodic basis how much money has been invested in the country or shows a proven track record of investments and their benefits for the economy and subsequently receives “red carpet services”. According to the second model, the investor receives red carpet services before investing, by committing to invest in a way that will bring certain levels of benefit to the economy (e.g., a certain number of jobs). Key account support can involve one number to call and a dedicated officer to trouble shoot issues as they come up. Some called these investors “platinum investors” because they brought more benefits to the economy than others.</p> <p><i>Example: South Africa's InvestSA has a network of stakeholders across government departments, regulatory agencies and the private sector to fast-track investments with complicated requirements. Through this network, InvestSA was able to promptly facilitate a long-stalled recycling project and unlock a series of expansions and new projects with Mpact Limited.</i></p> <p><i>Example: Romania extended its state aid scheme to support investments that promote regional development through job creation until 2028.</i></p> <p><i>Example: Shanghai published regulations for promoting R&amp;D. Under the regulations, eligible foreign-funded R&amp;D centres can benefit from policy support measures, including customs clearance facilitation for cross-border R&amp;D, cross border financial services facilitation, talent acquisition and development, funding support, tax cuts, participation in government projects, facilitation of environmental assessment and hazardous waste management, facilitation on land use for R&amp;D purposes, and protection of intelligent property rights.</i></p> <p><i>Example: North Macedonia published the Law on Strategic Investment. Under the law, strategic investments are entitled to special treatment. The investment must be made in one of the following SDG sectors: energy, transportation, telecommunication, agriculture and food, forestry, or the water economy, health, technological parks, water and waste management, science and education.</i></p>
	<p>IPAs can provide aftercare services that are targeted to facilitate SDG reinvestment.</p> <p><i>Example: Invest SA focuses on aftercare services and promotes re-investments with high sustainable impact.</i></p> <p><i>Example: “Measure what matters” is an aftercare service of Invest Chile to foreign companies focused on improving the sustainability of their operations by helping them measure their ESG impact, including the evaluation and implementation of gender</i></p>

	<p><i>equality policies and training for foreign companies on gender equality and women's empowerment.</i></p>
	<p>About 100 developed and developing countries have tax incentives and also other programmes to advance the SDGs. Clear criteria for incentives help focus the targeting strategies of investment authorities.</p> <p><i>Example: The Republic of Korea restructured tax incentives to target foreign companies engaged in high-tech businesses and extended their benefits.</i></p> <p><i>Example: Côte d'Ivoire grants additional tax credits to companies in industries such as agriculture, agribusiness, health care, and tourism that are in line with its national development strategy.</i></p> <p><i>Example: Burkina Faso reduced by one quarter the threshold for incentives to invest in strategic sectors.</i></p> <p><i>Example: China expanded income tax benefits for investors, exempting them from withholding of income tax on the reinvestment of profits made in China.</i></p> <p><i>Example: Poland introduced financial incentives in order to promote the audiovisual industry. A qualification test applies to all applications and takes into account specific criteria stated in the law (audiovisual work should take place on Poland territory, Polish artists, crews and service providers participate in the production, use of Polish film infrastructures).</i></p> <p><i>Example: Mauritius elaborated an incentive-based Smart City Scheme, used to promote the transformation of rural lands into sustainable and innovative mixed-use social hubs. The incentive package includes exemptions from income tax for eight years, value added tax on capital goods, import duties on material for building and infrastructure construction, and assorted land-related taxes, as well as residence permits for purchasers of housing units over a certain value, and citizenship for non-citizen residents investing more than \$5 million in Mauritius.</i></p> <p><i>Example: South Africa has adopted a targeted measure in support of renewable energy through a cash grant of up to US\$3 million to cover 30% of the costs of a company retrofitting existing industrial facilities to use renewable energy by the purchase and installation of rooftop solar panels.</i></p> <p><i>Example: Rwanda revised the Investment Code to introduce new priority sectors and activities and adopted several new tax incentives for philanthropic investors, angel investors or strategic investment projects.</i></p>
	<p>IPAs can collaborate with different governmental agencies, academic institutions, host countries, international organisations and the private sector to facilitate investment in SDGs, such as green FDI, gender and quality employment.</p> <p><i>Example: The Kenyan IPA, KenInvest, and the World Wide Fund for Nature Kenya country office developed a national Green Investment Guide. The guide aims to inform and orient investors willing to invest in the country by promoting green business opportunities; clarifying national policy and legal requirements; and assessing investment concerns related to clean development mechanisms, biological diversity, waste management, occupational health and safety, and low-carbon development.</i></p> <p><i>Example: The Global Investor Coalition on Climate Change is a collaboration among Asia Investor Group on Climate Change, Ceres, the Investor Group on Climate Change, and the Institutional Investors Group on Climate Change. The coalition provides a global platform for dialogue between and among investors and governments to accelerate low-carbon investment practices, corporate actions on climate risk and opportunities.</i></p>



	<p><i>Example: Invest SA facilitated the expansion of Procter and Gamble's operations in the country, which included a project to establish a local zerowaste-to-landfill site and energy-saving plant to produce sanitary pads. The project included a public commitment by the company to deliver puberty education to 1.5 million girls in South Africa, as well as free sanitary pads to 13,000 girls every year. Procter and Gamble has also engaged in a partnership to upskill women-owned business and integrate them into the company's supply chain.</i></p>
	<p>Diplomats can assist in the facilitation of SDGs by handling investor enquiries and facilitating partnerships that will increase the likelihood of investment; assisting investors with investment projects in the diplomat's duty station through the provision of data on the location, relevant contact details of government departments and local businesses, as well as information on home country finance, the legal framework and investment guarantee schemes; providing aftercare: maintaining long-term relationships with key SDG stakeholders in the countries where they are posted; pursuing stakeholder feedback; and policy advocacy.</p> <p><i>Example: The commercial counsellor based in the High Commission of Namibia in Germany is an overseas representative of the country's IPA, the Namibia Investment Promotion and Development Board. As part of the embassy team, it had an active role in facilitating the establishment of the German company, Desertfoods, in Namibia. The company aims to address food security through innovative and resource-efficient farming solutions, and identified eight specific SDGs that its activities are aligned with. Facilitation of the SDG-related investment included the commercial counsellor providing data on the agronomic product consumption in the country to analyse the market potential in Namibia. The work of the commercial counsellor also involved facilitating partnerships, both internationally as well as at the local level.</i></p>
	<p>Investment measures and procedures should have safeguards against corruption and conform with the intergovernmental standards of the Financial Action Task Force.</p> <p>Technical assistance should be provided to developing countries and especially LDCs to enhance their ability to facilitate more sustainable FDI, based on need assessments.</p>
<p>V.2 Linkages with the host economy</p>	
<p>Rationale</p>	<p>Connecting foreign investors to domestic suppliers of goods and services facilitates their investment decision and activities.</p> <p>Supplier linkages provide direct benefits to contracted firms, while also dispersing the benefits of investment widely within the domestic economy, thereby enhancing the development dimension of investment.</p>
<p>Implementation</p>	<p>Build and maintain a database of local enterprises to help new and established foreign investors identify potential subcontractors as part of the onboarding and aftercare activities. Databases should include sustainability information to facilitate sustainable FDI. Such databases should seek to ensure the inclusion of under-represented groups, including women, indigenous peoples, youth, and minorities. Local associations can help identify qualified local enterprises. This is especially important for SMEs having to navigate domestic and regional markets. Examples of supplier databases include Ireland and Costa Rica. Database information should be freely available to all. (For a possible formulation on 'Domestic Supplier Databases', see sample text 11.)</p>

	<p><i>Example: The Council for the Development of Cambodia is setting up a supplier database with sustainability characteristics with the support of the World Economic Forum.</i></p> <p><i>Example: Oman established an investment portal designed to enable local companies to attract foreign investors worldwide.</i></p>
	<p>Include in database information on FDI projects, thereby facilitating matchmaking between new and established foreign investors and domestic firms, as part of the onboarding and aftercare activities.</p> <p><i>Example: Invest India has compiled a pipeline of nearly 4,000 projects in nearly three quarters of India's 686 districts. This pipeline is accessible as an online searchable database.</i></p> <p><i>Example: Haiti has smart talent platform to connect foreign companies with certified suppliers and providers.</i></p>
	<p>Develop with other national agencies, private sector associations, academia, and international organizations supplier-development programmes to increase the number and capacity of qualified local enterprises that can contract with foreign affiliates. Such development programmes can prioritise the inclusion of under-represented groups, including women, indigenous peoples, youth, and minorities. There may be potential to deepen supply chains in all sectors. (For a possible formulation on 'Supplier Development Programmes', see sample text 12.)</p> <p><i>Example: The Ministry of Industry and Technology in Turkey, with the support of the World Bank and the Improving Business Environment for Prosperity programme, has developed a supplier development programme pilot that seeks to boost the competitiveness and capacity of both existing and potential local suppliers. Under the programme, participating firms will receive technical assistance and coaching focused on performance and competitiveness improvement over 24 months. An important feature of the programme is the focus on suppliers of electric and hybrid vehicle production.</i></p> <p><i>Example: Guinea established an online supplier marketplace platform. Almost 900 domestic companies (more than 100 women-owned) registered on the platform. More than 70% of requests posted have been awarded to SMEs registered on the platform.</i></p> <p><i>Example: Vietnam established a supplier development programme that led to 70% increased capacity of SMEs through the application of new standards and management tools, and 42% established new connections with MNE buyers, of which 9% became formal suppliers to MNEs.</i></p>
	<p>Partnerships can also take the form of foreign investors working with local suppliers to upgrade them, in cooperation with host and home country governments and international organizations.</p> <p><i>Example: In Pakistan's food industry, Nestlé partnered with the Swiss Agency for Development and Cooperation to train 400 farmers in best farm practices, and also with UNDP to train 4,000 women livestock extension workers.</i></p>
	<p>Promote backward investment linkages between businesses, especially between foreign affiliates and local enterprises, including through the promotion of industry clusters.</p>

	<p>Collaboration among foreign investors, domestic producers and consumers, to develop industry-specific solutions and enable industry development.</p> <p><i>Example: Huawei's ecosystem for local start-ups in France, Germany, Spain.</i></p> <p><i>Example: R&amp;D centres create backward and forward linkages, such as in the Penang Science Park in Malaysia.</i></p>
	<p>Governments can foster partnerships between foreign affiliates and local universities or other bodies to create centres of excellence for training or research and development (R&amp;D).</p> <p><i>Example: GTAI, the national German trade and investment promotion agency, assists foreign investors in looking for partnership with German enterprises or R&amp;D institutions to evaluate and test new products, which can result in further investment.</i></p> <p><i>Example: The Maharashtra Chamber of Commerce in India works with local universities to develop targeted training modules of about 2-3 months so that graduates have the skills that industry needs, thereby facilitating investment.</i></p>
	<p>Governments could promote targeted skill development in sectors of national priority to meet foreign investors' needs. A key component of IPAs onboarding and aftercare strategy could focus on skill development, by anticipating labour needs for foreign investors, including sector expansion and operational upgrade.</p> <p><i>Example: The Investment Promotion Agency of Costa Rica, CINDE, surveys the skill demand of foreign investors, bringing them together with academia in Costa Rica to design and deliver training programmes and informing students of career paths in demand. In addition, CINDE visits some investors regularly as part of its aftercare programme to enquire about the skill sets needed to meet the companies' long-term strategic goals. CINDA also facilitates linkages through a virtual platform that brings together current job offerings available at MNEs based in the country and jobseekers.</i></p> <p><i>Example: InvestPenang (a state IPA in Malaysia) follows FDI trends and provides local universities with information on the skills needed to be competitive among targeted potential investors.</i></p>
	<p>linkages can be supported through sustainable FDI projects, which can be developed through partnerships between investment authorities in host and home economies. With the growth of impact investing and other SDG-oriented investment, such efforts may help these investors find bankable projects quickly and easily.</p>
V.3 Build constructive stakeholder relationships	
Rationale	<p>Constructive stakeholder relationships enable businesses to help shape a productive investment environment, ensures problems can be dealt with expeditiously, strengthens private-public sector partnerships, and enables businesses to operate in a more socially responsible manner.</p> <p>Some IPAs may not have the specialized expertise to develop and implement a comprehensive sustainable FDI strategy.</p>
Implementation	<p>Establish and maintain mechanisms for regular consultation, effective dialogue and collaboration with stakeholders to identify and address issues encountered by investors and affected communities.</p>

	<p>Establish and maintain a mechanism to provide interested parties with the opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation and with sufficient advance notice to be able to provide input.</p>
	<p>Share among Member states experiences of successful stakeholder consultative mechanisms and public private dialogues, to take advantage of information on successes and problems encountered by established investors.</p>
	<p>Promote the role of policy advocacy within IPAs as a means of addressing the specific investment problems raised by investors, including those faced by SMEs and underrepresented groups such as women. In this respect, IPAs should engage in partnerships and programmes, and undertake independent surveys that aim to strengthen data on SMEs and underrepresented groups.</p>
	<p>Build partnerships with stakeholders to assist with capacity building both within government agencies and with potential investors.</p> <p><i>Example: Wesgro, the official tourism, trade and investment promotion agency for Cape Town and Western Cape, collaborated with GreenCape, an NGO that supports the growth of the green economy in Western Cape. This partnership enables Wesgro to outsource specialist services to a qualified partner. GreenCape provides investors insight into the legal frameworks in the local economy and continues to provide ongoing market intelligence and support to make sure that businesses grow and remain sustainable. Together, both organisations can unlock the investment and employment potential of green technologies and services in the region.</i></p> <p><i>Example: Dubai FDI developed a global multi-stakeholder programme, Dubai Green Economy Partnership, to engage private sector investors and technology providers with government partners.</i></p>
V.4 Evaluating development impact	
Rationale	<p>Use of international standards can facilitate technical assessments (e.g., economic, environmental and social impacts).</p>
Implementation	<p>Investor commitments to adhere to international standards could be accepted in lieu of detailed reviews of plant blueprints.</p> <p><i>Example: the U.N. has guidelines for national waste management strategies.</i></p>
	<p>The International Organization for Standardization (ISO) has certifications for management.</p> <p><i>Example: ISO 14001:2015 specifies requirements for environmental management. ISO 20887:2020 specifies sustainability requirements for buildings and civil engineering works.</i></p>
	<p>Public-private partnerships have developed standards.</p>

	<p><i>Example: LEED (Leadership in Energy and Environmental Design) certification for buildings.</i></p>
	<p>The ILO has international standards on occupational safety and health, and related guidelines.</p> <p><i>Example: Uruguay's Ministry of Finance modified the rules governing free zones based on discussions between the government, users and tax authorities, while alienating the regime with international standards for the prevention of harmful tax practices, particularly the recommendations of action 5 of the OECD/G20 BEPS project.</i></p>
V.5 Evaluating large-scale investment proposals	
Rationale	Recourse to external expertise can facilitate proper project evaluation.
Implementation	<p>A central coordinating body could facilitate evaluation and approval of large and complex investments, by bringing together different relevant government departments to reach a common position.</p>
	Impact assessments should be used for the ex-ante evaluation of large investment projects to ensure they align with development goals.
	<p>Project evaluation assistance is available in the private sector for a fee.</p> <p>Assistance is also provided on a concessional basis from non-governmental and intergovernmental organizations. (See sample text 13 for a provision on investment project-evaluation assistance.)</p> <p><i>Example: Assistance is provided by the African Legal Support Facility, the CONNEX Support Unit, the International Senior Lawyers Project, and the Investment Support Programme for Least Developed Countries of the International Development Law Organization.</i></p>
V.6 Public-private partnerships	
Rationale	Large projects, to be commercially viable, may be packaged as public-private partnerships.
Implementation	<p>If properly designed public-private partnerships (PPPs) can facilitate investments in infrastructures and sustainability projects.</p> <p>There are many measures to take into consideration for an effective implementation of public-private partnerships. A regulatory framework could assist in effectively executing such partnerships.</p> <p><i>Example: Viet Nam passed the Law on Public-Private Partnership Investment, which regulates investment activities under the PPP model. The law focuses on five essential areas: transportation, power grid and plants, irrigation, clean water supply, water and waste treatment, healthcare and education, and information technology infrastructure.</i></p>

	<p>Projects should be vetted in stakeholder consultations, involving local industry and community associations.</p> <p><i>Example: India's Model Concession Agreement for PPP projects at major ports will be recast based on suggestions from the "existing/prospective investors/PPP concessionaires/individuals/stakeholders".</i></p>
	<p>Establishing a separate unit for PPPs should be considered.</p> <p><i>Example: Abu Dhabi enacted a law designed to encourage private sector involvement in housing, infrastructure and education projects. The law formalizes the establishment of the Abu Dhabi Investment Office driving FDI and gives it the mandate to lead the United Arab Emirates public-private partnership programme.</i></p> <p><i>Example: Uzbekistan set up a legal framework to regulate public-private partnerships, with fiscal benefits provided for key private partners, and established a presidential advisory body for investment.</i></p>
V.7 Home-country measures <sup>157</sup>	
Rationale	Home country governments can play a role, in addition to host country governments, to facilitate and support sustainable FDI flows.
Implementation	<p>Home countries can have clear criteria linking or conditioning their support measures (including with information, loans, grants, guarantees, political risk insurance, preferential trade access) to a positive development impact in host economies or the absence of a negative impact, such as through ex ante environmental and social impact assessments (For a possible formulation on transparency of home country measures, see sample text 14.)</p> <p><i>Example: Under the German investment guarantee scheme, an investment needs to fulfil certain conditions to be eligible, such as positive effects on the host country. These can be manifested by the substitution of imports, the creation of jobs with high social standards or the implementation of modern, environmentally friendly technologies. Another essential aspect of the eligibility is the legal impact of environmental, social and human rights regulations on the project.</i></p> <p><i>Example: The United States Overseas Private Investment Corporation, which has since become the United States International Development Finance Corporation, provides green guarantees.</i></p> <p><i>Example: The Netherlands Enterprise Agency supports companies doing business in international, innovative, sustainable, and agrarian activities. It fosters international private sector investments in developing countries through financial tools and information on markets and regulations, along with the identification of international business partners. In 2014, the Dutch Good Growth Fund was established, partly managed by the agency. It is aimed at assisting SMEs and start-ups in the Netherlands with investments in 68 emerging markets by providing loans, guarantees and indirect participation up to €10 million.</i></p>

<sup>157</sup> For detailed information, see Jan Knoerich, Matthew Stephenson and Heather Taylor-Strauss, "Outward FDI Policy Toolkit for Sustainable Development" (King's College London, UNESCAP and WEF, 2021), <https://artnet.unescap.org/ofdi>, and Karl P. Sauvant, Persa Economou, Ksenia Gal, Shawn Lim, and Witold Wilinski, "Trends in FDI, Home Country Measures and Competitive Neutrality", *Yearbook on International Investment Law & Policy 2012-2013* (New York: Oxford University Press, 2014), pp. 3-107, SSRN: <https://ssrn.com/abstract=2814307>.

	<p>Home countries should establish institutional arrangements to manage outward FDI policy and provide home country measures that promote SDGs, such as gender equality, green FDI and quality employment.</p> <p>A main coordinating institution can be assigned by the government and given primary responsibility for outward foreign direct investment (OFDI), given that home-country measures are generally provided by many different governmental institutions, including different ministries, investment and trade promotion agencies, export credit agencies, development finance institutions, and special-purpose institutions (e.g., regarding innovation). The coordinating institution can function as a “one-stop shop” for OFDI-related services.</p> <p>OFDI responsibility can be placed in the same agency as that which is responsible for inward investment, with no separation between the two: this would allow the pooling of resources and expertise, but it may lead to confusion between inward and outward investment functions, and challenges of prioritization between the two.</p> <p>Another option is for OFDI responsibility to be in a different agency from that which is responsible for inward investment. Especially in developing countries, situating OFDI coordination within an export promotion agency can be beneficial, as exports and internationalization through OFDI are often interlinked.</p> <p><i>Example: Innovation Norway, Norway’s outward investment promotion agency, has an overseas office in Brazil and is implementing programmes to facilitate the impact of Norwegian MNEs investing abroad on gender equality.</i></p> <p><i>Example: The Netherlands Enterprise Agency supports companies that do business in international, innovative, sustainable, and agrarian activities. The Agency provides financial tools, technical support and substantial knowledge and information on developing countries to international investors. The Agency also manages the “Dutch Good Growth Fund” that aims to stimulate private investment by Dutch SMEs in 68 developing countries, by providing loans and guarantees for SMEs that contribute to increasing local employment opportunities, expanding local production capacity and promoting knowledge transfer.</i></p> <p><i>Example: The development finance institution of the United States, the Overseas Private Investment Corporation (OPIC), provides investors with financing, political risk insurance and support for private equity investment funds. Part of OPIC’s review and selection includes an assessment of human rights and corporate social responsibility. In addition, OPIC undertakes thorough project monitoring and evaluation of the expected host country impacts.</i></p> <p><i>Example: Spain’s Institute for Foreign Trade/España Exportación e Inversiones (ICEX) promotes Spanish exports, inward FDI and outward FDI. At the same time, a number of other institutions provide home-country measures, including CONFIDES (Compañía Española de Financiación del Desarrollo) that finances outward FDI projects, Instituto de Crédito Oficial (ICO) that provides development finance, and the Centre for the Development of Industrial Technology (CDTI), a special-purpose institution under the Ministry of Economy, Industry and Competitiveness that fosters technological development and innovation in Spanish companies.</i></p> <p><i>Example: The Republic of Korea’s Korea Trade-Investment Promotion Agency (KOTRA) provides support related to exports, inward FDI and outward FDI. For internationalisation, its focus is in supporting Korean SMEs.</i></p> <p><i>Example: Thailand’s Board of Investment, which is the country’s IPA, has a division responsible for OFDI, the Thai Overseas Investment Promotion Division. It also focuses on SMEs.</i></p>
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	<p>Home countries can put in place regulations on OFDI, including restrictions and requirements. Home countries can ensure that any restrictions on OFDI are the least burdensome possible to achieve their policy objectives, and can remove unnecessary restrictions.</p> <p>Restrictions on OFDI primarily come in two forms: approval procedures that require companies to first seek approval for their investment from a government agency, which will normally vet the proposed investment according to specified criteria; foreign exchange controls that aim to limit or control investors' access to foreign currencies and the maximum amount they can invest abroad, to manage foreign exchange and ensure monetary and financial stability.</p> <p>Home countries can adopt requirements that OFDI be carried out in accordance with standards of responsible business conduct.</p> <p>A first step is often the development of voluntary codes of conduct for OFDI.</p> <p>Home countries can require reporting on OFDI, and using this information to monitor OFDI activities, including whether this investment is sustainable FDI.</p> <p>Example: China's Ministry of Commerce has a "Registration System for Overseas Chinese Invested Enterprises"; it provides "<a href="#">Going Out Policies and Regulations</a>" guidelines and carries out a <a href="#">Joint Annual Inspection of Overseas Investment</a>. China also provides guidance on how OFDI should follow good environmental practices through the <a href="#">Announcement by China's Ministry of Commerce and Ministry of Environmental Protection on Environmental Protection in Foreign Investment and Cooperation</a>, 4 March 2013, and the <a href="#">Announcement of the Guidelines for the Sustainable Management and Utilization of Overseas Forests by Chinese Enterprises</a>, 1 June 2009.</p> <p><i>Example: South Africa's Department of Trade and Industry published in 2016 voluntary guidelines for its firms to invest responsibly and sustainably in the African continent: "Guidelines for Good Business Practice by South African Companies Operating in the Rest of Africa".</i></p>
	<p>Home countries can provide early support services for OFDI, including information on host countries, OFDI processes and opportunities and available home-country measures (HCMs).</p> <p>Information is often provided in the form of publications, reports and databases. Information on host countries covers the characteristics of potential target countries, including their economic conditions, industries and the quality of the investment environment, e.g., details about investment laws and regulations, support measures, available infrastructure, strategic sectors, industry clusters, and distribution networks. Information about specific (market and sector) opportunities can also be provided. Information on the OFDI process includes information on financing, legal aspects and other laws and requirements in both the home and host countries. Information on HCMs should also be made available to potential investors so that they are aware of the support that can be provided as they consider, or undertake, investment abroad.</p> <p>Additional early support services include investment missions, matchmaking services, training, and consultancy/advisory services on OFDI, including through feasibility studies.</p> <p>Such missions aim to provide interested companies with an opportunity to explore the investment conditions and opportunities in countries of interest. Matchmaking services can then support interested companies in establishing networks with governments and businesses in host countries. This can take place through both facilitating connections with governments and businesses overseas and through maintaining business matchmaking databases. Consultancy/advisory services involve helping firms with</p>



	<p>planning OFDI and the associated strategic considerations. This can also include the preparation of feasibility studies.</p> <p><i>Example:</i> The Japan External Trade Organization (JETRO), the country's IPA, provides <a href="#">information on OFDI</a>, business support and human resources development. ETRO also operates an international business <a href="#">matching site</a>.</p> <p><i>Example:</i> KOTRA's <a href="#">Korea Investment Company Support Centre</a> provides information on overseas investment, consultation support by experts and seminars and opportunities for overseas networking with governments and other organizations.</p>
	<p>Home countries can provide financial support for OFDI, whether in the form of grants, loans, equity participation, or financial guarantees or the repayment of loans.</p> <p>Grants can include funds for pre-investment feasibility studies and research, cover the establishment of offices overseas to enable initial exploration before a final decision is made on the full implementation of an investment project, training to prepare staff and managers for overseas posts, and consultancy and other advisory support for OFDI projects.</p> <p>Loans can be structured in many different ways, whether concessional loans, non-concessional loans or structured finance (e.g., linking repayment to the success of the OFDI project, or converting loans to shares in OFDI ventures). Risk-sharing arrangements are advisable between the home country government and home country firms, to make sure financial support is warranted and efficiently provided.</p> <p>Equity participation usually involves the ownership of a minority stake in foreign affiliates. Exit options may be included in the arrangement to allow the investing company to repurchase the shares from the government.</p> <p>Financial guarantees on the repayment of loans could be offered by governments to private lenders to reduce the risk to the latter when they agree to fund specific OFDI projects. Such assurances enable private lenders to make more capital available to support OFDI projects.</p> <p><i>Example:</i> Canada's <i>Export Development Canada</i> offers <a href="#">direct lending</a> as well as <a href="#">structured and project finance</a> to support companies to expand overseas and deliver projects abroad, as well as <a href="#">financial guarantees</a> on loans to carry out OFDI.</p> <p><i>Example:</i> Malaysia's Ministry of International Trade and Industry, through MATRADE, offers <a href="#">grants</a> to support the establishment of OFDI projects, while Malaysia's Exim Bank provides <a href="#">financial support</a> for Malaysian investors overseas.</p> <p><i>Example:</i> Germany's DEG, part of the state financial institution KfW, offers <a href="#">loans and equity investments</a> to firms investing in developing countries.</p>
	<p>Home countries can provide fiscal support for OFDI, whether in the form of tax reductions, tax relief, tax deductions, tax deferrals, tax credits, or allowances.</p> <p>Fiscal support offers governments an opportunity to incentivise OFDI activities that are in line with sustainability, as well as national development goals, or disincentivise those that are not.</p> <p><i>Example:</i> Malaysia provides tax incentives on pre-OFDI <a href="#">business expenditures</a>, as well on <a href="#">acquiring foreign firms</a>.</p> <p><i>Example:</i> Singapore has a host of tax incentives for <a href="#">firm internationalization</a>.</p>
	<p>Home countries can provide political risk insurance for OFDI.</p>

	<p>Political risk insurance commonly covers non-commercial risk, including unlawful host-government interference and breach of commitments by the host country government, such as nationalisation, expropriation, embargoes, and preventing the transfer of funds out of the host country. It also insures against circumstances that might jeopardise an investment, such as war, armed conflicts and political violence.</p> <p><i>Example: The India Export Credit Guarantee Corporation offers <a href="#">‘Overseas investment insurance’</a>.</i></p> <p><i>Example: Belgium’s Credendo offers <a href="#">political risk insurance</a> for OFDI.</i></p> <p><i>Example: Russia’s Export Insurance Agency of Russia offers <a href="#">political risk insurance</a> for OFDI.</i></p> <p><i>Example: The United States International Development Finance Corporation offers <a href="#">political risk insurance</a> for OFDI.</i></p>
	<p>In addition to political risk insurance for OFDI that may be provided by national governments, the Multilateral Investment Guarantee Agency (MIGA), part of the World Bank Group, offers <a href="#">political risk insurance</a> to firms from Member countries; hence, countries may not need to provide this home country measure directly for it to be available for their firms and thus facilitate OFDI.</p>
	<p>Home countries can provide operational support to facilitate OFDI. This can include facilitating establishment in a host country, political and diplomatic backing and coordination with the host country government.</p> <p>Home countries can use foreign offices (consulates, foreign offices that are staffed by investment professionals, embassies) to facilitate outward FDI.</p> <p>Facilitating establishment in host countries might include finding ways for investors to overcome entry barriers and other bureaucratic hurdles. This might also involve troubleshooting regarding issues and problems with an investment, including support in addressing investor grievances. Coordination with the host country government can involve coordination on investment promotion and facilitation with a host country’s investment promotion agency, or the establishment of a collaboration platform between home and host country institutions to facilitate knowledge sharing, policy advocacy and two-way investment flows.</p> <p>Operational support to facilitate OFDI can also include mobilising domestic support for OFDI and providing auxiliary services overseas.</p> <p>Home country governments can facilitate OFDI by encouraging inter-firm collaboration on OFDI, e.g., by internationalising together, especially when firms may lack the capacity to go it alone. The home country government can also facilitate OFDI by encouraging banks and financial institutions to finance or otherwise support OFDI.</p> <p>Auxiliary services can involve mobilising service providers to establish their own presence in host countries, to directly support outward invested firms and their affiliates on the ground. Auxiliary services can also involve establishing centres or industrial parks in host countries to make it easier for home country firms to establish foreign affiliates.</p> <p><i>Example: Spain’s Centre for the Development of Industrial Technology has a <a href="#">network of overseas representatives and offices</a> to support the international technological activities and cooperation of Spanish companies.</i></p> <p><i>Example: Poland’s Investment and Trade Agency has a network of over 60 representatives around the world who provide operational support to Polish firms when they internationalise.</i></p>

	<p><i>Example: China and Malaysia have cooperated on facilitating OFDI through joint operational support provided by the <a href="#">Malaysia-China Business Council</a>, which facilitates coordination among enterprises of both countries, including through business information and advisory services and by helping to find solutions to issues and problems when they arise.</i></p>
	<p>Home countries can adopt measures that maximise the benefits of OFDI to home countries, and thus facilitate long-term growth of OFDI.</p> <p>This can include measures to boost absorptive capacity in the home country and among its firms. Strengthening absorptive capacity is important to ensure that the know-how and technologies repatriated from overseas investments to the home country can be effectively assimilated into domestic innovation systems and economic activities.</p> <p>This can also include measures to promote the competitiveness of the home country and its firms, which could involve science and technology policies, investment in human capital development and funding innovation.</p> <p>It can include measures promoting domestic inter-firm linkages to facilitate spillover effects and the diffusion throughout the home country of capacities acquired overseas.</p> <p><i>Example: Spain's CDTI fosters Spanish companies' <a href="#">technological development and innovation</a> to improve their technological capabilities, including through promoting international technology transfer, supporting the internationalisation of R&amp;D and advancing international technology cooperation.</i></p> <p><i>Example: Japan's Innovation Network Corporation of Japan creates and nurtures key industries via <a href="#">open innovation and by overcoming the boundaries</a> between companies and industries.</i></p>
	<p>Home countries can put procedures in place to evaluate the effectiveness of their home country measures in facilitating OFDI and especially achieving the strategic and developmental goals sought through OFDI support.</p> <p>Feedback mechanisms need to exist for firms to relay to home country governments whether home country measures are effectively facilitating OFDI in practice. This feedback can be gathered through either surveys or listening sessions.</p> <p>Evaluation can be undertaken through data analysis of quantitative and qualitative indicators, especially to see which home country measures are actually being used in practice, and in what ways. This may allow the finetuning and further targeting of home country measures so that home countries can even more effectively and efficiently facilitate OFDI.</p> <p><i>Example: China has put supervision procedures in place to evaluate the overseas performance of Chinese investments.</i></p> <p><i>Example: Thailand's Board of Investment, Thai Overseas Investment Promotion Division, organises listening sessions as part of its training activities and seminars.</i></p>
	<p>Feedback by nongovernmental organizations can inform home country governments on innovative ways to advance sustainable development goals.</p> <p><i>Example: The Swiss HELVETAS advocates responsive outward polices.</i></p>

## VI. Coordination and cooperation

VI.1 Dispute prevention	
Rationale	<p>Avoiding disputes is key to facilitating investment. In addition to potential loss of existing investment, a large part of investment is reinvestment by existing investors, and if they get embroiled in disputes, they may not reinvest. Moreover, prospective investors speak with existing investors to understand the de facto investment climate, and so avoiding disputes is key for existing investors to communicate a welcoming investment climate.</p> <p>Fair rules and their effective implementation are important to address investor issues before they escalate into legal disputes. Such a system wins investor confidence and facilitates investment.</p>
Implementation	<p>Tracking complaints through an investment grievance mechanism or an “early warning system” to catch problems early – before they escalate into disputes or even formal grievances – are useful mechanisms to consider. Complaints could be registered in a database, and the information about the nature of complaints should be circulated (in anonymous form) to the relevant offices. (See sample texts 15 and 16 on an Investment Grievance Mechanism and an Investment Alert Mechanism.)</p> <p><i>Example: China has mechanisms to strengthen the procedure for handling complaints from foreign affiliates by broadening the scope of possible grievances.</i></p> <p><i>Example: Iraq establishment an investor grievance mechanism within the Basra Investment Commission.</i></p> <hr/> <p>The investment grievance mechanism can be a separate channel to deal with investment-related grievances within the overall administrative review process, as otherwise investor complaints can get stuck in a very lengthy review of administrative decisions. Timeliness of the appeal mechanism and decision should be provided.</p> <p><i>Example: KOTRA assigns ‘home doctors’ to give special attention to investors experiencing business difficulties and having complaints. They provide preventive care by reviewing specific rulings (e.g., tax, visa, labour, property) and check the validity of regulations.</i></p> <p><i>Example: The Hungarian Investment Promotion Agency enables investors to provide feedback and mediates between government and business using such business input.</i></p> <hr/> <p>Training sessions specialized in civil complaints and for ombudsperson should be arranged for relevant officials and organizations.</p>

VI.2 Ombudsperson	
Rationale	<p>Provides additional recourse outside the normal administrative process.</p> <p>Establishing an ombudsperson-type mechanism shows capacity for introspection.</p> <p>Encourages investor retention and reinvestment.</p> <p>Difficulties are unavoidable but early resolution can avoid escalation into disputes and costly outcomes, both in terms of financial settlements and relationships and reputation.</p>
Implementation	<p>The ombudsperson is a respected and independent actor empowered to resolve investment issues and avert escalation into investment disputes. The ombudsperson informs relevant government institutions of serious complaints and urges amicable resolution.</p>
	<p>The authority of the ombudsperson is based on its tact, independence and collaboration in diffusing complaints before they become grievances, thus preventing disputes.</p> <p><i>Example: The ombudsperson of the Republic of Korea is a designated neutral facilitator who provides confidential and impartial assistance in resolving grievances and disputes. The ombudsperson investigates complaints, reports finding, and mediates fair settlements between individuals, group of individuals and institutions or organizations. Importantly, the ombudsperson is connected to, but independent from, line ministries, being appointed by the President of the country. The ombudsperson also helps to identify potential areas of grievances and address them early.</i></p>
	<p>The ombudsperson may recommend improvements in administrative procedures, including by tracking patterns of complaints over time to detect their source. (See VI.1 Dispute Prevention, including sample text 16 on an Investment Alert Mechanism).</p>
	<p>The ombudsperson office could be equipped with an online platform to receive communication from investors.</p>
	<p>Note: Even if not availed, the presence of an ombudsperson is comforting.</p>
VI.3 High-level national coordinating body	
Rationale	<p>Provides coordination within the government where decision-making is distributed among departments and regional offices. This not only sets the tone, sends signals, and leads/issues investment policy and FDI strategy for the country, it also must make sure all stakeholders contribute to the improvement of the investment ecosystem</p>
Implementation	<p>To ensure coordination within the government, a high-level coordinating body should be appointed to oversee efficient processing of investment matters. The body should have authority to intercede with government units and to reconcile differences in administrative appraisals.</p> <p><i>Example: Oman issued a Royal Decree to reorganize the Public Authority for Investment Promotion and Export Development. The decree gives power to the chairperson to design an overall investment framework that is consistent with the general policy of the state.</i></p>

	<p><i>Example: Chile issued a new Framework Law for Foreign Investment that established the Foreign Investment Promotion Agency which is the only body authorized to implement state policy to attract all types of foreign capital and investment, and it works in coordination with the country's regional governments.</i></p> <p><i>Example: China established a comprehensive service mechanism whereby municipal and district commerce departments take the lead in responding to cross-departmental and cross-regional issues raised by foreign investors and foreign affiliates.</i></p> <p><i>Example: Ethiopia established a high level Inter-Regional Council to coordinate federal and regional state investment authorities with respect to synchronizing and simplifying administration; providing oversight; and addressing major difficulties identified by investors.</i></p>
VI.4 Domestic regulatory coherence	
Rationale	More generally, apart from particular complaints, there is utility in assessing how well investment facilitation measures and procedures work in practice, and in providing feedback to policymakers on possible ways to strengthen the overall coherence of the policy regime.
Implementation	Conduct periodic assessments of the Investment Facilitation Framework's impact on actual investments, especially considering the needs of SMEs.
	Establish an inter-agency coordination mechanism for domestic regulatory coherence in areas of overlapping jurisdiction, which will help with implementation of investment facilitation measures. <i>Example: The United Arab Emirates established an FDI unit within the Ministry of Economy that is mandated to propose and implement FDI policies.</i>
	Establish mechanisms to enhance coherence between national and sub-national IPAs activities.
	Establish a mechanism for public-private dialogue to inform regulation and implementation, such as a standing quarterly meeting. <i>Example: Cambodia established the Government-Private Sector Forum as a standing body chaired by the Prime Minister to address investor issues. It is operationalized through 13 working groups that cover different sectors, each one co-chaired by a minister and the representative of an industry association.</i>
	Conduct investor perception surveys. Survey results enables IPAs and respective governments to enhance their services to investors. <i>Example: Belize, Bulgaria, Germany, Guinea, Madagascar, Moldova, the United Arab Emirates, and the United Republic of Tanzania IPAs all undertake investor surveys. Japan External Trade Organization surveys the activities of its outward investors.</i>
	Bring together investors and related stakeholders to openly address practical issues of implementation and clarify areas of confusion.  A government mechanism for airing and addressing investor and other stakeholders' concerns and complaints should be available, operating impartially, openly and accessible to all.



	<p><i>Example: KenInvest’s portal allows users to report problems and complain online if they witness unlawful or irregular behaviour. The portal also receives comments and suggestions from the public, which helps to improve public-private dialogue on investment.</i></p> <p><i>Example: The Tunisian Investment Authority produces yearly reports of the main challenges investors face, and proposes reforms to a Strategic Council on Investment, chaired by the Prime Minister.</i></p>
	<p>National Investment Facilitation Committees, similar to those for trade facilitation, are a potential platform for stakeholder participation. The establishment of such bodies should facilitate the implementation of the Investment Facilitation Framework, promote domestic coordination (including over technical assistance and capacity building) and serve as a platform of dialogue with stakeholders. Local private sector participation is invaluable to orient and improve implementation.</p>
VI.5 Cross-border cooperation	
Rationale	<p>Cooperation among investment agencies can help with peer-to-peer learning, including on experience sharing and good practice.</p> <p>Cooperation between investment agencies in home and host economies can facilitate two-way investment.</p> <p>Cooperation on trade facilitates investment.</p> <p>Cooperation among host countries facilitates regional investment.</p>
Implementation	<p>Facilitate the creation of partnerships between investment authorities in different jurisdictions. Such cooperation could include joint business missions, promotion campaigns and roadshows, joint standing committees to help aftercare and policy advocacy, matchmaking, linkages, and supplier development programs.</p> <p>Partnerships can either be between IPAs in two different jurisdictions or between an IPA and an outward investment agency (OIA). In some cases, the function of supporting outward FDI is given to the IPA and thus the IPA is the OIA, but in some cases it is given to another agency, often the trade promotion agency.</p> <p>These partnerships can be codified through memoranda of understanding and implemented through joint activities identified by the parties as priorities.</p> <p>One example of a win-win joint activity is matchmaking of firms in their respective economies, which has been identified by firms as an important measure to facilitate their investment.</p> <p>Another example of a joint activity is the development of sustainable FDI projects, whereby the host investment authority identifies sector-based or capacity-based investment needs, and the home investment authority helps identify a potential FDI firm and ensures that any support provided is conditioned on the firm carrying out sustainable FDI. Such promotion and facilitation agenda could include enhancing the opportunities for women, including women workers and business owners, promoting green and climate-neutral investment, including eco-innovation, low-carbon technologies and energy efficiency, and developing quality employment, including training programmes and worker safety.</p>

	Investment agencies can share experience through the World Association of Investment Promotion Agencies (WAIPA), and organize bilateral assistance for peer-to-peer learning.
	Mutual recognition of standards among economies facilitates investment, especially export-oriented investment.
	Alignment of procedures and formalities with neighbouring countries, where applicable. This can include the harmonization of data requirements, documentary controls and computer systems.
	Host countries can create large regional markets to attract investment and trade.
	Cooperation within relevant UN frameworks, particularly financing for sustainable development and the programmes of action for LDCs.
	Co-operation and co-ordination with agencies and representations abroad, such as embassies and consulates. <i>Example: Egypt's IPA relies on embassies and consular offices to connect with the home country's business community.</i> <i>Example: The Polish Investment and Trade Agency (PAIH), which supports both the foreign expansion of Polish business and the inflow of FDI into Poland, is increasing the number of offices that it has abroad as part of its investment support strategy.</i>

## VII. Enhancing international cooperation

VII.1 Cooperation with multilateral organizations	
Rationale	<p>Collaboration among international organizations with investment mandates would foster an integrated approach to investment facilitation.</p> <p>Make use of regional initiatives to build investment capacity, expertise and information sharing.</p> <p>Make use of non-governmental organizations and initiatives.</p>
Implementation	<p>Intergovernmental organizations, such as UNCTAD, the WBG, ITC, UNIDO, the IDB, and OECD have competence, programs and resources. For details, see:</p> <ul style="list-style-type: none"> <li>UNCTAD: <a href="https://unctad.org/en/pages/DIAE/DIAE.aspx">https://unctad.org/en/pages/DIAE/DIAE.aspx</a>.</li> <li>WBG Investment Climate team: <a href="https://www.worldbank.org/en/topic/investment-climate/brief/investment-policy-and-promotion">https://www.worldbank.org/en/topic/investment-climate/brief/investment-policy-and-promotion</a>.</li> <li>ITC: <a href="http://www.intracen.org/itc/goals/Strengthening-trade-and-investment-support-institutions">http://www.intracen.org/itc/goals/Strengthening-trade-and-investment-support-institutions</a>) and <a href="http://www.intracen.org/piga">http://www.intracen.org/piga</a>.</li> <li>UNIDO: <a href="https://www.unido.org/our-focus/cross-cutting-services">https://www.unido.org/our-focus/cross-cutting-services</a>.</li> <li>IDB: Trade and Integration Sector: <a href="https://www.iadb.org/en/about-us/departments/int">https://www.iadb.org/en/about-us/departments/int</a></li> </ul>



	<ul style="list-style-type: none"> <li>• ESCAP: <a href="https://www.unescap.org/">https://www.unescap.org/</a></li> <li>• OECD: <a href="http://www.oecd.org/investment/">http://www.oecd.org/investment/</a>.</li> </ul>
	Other international organizations, such as the World Economic Forum, have competence, programs and resources. For details, see, the Forum's Global Investment Policy and Practice initiative: <a href="https://www.weforum.org/projects/investment">https://www.weforum.org/projects/investment</a>
VII.2 Needs assessments	
Rationale	<p>Assessing an economy's current investment facilitation capabilities is a necessary first step to determine what kind of technical assistance and capacity building support may be needed.</p> <p>Such needs assessments not only form the basis of future technical assistance, but also allows the economy to negotiate and enter into a potential framework that supports its specific circumstances and needs.</p> <p>Needs assessments can form the basis of notifying commitments to an Investment Facilitation Committee at the WTO.</p>
Implementation	<p>Technical assistance and capacity building should be channelled to provide needs assessments in two phases:</p> <ul style="list-style-type: none"> <li>• Needs assessments during the negotiations phase are structured to raise awareness of the economy's current circumstances with regards to investment facilitation and the possibility of providing support to increase its capacity through an international framework.</li> <li>• Needs assessments after the negotiations are completed are structured to help economies evaluate the levels of implementation of measures in the framework, estimate the time needed for implementation and calculate the type and magnitude of technical assistance and capacity building required for implementation.</li> </ul>
VII.3 Sharing of experiences and mutual learning	
Rationale	<p>Achieving the Sustainable Development Goals will require large, new and innovative investment.</p> <p>Sharing of experiences, including through voluntary peer reviews, would promote discovery and diffusion of innovative approaches and practice.</p>
Implementation	<p>Cooperation can be fostered through the proposed WTO Committee on Investment Facilitation, which should include inputs from the private sector and other stakeholders and can also facilitate voluntary peer review.</p> <p>Share experiences in expert meetings of UNCTAD and other relevant UN and other international bodies.</p> <p>Participate in regional fora for sharing experiences and create programmes for regional cooperation.</p>

	<p>Create open-ended working groups to explore investment facilitation issues.</p> <p>Encourage and enhance cooperation among national focal points. <i>Example: the OECD IPA Network was created to share IPA experiences and discuss good practices on investment promotion and facilitation.</i></p> <p>Technical assistance and capacity building could facilitate sharing best practices through creating a website for IPAs to submit inquiries or receive online training on how to proceed with implementation efforts.</p>
VII.4 Technical assistance and capacity building	
Rationale	Investment facilitation in developing countries, particularly the least developed, is constrained by scarce skills, imperfect institutions and weak infrastructure.
Implementation	<p>Technical assistance for investment facilitation would complement and enhance the corresponding facility of the Trade Facilitation Agreement.</p> <p>Assistance for sub-national capacity building should be provided.</p> <p>Assistance to LDCs is particularly important, given their relatively low ranking on investment facilitation indicators (see the Investment Facilitation Index of the German Development Institute).</p> <p>Technical assistance and capacity building could be coordinated through an Investment Facilitation Facility.</p> <p>Technical assistance should be provided to support all investment facilitation measures identified as useful.</p> <p>Technical assistance may include, among other things, capacity building for investment authority personnel on marketing, communications, budgeting, and planning and the exchange of staff and training programmes at the international level.</p>

## Inventory – Sample texts for investment agreements

### Sample text 1: A provision on establishing/maintaining an IPA

#### Establishment/Maintenance of an investment promotion agency

Each Member [shall establish/maintain] [is encouraged to establish/maintain/designate] an investment promotion agency (IPA). The IPA shall be established/maintained/designated according to international good practice principles or critical success factors. *Inter alia*, these include:

- a. Establishing high-level government support to FDI and the IPA;
- b. Developing an IPA strategy with a focus on competitive segments;
- c. Ensuring a clear, uncontested mandate for investment promotion;
- d. Guaranteeing a high degree of institutional and financial autonomy;
- e. Maintaining strong governance for the IPA, including a strong and active board with private-sector representation;
- f. Recruiting management and key promotion staff with strong private-sector experience;
- g. Maintaining significant and sustained financial resources;
- h. Maintaining a strong investor-centric services orientation;
- i. Developing a strong national-subnational framework.

**Note Source:** World Bank Group's research and operational experience

### Sample text 2: A sub-section 'Publication of an investment incentives inventory' in Section II of the streamlined text

#### Transparency of investment incentives

Members shall ensure transparency of their investment incentives and of the rules, regulations, policies and procedures governing such incentives. They shall publish information (ideally in English) regarding all investment incentives on a regular basis and make such information publicly available, on a non-discriminatory basis.

Each Member shall, online where possible, establish an Incentives Inventory.<sup>158</sup> The Incentives Inventory should include all incentives available to investors, including financial incentives (direct grants, cost-sharing

<sup>158</sup> Incentives policy and negotiation good practice scorecard

A. Incentives policy	<ol style="list-style-type: none"> <li>1. What are the objectives of incentives?</li> <li>2. What types of incentives are on offer?</li> <li>3. Are incentives aligned to the needs of different sectors?</li> <li>4. Are they linked to performance targets?</li> <li>5. Do these meet the objectives?</li> <li>6. Are the incentives clear to investors?</li> </ol>
B. Negotiation/Processing	<ol style="list-style-type: none"> <li>1. Who can get the incentives?</li> <li>2. Who allocates/awards the incentives?</li> <li>3. Is the negotiation process predictable and transparent?</li> <li>4. Are the incentives needed to win the project?</li> <li>5. What will be the return on investment?</li> </ol>
C. Approval	<ol style="list-style-type: none"> <li>1. What is the process for awarding incentives?</li> <li>2. Is it politicized?</li> <li>3. How speedy and fair is the process?</li> </ol>
D. Post-approval	<ol style="list-style-type: none"> <li>1. What happens after approval?</li> <li>2. Is there monitoring of performance targets?</li> <li>3. Do investors receive the incentives?</li> <li>4. Are there effective 'claw back' mechanisms if investors do not meet targets?</li> </ol>

**Note Source:** Loewendahl, Henry B. (2001), *Bargaining with Multinationals: The Investment of Siemens and Nissan in North-East England*. Houndsmills, United Kingdom: Palgrave.

schemes, lending instruments, lending guarantees, etc.), fiscal incentives (incentives related to income tax, value-added tax, customs duty, etc.) and in-kind transfers (including non-financial incentives).

The inventory shall comprise a comprehensive listing of all incentives offered, including:

- a. Eligibility criteria;
- b. Nature of the benefit;
- c. Legal sources;
- d. Application process, including forms and documents;
- e. Contact information, and uniform resource locators (URL) if any, of relevant competent authorities and of the [enquiry point(s)] [contact/focal points] referred to in paragraph[s];
- f. Other information that the Member considers to be useful for investors.

**Note Source:** Research by the World Bank Group

### Sample text 3: Section on the administration of incentives, promoting the use of 'smart' incentives

#### Administration of incentives

Each Member shall administer incentives using the following principles. Incentives should be:

- a. Used sparingly to address targeted market failures, and after considering other instruments and the opportunity costs;
- b. Conceived with clearly defined and articulated policy objectives;
- c. Precisely tailored so the benefits are tied directly to the intended objective (e.g. by using performance-based instruments);
- d. Clearly laid out in the relevant law in the case of tax incentives, ideally the tax code;
- e. Offered with no or minimal discretion, providing clear eligibility criteria;
- f. Administered in a streamlined manner (through an automatic system in the case of tax incentives);
- g. Designed to minimize distortions to competition;
- h. Targeted to investors who are responsive to incentives, like efficiency-seeking FDI in the context of investment promotion;
- i. Cost-efficient based on an evaluation of the costs and benefits (examining expenditures and additionality);
- j. Systematically monitored and evaluated to assess whether the schemes are effective at achieving their intended objectives. Each Member shall evaluate the effectiveness of incentives to ensure incentives are 'targeted' by using incentive-specific M&E frameworks and cost-benefit analyses. Cost-benefit analysis may be performed *inter alia* through return-on-investment analysis (micro-simulation), sectoral regression analysis or investor motivation surveys.

**Note Source:** Research by the World Bank Group

### Sample text 4: Provision on facilitating visa and entry of persons in connection with foreign investment

Each Member shall facilitate the granting of visas and permits to investors, including foreign workers, employees and consultants as designated by the investor, in order to assist in the management of the investment.

Each Member shall accord to investors, including foreign workers, employees and consultants as designated by the investor, the benefit of fast-track visa applications and smooth process in the issuance of such visas, and, where appropriate/feasible, through green channels.

Each Member shall promptly publish, in a non-discriminatory and transparent manner and through paper and electronic means, any relevant information on requirements for visas, including required forms and documents. The information shall be kept updated.

**Note Source:** Research conducted in the framework of this project

### Sample text 5: Section adopting risk-based authorization/approval procedures as part of sub-section 10 (Authorization Procedures)

Each Member [shall introduce] [is encouraged to introduce] a risk-based approach when applying an authorization or approval/procedures. Risks could be categorized by sectors or industries (those sensitive, those less so), in accordance with health and safety, environment and public security risks or other criteria based on public policy considerations. Low-risk investments would be approved with a very light review, while high-risk investments would receive a more detailed, in-depth review.

**Note Source:** Research conducted by the World Bank Group and in the framework of this project

### Sample text 6: 'Silent consent' for low- and medium-risk administrative procedures

Members shall simplify and expedite procedures for applications and approvals of investment projects at all levels. In this respect, Members should consider introducing silent consent administrative procedures to facilitate investment in their territories.

Each Member shall recognize administrative silence in accordance with its laws and regulations and shall make them available to investors.

When established, silent consent administrative procedures shall ensure that authorization is automatically granted to investors where the competent authority of the concerned Member fails to act within the specified time period required under its laws and regulations, unless investors have been notified otherwise.

**Note Source:** Research conducted in the framework of this project

### Sample text 7: The dimensions of sustainable FDI their sustainability characteristics

	Characteristic		Characteristic
Economic dimension	<ul style="list-style-type: none"> <li>• <i>Employment</i></li> <li>• <i>Local linkages</i></li> <li>• Technology transfer</li> <li>• Infrastructure</li> <li>• <i>Community development</i></li> <li>• <i>Equitable distribution of wealth</i></li> <li>• Tax accountability</li> <li>• Promote research and development</li> </ul>	Social dimension	<ul style="list-style-type: none"> <li>• <b>Labour rights</b></li> <li>• <i>Skills enhancements</i></li> <li>• <i>Public health</i></li> <li>• <b>Workplace safety</b></li> <li>• <b>Non-discrimination</b></li> <li>• <i>Fair wages</i></li> <li>• <i>Benefits</i></li> <li>• <b>Human rights</b></li> <li>• <i>Indigenous rights</i></li> <li>• <i>Gender</i></li> <li>• <b>Resettlement</b></li> <li>• <i>Cultural heritage protection/diversity</i></li> </ul>
Environmental dimension	<ul style="list-style-type: none"> <li>• <i>Resource management</i></li> <li>• <i>Pollution controls</i></li> <li>• <b>Low carbon/greenhouse gases footprint</b></li> <li>• <i>Waste reduction</i></li> <li>• <i>Biodiversity protection</i></li> <li>• Climate change</li> <li>• <i>Water</i></li> <li>• Renewable energy</li> </ul>	Governance dimension	<ul style="list-style-type: none"> <li>• <b>Transparency</b></li> <li>• Local management</li> <li>• <b>Supply chain standards</b></li> <li>• Consumer protection</li> <li>• <b>Stakeholder engagement</b></li> <li>• <i>Anti-corruption</i></li> <li>• <b>Legal compliance</b></li> <li>• <i>Risk management systems</i></li> <li>• Environmental management systems</li> </ul>

			<ul style="list-style-type: none"> <li>• <i>Environmental impact assessment/social impact assessment</i></li> <li>• Human rights due diligence</li> <li>• Corporate governance</li> </ul>
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**Note:** **bold** = common FDI sustainability characteristics, i.e. those sustainability characteristics that appear in 50% or more of the instruments surveyed; *italic* = emerging common FDI sustainability characteristics, i.e. those characteristics that are present in at least one-third of the instruments.

**Note Source:** Sauvart P. K. and Mann H. (2017). Towards an indicative list of FDI sustainability characteristics. Geneva: ICTSD and World Economic Forum. Last accessed on 10 March 2021 from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3055961](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3055961)

## Sample text 8: CSR commitments

### Corporate social responsibility

1. Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article and internal policies, such as statements of principle that have been endorsed or are supported by the Parties.
2. The investors and their investments shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State:
  - a. contribute to the economic, social and environmental progress, aiming at achieving sustainable development;
  - b. respect the internationally recognized human rights of those involved in the companies' activities;
  - c. encourage local capacity building through close cooperation with the local community;
  - d. encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers;
  - e. refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;
  - f. support and advocate for good corporate governance principles, and develop and apply good corporate governance practices, including anti-corruption measures;
  - g. develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which their operations are conducted;
  - h. promote the knowledge of, and the adherence by workers, to the corporate policy, through appropriate dissemination of this policy, including professional training programs;
  - i. refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;
  - j. encourage, whenever possible, business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided for in this Article; and
  - k. refrain from any undue interference in local political activities.”

**Note Source:** Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, art. 12, 25 January 2020.

## Sample text 9: Recognized Sustainable Investors

### X. Investment Facilitation Measures for Recognized Sustainable Investors

- (a) Each Member shall provide additional investment facilitation measures related to the establishment, acquisition, expansion, management, conduct, operation, and expansion of investments in its territory, pursuant to paragraph X.3, to international investors who meet specified criteria, hereinafter called Recognized Sustainable Investors.<sup>1</sup> Alternatively, a Member may offer such

- investment facilitation measures through procedures generally available to all investors and is not required to establish a separate scheme.
- (b) The specified criteria to qualify as a Recognized Sustainable Investor shall be the following:
- a. Such criteria, which shall be published, shall include:
    - i. A pledge to observe certain internationally recognized guidelines [e.g. the UN Guiding Principles on Business and Human Rights, the ILO MNE Declaration, the OECD Guidelines for Multinational Enterprises and, if applicable, certain industry specific codes];
    - ii. Any [e.g. two or three] of the following requirements:
      1. The publication and wide distribution of CSR statements and progress reports;
      2. An appropriate record of compliance with local laws and regulations;
      3. A system of managing records to allow for necessary internal controls;
      4. A history of access to loans based on environmental, social and governance performance;
      5. Appropriate supply chain management.
  - b. Such criteria, which shall be published, shall also include a number [e.g. two or three] specific FDI sustainability characteristics chosen by the Recognized Sustainable Investor from a list of such characteristics identified by each host country Member, and which the investor makes reasonable best efforts to reach:
    - i. Create a certain number of jobs across all investments in the Member's jurisdiction;
    - ii. Create backward linkages across all investments in the Member's jurisdiction;
    - iii. Engage in community developments related to each investment in the Member's jurisdiction;
    - iv. Reduce the investor's carbon footprint across all investments in the Member's jurisdiction;
    - v. Follow commercially responsible resource management practices in each investment in the Member's jurisdiction;
    - vi. Use non-discriminatory hiring-practices across all investments in the Member's jurisdiction;
    - vii. Provide specific skill-based training for local workers in each of the investments within a Member's jurisdiction;
    - viii. Maintain a high-level of supply chain standards across all investments in the Member's jurisdiction;
    - ix. Engage with stakeholders related to each investment in the Member's jurisdiction.
  - c. Such criteria shall not:
    - i. Be designed or applied so as to afford or create arbitrary or unjustifiable discrimination between investors where the same conditions prevail;
    - ii. To the extent possible, restrict the participation of small and medium-sized enterprises and domestic firms.
- (c) The additional investment facilitation measures, which shall be published, provided pursuant to paragraph X.1 shall include at least [e.g. three or four] of the following measures:<sup>2</sup>
- a. Access to a specific Recognized Sustainable Investor focal point;
  - b. Priority assistance (at reduced fees and/or charges) in obtaining licences, meeting other requirements and procedures (including the processing of applications), and granting simplified investment documents approval and shortened time frames for approvals;
  - c. Lower regulatory oversight or lighter regulatory requirements, such as frequency of tax audits or inspections;
  - d. Establishment of a 'green channel' for the Recognized Sustainable Investor's employees for expedited entry into the host country;
  - e. Help in establishing local backward and forward linkages through, for example, linkage programs that upgrade local suppliers;
  - f. Aid with efforts to secure land for production purposes;
  - g. Specialized employee training programs geared specifically toward RSI investments;
  - h. privileged access to markets that are otherwise closed to foreign investors;
  - i. targeted fiscal, financial or other incentives, including, e. g., access to lower interest loans, special grants, or subsidized infrastructure and services.
- (d) Members are encouraged to develop Recognized Sustainable Investor schemes.

- (e) In order to enhance the investment facilitation measures provided to Recognized Sustainable Investors, Members shall afford to other Members the possibility of negotiating mutual recognition of Recognized Sustainable Investor schemes.
- (f) Members shall exchange relevant information within the [Committee established by an international investment facilitation framework] about Recognized Sustainable Investor schemes in force. The Committee shall establish a publicly available database of Recognized Sustainable Investors and the countries in which they are recognized.

**Note Source:** Sauvart, Karl P. and Gabor, Evan, Facilitating sustainable FDI for sustainable development in a WTO Investment Facilitation Framework: four concrete proposals. *Journal of World Trade*, vol. 55 (2021), pp. 261-286., Available at: <http://dx.doi.org/10.2139/ssrn.3496967> <http://dx.doi.org/10.2139/ssrn.3496967>

<sup>1</sup> Governments could also consider designating domestic firms as Recognized Sustainable Investors and, if firms qualify, extend appropriate benefits (X.3) to them as well.

<sup>2</sup> A measure listed in subparagraphs X.3 will be deemed to be provided to Recognized Sustainable Investors if it is generally available to all investors.

### Sample text 10: Example text for Articles in international investment agreements encouraging the facilitation of climate-neutral and gender-equal FDI

#### Suggested Article for climate-neutral FDI:

Each Party shall encourage the facilitation of green foreign direct investment that assists the Parties to become carbon neutral, including by promoting renewable energy, energy efficient investments and appropriate technologies, and taking other measures that help the transition to a carbon-neutral, sustainable and climate-resilient economy.

**Note Source:** Karl P. Sauvart, Matthew Stephenson and Yardenne Kagan, 'Green FDI: Encouraging carbon-neutral investment,' *Columbia FDI Perspectives*, No. 316, October 18, 2021 ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3943705](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3943705)).

#### Suggested Article for gender equal FDI:

Each Member shall encourage the facilitation of agendas with a view towards promoting gender-equal access for the opportunities created by this Agreement, to facilitate business partnerships and the creation of information networks that foster gender-equal opportunities and participation in international investment.

**Note Source:** Research conducted in the framework of this project.

### Sample text 11: Publicly accessible domestic supplier database

#### Domestic supplier databases

Each Member should establish a domestic supplier database. Such database shall list relevant domestic suppliers in specific sectors, especially those supporting the specific developmental goals of a Member.

Domestic supplier databases shall be transparent, non-discriminatory and quality-based. They shall, where possible, possess inter alia the following features:

- (a) highlight local production capacity through company factsheets;
- (b) be searchable by sector or industry, name of product or service, location, certifications, etc.;
- (c) be linked to investor servicing and aftercare efforts;
- (d) be available online and in English;
- (e) be consistently updated;
- (f) track user statistics.
- (g) provide information on domestic suppliers that would help investors make choices aligned with sustainable investment and CSR goals, which could include, but is not limited to:
  - (i) commitments to respect supply chain standards and certifications;



- (ii) commitment to environmental practices and carbon neutral transition;
- (iii) commitment to gender equality in employment;
- (iv) commitment to quality employment, including training, worker safety and labour rights;
- (iv) commitment to prevent corrupt practices.

**Note Source:** Research by the World Bank Group and in the framework of this project

### Sample text 12: Supplier development programmes

#### Supplier development programmes

Each Member [shall] [is encouraged to] implement supplier development programmes with the aim to strengthen the capabilities and competitiveness of local companies in light of FDI local sourcing demand and standards. Such programmes shall, inter alia, exhibit the following good practices:

- (a) be designed in close cooperation with domestic and foreign investors;
- (b) be demand-driven;
- (c) identify, select and audit companies (MSMEs) with potential to be long-term suppliers;
- (d) identify buyer needs and transmit these to participating firms;
- (e) provide initial certification that MSMEs meet buyers' needs and facilitate linkages;
- (f) support the development of formal relationships between suppliers and buyers;
- (g) engage in ongoing and customized mentoring/advisory support to strengthen competitiveness and help companies to help themselves;
- (h) Facilitation of improvement plans, including management processes, technology, adoption of standards, and business lay-out, based on business reviews of individual MSMEs, especially of MSMEs owned by under-represented groups including women, indigenous peoples, youth, and minorities.
- (i) facilitate access to financial instruments, as necessary, for firms to implement their improvement plans;
- (j) provide tailored consultancy support to follow-up on business review results;
- (k) actively match opportunities (suppliers and investors).
- (l) prioritization of the inclusion of under-represented groups, including women, indigenous people, youth, and minorities in the supplier development programmes.

**Note Source:** Research by the World Bank Group and in the framework of this project

### Sample text 13: Investment project-evaluation assistance

#### Investment project evaluation

Investment project-evaluation assistance should be provided to requesting Members, in particular least developed country Members, properly to evaluate investment project proposals, especially when they involve large-scale investments with returns planned over the long term and significant impact on development. Targeted assistance and support should be provided to developing country and least developed country Members so as to help them build capacity to undertake/conduct project evaluation of large-scale investment project proposals.

This could be done directly in cooperation with countries or through organizations with capacity in this area, such as the African Legal Support Facility, the CONNEX Support Unit, the International Senior Lawyers Project and the Investment Support Programme for Least Developed Countries of the International Development Law Organization.

**Note Source:** Research conducted in the framework of this project

### Sample text 14: Transparency of home country measures

1. Members recognize that home country measures should be, where possible, adopted to facilitate flows of outward foreign direct investment and especially flows of sustainable foreign direct investment.
2. Members are encouraged to adopt appropriate measures to facilitate outward foreign direct investment flows, and especially sustainable foreign direct investment flows, including through legal frameworks (e.g., double taxation agreements), investment guarantees, political-risk insurance, technical assistance, investor support services (e.g., feasibility studies, business missions, matchmaking), financial and fiscal measures (e.g., loans, equity, tax exemptions, tax deferral), and the provision of information.
3. All home country measures shall be made transparent in publicly available databases.
4. Members undertake to cooperate and to share information on the operations of investors from their territories. In this respect, each Member shall, on request, and in a timely manner, provide to another Member such information as is requested and available.
5. Home country measures shall protect confidential business information.

### Sample text 15: Investment grievance mechanism

#### Investment grievance mechanism

Each Member shall [to the extent practicable and] in a manner consistent with its legal system designate, maintain or establish a mechanism with the responsibility to receive, resolve and track grievances. The mechanism shall *inter alia* exhibit the following good practice principles:

- a. A designated 'lead agency' that as a first step would determine if an investor complaint constitutes a grievance or not (a grievance being actions that have broken legal commitments and thus for which there could be legal consequences);
  - i. If the complaint does not constitute a grievance, then it would be referred to the aftercare mechanism;
  - ii. If the complaint does constitute a grievance, then it would be referred to the investment grievance mechanism.
- b. The lead agency would be responsible for implementing the investment grievance mechanism empowered with problem-solving methods to coordinate with relevant government agencies, obtain information from them and effectively solve grievances (examples of methods are: simple exchanges of information, peer pressure or legal advisory opinions);
- c. Continuous information sharing by the lead agency to other institutions on content and breadth of the obligations included in different international investment agreements and domestic law;
- d. Early alert mechanisms that enable the lead agency to learn about grievances as early as possible, either passively or actively (e.g. coupled with aftercare programmes);
- e. Filtering and assessment of grievances to allow for prioritization, based on two types of assessment: economic (value and jobs at risk, potential tax losses) and legal (potential current and future liability arising from the grievance, impact on the investment project);
- f. Escalation mechanisms that foresee elevation of a grievance to political decision-makers if it cannot be solved at the technical level;
- g. Use of a tracking tool that quantifies the investment at risk, retained, expanded or lost, allowing to evaluate the effectiveness of the investment grievance mechanism and to inform policy advocacy;
- h. Sustained financial resources and staffing with sufficient legal and economic expertise.

**Note Source:** Research by the World Bank Group

### Sample text 16: Investment alert mechanism

Identifying and addressing investors' complaints at an early stage is key to prevent the escalation of complaints to legal grievances and to investor-state disputes. It also enables governments to respond to complaints in a transparent, fair and timely manner and improves investors' perceptions of investor protection.

Early warning systems have been piloted by ITC in trade through its Trade Obstacle Alert (see <https://ntmsurvey.intracen.org/what-we-do/trade-obstacle-alert/>). Such a mechanism involves setting up an online platform to collect complaints information, determining whether these complaints could constitute legal grievances, identifying patterns of complaints, and addressing complaints through cooperation among the regulatory agencies.

A sample text can read as following:

#### **Investment alert mechanism**

1. Each member shall, to the extent practicable, establish an investment alert mechanism to address investment-related complaints before they become legal grievances. The investment alert mechanism shall comprise the agencies responsible for investment and shall ensure cooperation of the agencies involved.
2. The investment alert mechanism shall:
  - Provide channels, such as a hotline or an online platform for parties in an investment, including investors and actors affected by the investment, to transmit information about complaints related to the investment;
  - Register complaints in a database and circulate information about complaints to the relevant investment agencies;
  - Identify which complaints have the potential to become legal grievances as those actions contravene legal commitments, and prioritize resolution of these grievances, such as through an investor grievance mechanism;
  - Provide timely remedy to complaints, including resolution through the coordination among the investment agencies, or providing guidance on the process to remedy complaints;
  - To the extent practicable, make publicly available information about complaints and grievances and actions taken to address them.

**Note Source:** Research conducted in the framework of this project

## Annexes

Annex I: **Chronology of meetings undertaken in the framework of the ITC-DIE project, December 2019 to December 2021**

Date	Type of meeting	Title	Co-organizers
11 December 2019	Capacity-building workshop <sup>159</sup>	<a href="#">Opportunities and challenges of establishing an IFD Agreement in the WTO: concrete measures for an IFD Agreement</a>	Bertelsmann Stiftung, World Economic Forum (WEF)
11 February 2020	Public webinar <sup>160</sup>	<a href="#">The negotiations of an IFD Agreement</a>	
26 February 2020	Commentary Group <sup>161</sup>	<a href="#">Investment facilitation measures to include in an IFD Agreement</a>	WEF
11 March 2020	Capacity-building workshop	<a href="#">Concrete measures to facilitate the flow of sustainable FDI</a>	
19 March 2020	Public webinar	<a href="#">The extent to which an IFD Agreement could contribute to quality FDI flows</a>	
20 March 2020	Expert Network <sup>162</sup>	<a href="#">Lessons learned from investment facilitation provisions in BITs and investment chapters in preferential trade agreements</a>	
7 April 2020	Commentary Group	<a href="#">Measures that increase the development benefits of investment flows</a>	WEF
30 April 2020	Public webinar	<a href="#">Main challenges in implementing an IFD Agreement and how to address them</a>	
4 May 2020	Expert Network	<a href="#">Lessons learned from the negotiation and implementation of the TFA</a>	
7 May 2020	Commentary Group	<a href="#">Implementation of an IFD Agreement</a>	WEF
12 May 2020	Capacity-building	<a href="#">Increasing the development impact of an IFD Agreement: concrete measures to facilitate sustainable FDI and CSR</a>	
28 May 2020	Public webinar	<a href="#">How an IFD Agreement could be integrated into the WTO system and how it relates to other agreements</a>	
26 June 2020	Expert Network	<a href="#">The relationship between a multilateral IFD Agreement and international investment agreements</a>	

<sup>159</sup> Capacity-building workshop for delegates and government officials.

<sup>160</sup> Public webinars are open to stakeholders and the interested public.

<sup>161</sup> The Commentary Group on an IFD Agreement is convened together with the World Economic Forum. It consists primarily of experts from IPAs, investment service providers and private sector representatives, to provide practical, ground-level insights focused on investment facilitation.

<sup>162</sup> The Expert Network consists of academic experts who explore legal, political and economic challenges that need to be addressed in the IFD Agreement negotiations, through a series of solution-oriented discussions and technical papers.

3 July 2020	Commentary Group	<a href="#">Concrete investment facilitation measures that should be included in an IFD Agreement</a>	WEF
23 September 2020	Capacity-building workshop	<a href="#">Implementation challenges for an IFD Agreement</a>	WAIPA, WEF
5 October 2020	Public webinar	<a href="#">What can we learn from regional initiatives on investment facilitation</a>	
6 October 2020	Expert Network	<a href="#">Integrating an IFD Agreement into the WTO</a>	
27 October 2020	Commentary Group	<a href="#">The “investment lifecycle” - investment facilitation challenges and priority measures</a>	WEF
11 December 2020	Capacity-building workshop and public webinar	<a href="#">Looking back and looking forward</a>	
11 December 2020	Capacity-building workshop	<a href="#">IFD Agreement: hearing from practitioners</a>	
19 January 2021	Public webinar	<a href="#">The potential value-added of an IFD Agreement</a>	
16 February 2021	Expert Network	<a href="#">The potential value added of an IFD Agreement</a>	
18 February 2021	Commentary Group	<a href="#">Investment conflict prevention and management</a>	WEF
23 February 2021	Regional event – Asia and Pacific economies	Investment facilitation framework for development: current discussions at regional and multilateral levels	ESCAP
24 February 2021	Regional event –Caribbean economies	<a href="#">High-level regional roundtable on the IFD Agreement negotiations: perspectives from Caribbean economies</a>	Shridath Ramphal Centre, WEF
25 February 2021	Public webinar	<a href="#">Investment dispute prevention and management at the national level</a>	
26 February 2021	IPA and government officials: capacity strengthening	<a href="#">Strengthening investment facilitation capacity for development: an overview, based on ‘An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?’</a>	WAIPA, WEF
3-4 March 2021	Regional event –African economies	<a href="#">High-level regional roundtable on an IFD Agreement: The benefits and challenges of international investment facilitation frameworks for development for African economies</a>	UNECA, African Union Commission, Secretariat of the African Continental Free Trade Area, WEF
17 March 2021	IPA and government officials:	<a href="#">Investment facilitation: transparency and streamlining of administrative procedures</a>	WAIPA, WEF

	capacity strengthening		
30 March 2021	Regional event – Asia and Pacific economies	<a href="#">High-level regional roundtable on the IFD Agreement negotiations: perspectives from Asian and Pacific economies</a>	Association of Southeast Asian Nations, ESCAP, WEF
13 April 2021	IPA and government officials: capacity strengthening	<a href="#">Promoting linkages and supplier databases</a>	WAIPA, WEF
4 May 2021	IPA and government officials: capacity strengthening	<a href="#">Linking outward FDI to inward FDI: the role of home country measures</a>	ESCAP, WAIPA, WEF
6 May 2021	Regional event – Latin America economies	<a href="#">High-level regional roundtable on the benefits and challenges of an IFD Agreement for Latin American economies</a>	ECLAC, WEF
18 May 2021	Commentary Group	<a href="#">Increasing the effectiveness of IPAs to facilitate sustainable FDI flows: key technical assistance needs</a>	WEF
20 May 2021	Expert Network	<a href="#">Options to integrate an IFD Agreement into the WTO rulebook</a>	
28 May 2021	Public webinar	<a href="#">The WTO Investment Facilitation Framework for Development and the Importance of Facilitating Sustainable Investment for MSMEs</a>	
1 June 2021	IPA and government officials: capacity strengthening	<a href="#">Incentivizing sustainable FDI</a>	Ghana Investment Promotion Centre, WAIPA, WEF
6 July 2021	IPA and government officials: capacity strengthening	<a href="#">Assessing large-scale investment contracts</a>	CONNEX Support Unit, WAIPA, WEF
2 September 2021	Commentary Group	<a href="#">How to facilitate investment that is green, gender-equal, and contributes to generating skills (3Gs)</a>	WEF
15 September 2021	Public webinar	<a href="#">Implementing an investment facilitation framework – Learning from the TFA experience</a>	
17 September 2021	IPA and government officials: capacity strengthening	<a href="#">Implementing the IFD Agreement: What are the next steps?</a>	WAIPA, WEF

30 September 2021	WTO Public Forum 2021	<a href="#">Investment Facilitation for Development: Revitalizing investment for covid-19 recovery</a>	
4 October 2021	Expert Network	<a href="#">Approaches to implement an IFD Agreement to support domestic investment facilitation reforms</a>	
12 October 2021	IPA and government officials: capacity strengthening	<a href="#">The role of partnerships in facilitating investment</a>	WAIPA, WEF
26 October 2021	Public webinar	<a href="#">Increasing the development impact of FDI: Creating linkages between foreign investors and the local economy in light of the Covid-19 pandemic</a>	
9 November 2021	Commentary Group	<a href="#">Good practices for stakeholder consultations to facilitate FDI flows</a>	WEF
19 November 2021	Expert Network	The possible work programme of a future WTO Committee on Investment Facilitation	
3 December 2021	IISD Trade + Sustainability Hub Virtual Conference	<a href="#">How to ensure a positive development impact of a future Investment Facilitation for Development Agreement?</a>	

## Annex II: Regional events – Reports

### Tenth Meeting of the Asia-Pacific Foreign Direct Investment Network: Investment facilitation framework for development: current discussions at regional and multilateral levels

23 February 2021

The session was held as part of the Tenth Meeting of the Asia-Pacific FDI Network. The session was co-organized by the ITC, the DIE and the ESCAP, in the framework of the Investment Facilitation for Development project, jointly implemented by ITC and DIE.

The session was chaired by Axel Berger, Senior Researcher, DIE, and included the following speakers: Claudia Locatelli, Economic Officer, WTO, Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum, and Stefanie Schacherer, Swiss National Science Foundation post-doctoral research fellow, World Trade Institute, University of Bern. The programme is annexed to this report.

#### Highlights

At the opening of the session, it was stated that investment facilitation is different from investment protection and investment liberalisation provisions in IIAs. Investment facilitation should aim to build and improve domestic regulation and administrative procedures to ensure more transparency, predictability and efficiency; foster domestic and international cooperation and coordination on investment matters; and establish domestic structures to prevent and manage disputes—all with the aim of advancing development. In addition, investment facilitation has the potential to improve domestic regulatory systems, which would represent an important recalibration of policy approaches to attract foreign direct investments (FDI) and help promote sustainable development.

#### The WTO IFD Agreement

The joint statement initiative on the IFD was launched by a subset of developing countries, which were supported by a group of both developed and developing WTO Members. The background context for this initiative was the realisation of the increased interaction and interdependency between trade and investment flows. The ongoing negotiations aim to develop a multilateral framework on investment facilitation that would benefit the development of all WTO Members.

Currently, 106 WTO Members are participating in the IFD Agreement negotiations that were launched in September 2020. A convergence text is expected to be produced by April of 2021, and in July Members participating in the negotiations will take stock of the progress and make a plan for the second half of 2021, including for the MC12.

The core issues relating to investment facilitation that are being discussed amongst participating Members of the structured discussion include: transparency of investment measures; streamlining and speeding up administrative processes and documentation requirements; contact/focal points/ombudsperson mechanisms; domestic coordination and cross-border cooperation on investment flows; the development dimension; sustainable investment; cross-cutting issues, international and final provisions; and “firewall” provisions.

#### Improving the contribution of investment facilitation frameworks to sustainable development

Investment facilitation at the multilateral, regional, national, and sub-national levels are mutually reinforcing and complementary. Ensuring alignment and efficiency of regional investment facilitation collaboration (e.g., the WTO’s potential agreement on investment facilitation for development, the ASEAN Comprehensive Investment Agreement, the Asia-Pacific Economic Cooperation Investment Facilitation Action Plan, the African Continental Free Trade Agreement’s future Investment Protocol) could take place by clearly identifying measures at different levels, creating mechanisms of dialogue and cooperation and determining measures that should be prioritised at each level. Additionally, ESCAP’s proposal for creating an Asia-Pacific



investment cooperation platform could be used to leverage inter- and intraregional investment and also support investment facilitation frameworks.

During the session, direct measures that can contribute to sustainable development were mentioned, including fostering linkages through supplier databases with sustainability dimensions, the use of environmental and social impact indicators, the adoption and use of standards, the development of smart incentives, supporting FDI through home-country measures as highlighted in the ESCAP/WEF/Kings College of London outward FDI policy toolkit, adopting responsible business conduct standards, and fostering partnerships between investment authorities. Three investment facilitation measures that hold promise to indirectly contribute to sustainable development, include adopting “silent yes” mechanisms through which approval is provided automatically after a certain time has elapsed, absent active interventions; adopting a risk-based approach to administrative approvals (meaning authorities should concentrate on assessing high-risk applications and expediting low-risk applications); and creating “investment alert” mechanisms to handle complaints early, before they turn into legal disputes, which can make a difference in creating an attractive investment climate and facilitating investment.

### **Investment facilitation provisions in the Regional Comprehensive Economic Partnership (RCEP)**

During the session, it was indicated that RCEP’s provision on investment facilitation actually follow ASEAN treaty practice, as much of its wording is not different from the ASEAN-China Agreement on a free trade area and the ASEAN Comprehensive Investment Agreement. Under this provision, RCEP’s contracting parties commit to endeavour to facilitate investment among them, which is stated in four rather classical investment facilitation measures, including creating the necessary environment for all forms of investment; the simplification of procedures for both investment application and approval; a commitment to more transparency; and establishing/maintaining one-stop investment centers/entities to assist and advise investors. From the legal perspective, these measures are programmatic commitments and subject to the domestic laws and regulations of all parties. These built-in measures are a positive aspect, as they provide flexibility for domestic implementation, given the diversity of regulatory systems and development levels of RCEP’s countries. Because the RCEP’s investment facilitation provision does not indicate what types of investments should be facilitated, there is room for RCEP signatories to have more targeted FDI for sustainable development. From a sustainable development perspective, dispute prevention is key in facilitating investment. In addition, RCEP could be an opportunity to set up a framework for the exchange of knowledge and good practices, which is particularly important for sustainable development targeted investment. During the discussions, it was noted that the investment facilitation provision in RCEP comes with the caveat of some rather restrictive national laws. On collaborative frameworks, it was indicated that restrictions and approval requirements at the national level could be somewhat beneficial when targeting investment for sustainable development and, thus, would be suitable for certain collaborative frameworks that also aim to achieve similar goals. Investment facilitation could address joint interests between two economies. For countries with relatively restricted FDI regimes, participating in these two-way investment facilitation activities would allow them to not only stay consistent with their market access preferences, but also meet the interest of both parties in facilitating investment. Regarding mechanisms for least developed countries that are in need of technical assistance support, article 15.6 of RCEP in the chapter on economic cooperation is applicable.

### **The value-added of the IFD Agreement**

International and regional investment facilitation frameworks could complement and reinforce Members’ existing efforts to facilitate investment. A few main advantages of a multilateral framework were mentioned during the session. First, a clear and consistent global benchmark for investment facilitation anchored in shared domestic reforms would help reduce regulatory uncertainty, minimise transaction costs and streamline investment procedures. Second, providing a global forum to facilitate investment would enhance cross-border regulatory cooperation and information exchange. Third, anchoring domestic investment facilitation reforms in binding agreements would help unleash donor funding and technical assistance for and from international organizations. If the IFD Agreement would include binding commitments, all actors, including governments, donors, IOs, and even the private sector would put more efforts and resources to leverage the framework.

## High-level Regional Roundtable on the IFD Agreement Negotiations: Perspectives from Caribbean economies

24 February 2021

The high-level regional roundtable was co-organized by the ITC, DIE, the SRC of The University of the West Indies' Cave Hill Campus (The UWI Cave Hill) in Barbados, and the WEF, in the framework of the Investment Facilitation for Development project, jointly implemented by ITC and DIE.

The roundtable offered participants a platform for strategic exchange on the WTO negotiations on investment facilitation for development focused on the Caribbean economies. The event provided an opportunity for participants to reflect on the value added of a WTO framework on investment facilitation for development.

Opening addresses were provided by Neil Paul, Director, SRC UWI and Pamela Coke-Hamilton, Executive Director, International Trade Centre. A guest address was made by Yi Xiaozhun, Deputy Director General, World Trade Organization.

The first session "The state of play of the WTO Investment Facilitation for Development Agreement" was chaired by Karl P. Sauvart, Resident Senior Fellow, CCSI, and included the following speakers: Mathias Francke, Ambassador of Chile to the WTO, Coordinator of the Structured Discussions on Investment Facilitation for Development; Joel Richards, Senior Technical Specialist, Trade Permanent Delegation of the OECS in Geneva; Zoryana Olekseyuk, Senior Researcher, DIE; Makane Moïse Mbengue, Professor and Director of the Department of Public International Law and International Organization at the Faculty of Law of the University of Geneva.

The second session "Voices from the Caribbean countries on the importance of an agreement on investment facilitation at the WTO" was chaired by Jan Yves Remy, Deputy Director, SRC UWI and included the following speakers: Hon. Ian Douglas, Minister of Trade, Commerce, Entrepreneurship, Innovation, Business and Export Development, Dominica; Hon. Sandra Husbands, Minister, Ministry of Foreign Trade, Barbados; Chantal Ononaiwu, Trade Policy & Legal Specialist, Office of Trade Negotiations, CARICOM Secretariat; Suzette Hudson, Senior Advisor, Investment Promotion Caribbean Export Development Agency; Carmel Haynes, Executive Director of the Barbados International Business Association; Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum; and Alicia Nicholls, Trade Researcher, SRC UWI. Concluding remarks were provided by H.E. Ambassador Stephen Fevrier, Organisation of Eastern Caribbean States, Geneva Mission.

### Highlights

#### **The state of play of the WTO IFD Agreement**

To date, 106 WTO Members are participating in the IFD negotiations, four of which are from the Caribbean region. They are Barbados, Dominica, Grenada and Suriname. The current draft of the informal negotiations text includes Members' proposals that are now being consolidated into a revised text that was presented in April 2021, will be the basis of the final agreement between the Members, hopefully by the Twelfth WTO Ministerial Conference. The revised text includes provisions such as providing greater transparency to ensure predictability; providing measures to simplify, expedite and streamline administrative procedures during the investment life-cycle; and promoting domestic and cross-border cooperation. The scope of the discussions does not include market access, investment protection or ISDS.

A group of Members is working on revised proposals and alternative proposals, including facilitation of the movement of investors and insulating the investment facilitation agreement from other international investment agreements, also referred to as the "firewall". The provisions on which more work is needed include the scope of the agreement, certain definitions, special and differential treatment, sustainable investment provisions, and anti-corruption measures.

#### **The views of the Caribbean countries that are currently participating in the IFD Agreement**

Dominica and Grenada are currently the only Caribbean countries that have made a submission to the IFD agreement negotiations. The main issues that are of importance to the Caribbean countries include the following:

**Sustainability and development aspects in the IFD Agreement:** It is important to clarify that the definition of “investment” under the IFD Agreement will not include any type of investment other than investment for development. The development and sustainability aspects of the IFD Agreement are of core importance to the Caribbean countries and should be in line with their sustainable development goals and include corporate social responsibility elements.

**Anti-corruption obligations:** There is a reference in the IFD Agreement to anti-corruption obligations that the countries believe is too descriptive and goes too far. Such issues should be left to states.

**Special and differential treatment, technical assistance and capacity building:** During the roundtable, it was emphasised that technical assistance and capacity building should be provided not only to support the implementation of the IFD Agreement, but also to provide support to the Caribbean countries during the negotiations, to enable them to engage in a constructive way. Such support should include needs assessment and gap analyses, which are critical for a meaningful participation in the negotiations. It is critical for the engagement of the Caribbean countries in the initiative that they have the opportunity to assess their investment facilitation needs, and to assess what measures they really need to implement to attract and retain FDI.

**Home countries obligations:** The current IFD Agreement imposes obligations on host states but not on home states. There needs to be a rebalancing process, to include obligations on home states. Such obligations are still being discussed internally, but can include transparency of the incentives provided to outward investors. Home states may also be required to provide, upon request from a host country, an investor’s track record of sustainable investment (to the extent that this information is available to the home country).

During the roundtable it was suggested that, if more countries from the Caribbean would get involved in the negotiation process, they could be more influential.

### **Learning from recent developments regarding investment facilitation**

During the roundtable, the following five lessons and trends from recent developments regarding investment agreements were outlined:

**The shift:** The importance of investment promotion and protection is reduced, and there is consensus on the need to focus on investment facilitation. The investment guiding principles that were adopted for the AfCFTA Investment Protocol include investment facilitation measures as one of the top priorities.

**The spirit:** Another trend includes linkages between investment facilitation and cooperative measures. For example, the EU-China Comprehensive Agreement on Investment (CAI), the RCEP and the investment guiding principles for the AfCFTA all focus on investment cooperation, technical assistance and capacity building.

**The scope:** Investment facilitation primarily revolves around simplifying administrative procedures and ensuring transparency. ISDS is explicitly excluded from the IFD Agreement, which focuses instead on dispute prevention and alternative dispute mechanisms, such as mediation.

**Sustainability:** Recent investment agreements include linkages between investment facilitation and sustainability, such as in the CAI.

**The space:** Investment facilitation is a more appropriate tool to preserve policy space for states, as it allows for more flexibility regarding domestic regulation and laws in the implementation process. Africa has a bottom-up approach, which allows countries to implement their own policies.

### **The potential welfare gains from an IFD Agreement**

Governments do not seek to facilitate investment per se, but rather for the development benefits that investment provides, whether in the form of jobs, technology, upgrading, gender equality, environmental management, or social inclusion. Investment facilitation frameworks can help increase the sustainable development contribution of investment flows through certain measures. The pool of capital seeking to finance sustainable investment is growing, with capital earmarked for environmental, social and corporate governance investment estimated at over a trillion dollars.

Results from a DIE draft study on the potential welfare gains from different investment facilitation scenarios were introduced during the roundtable. The research is based on DIE’s Investment Facilitation Index which, in its current stage, covers 86 economies. The study showed that developing countries with low levels of

current investment facilitation practice would benefit most from the implementation of IFD Agreement proposals. The study further showed that, as greater investment facilitation commitments are taken, gains increase in terms of consumer welfare and gross domestic product impact, and that the lowest and middle-income countries can be expected to reap the highest gains. There are some spillover gains for non-participant countries that, however, are also lower than gains from membership in an IFD Agreement. The study indicates that Caribbean countries will benefit considerably if an IFD Agreement were adopted and implemented.

Under the ITC-DIE project, and in collaboration with the WEF, an Inventory of Investment Facilitation Measures was produced. This *Inventory* includes measures that might be important to include in the IFD Agreement and in regional and national efforts. Importantly, the *Inventory* has chapters on measures that make a direct contribution to sustainable development, as well as on measures that can leverage new digital tools to facilitate investment. It also suggests that investment facilitation should cover both inward FDI and outward FDI, as the evidence shows that outward FDI can be an additional, complementary, channel for sustainable development. The *Inventory* provides example text that may be adopted to operationalize these measures.

### **The value added of an IFD Agreement for Caribbean countries**

FDI is significant for the Caribbean countries, as a tool to increase productivity and employment, and contribute to economic growth. As a result of the COVID-19 pandemic and the related economic downturn, global flows of FDI fell by 42% in 2020. In Latin America and the Caribbean, the decline is estimated to have been even more, between 45% and 55%. Revitalizing investment flows is therefore a fundamental component of the recovery. In a context of uncertainty and declining FDI flows, investment facilitation may provide a boost in confidence and a practical solution for helping to revive the global economy.

With these objectives in mind, the significance of the IFD Agreement cannot be overstated. A successful outcome can contribute towards creating an enabling environment to facilitate FDI flows into productive activities. The Caribbean has always been an attractive destination for FDI, including because of its welcoming policies towards FDI, both financial and non-financial.

Many Caribbean economies have low corporate and income tax rates, but more could be done in terms of improving the regulatory environment. In the World Bank ranking of “ease of doing business”, no Caribbean country is in the top 50. It was mentioned during the roundtable that the IFD Agreement also needs to support measures that are already in place.

It was stated that the IFD Agreement can assist Caribbean countries with domestic reforms, focusing on sustainability, to meet national and international social development goals, help create a more enabling environment for investment and improve the investment climate. An IFD Agreement will also assist in establishing benchmarks for Caribbean countries’ level of investment facilitation.

In addition, an IFD Agreement can help establish partnerships between developed economies and developing economies, with the former helping to provide technical assistance and capacity building so that the latter can successfully implement the IFD Agreement. Partnerships can be established between investment authorities in different economies for knowledge sharing and peer-learning. Partnerships can also facilitate two-way investment. An IFD Agreement should therefore focus on supporting the development of partnerships between investment authorities for peer-learning and win-win two-way investment.

In addition, an added value in participating in the IFD Agreement negotiations is that participants can influence the final outcome of the agreement, which should include special and differential treatment, technical assistance and capacity building. Caribbean countries need to be in a position that they are shaping emerging multinational rules and not merely be takers of rules.

### **Implementation of the IFD Agreement and learning from the WTO TFA**

The experience with the WTO TFA provides a wealth of experience to build on with respect to investment facilitation. This includes providing for different levels of implementation capacity through self-designating Members in terms of categories ‘A’, ‘B’, and ‘C’ and providing developing economies with customized levels of support. The experience from trade facilitation also indicates the importance of creating public-private mechanisms to help implement provisions.

In order to realize the gains of an IFD Agreement, public-private mechanisms of consultation and collaboration are important, so that investors' needs can be understood. Such an understanding could lead to the implementation of measures that could have a real impact on investment decisions.

The TFA led to the creation of a Global Alliance for Trade Facilitation. The Global Alliance for Trade Facilitation currently has over a dozen projects around the world, soon scaling up to twenty. Reviews of these projects have found that they achieved significant gains in terms of time and cost saved to trade.

A similar alliance could support the implementation of an investment facilitation agreement.

## High-level Regional Roundtable on an IFD Agreement: The benefits and challenges of international investment facilitation frameworks for development for African economies

3-4 March 2021

The High-level Regional Roundtable was co-organized by the ITC, the DIE, the UNECA, the AUC, the Secretariat of the AfCFTA, and the WEF, in the framework of the Investment Facilitation for Development project, jointly implemented by ITC and DIE.

The Roundtable offered a platform for strategic exchange on the dynamic policy discussions and negotiations on investment facilitation for development taking place on various levels and international fora, focused on Africa. The event provided the opportunity to reflect on the potential benefits and challenges of international frameworks on investment facilitation for development.

The first day of the roundtable, the “High-level Segment”, included the following speakers. Opening addresses were made by Stephen Karingi, Director, Regional Integration and Trade Division, UNECA, Francis Mangeni, Director, AfCFTA Secretariat, Pamela Coke-Hamilton, Executive Director, ITC, and Børge Brende, President, WEF. The guest address was made by Yi Xiaozhun, Deputy Director General, WTO. The first session, “International negotiations on investment facilitation for development in the context of the international investment regime: State of play and way forward”, was chaired by Stephen Karingi and included the following speakers: Laura Paez, Chief Market Institutions Section, Regional Integration and Trade Division, UNECA, Roslyn Ng'eno, Senior Investment Expert, African Union Commission, Mathias Francke, Ambassador and Permanent Representative of Chile to the WTO, Coordinator of the Structured Discussions on Investment Facilitation for Development, and Axel Berger, Senior Researcher, DIE. The sessions included Makane Moïse Mbengue, Professor and Director of the Department of Public International Law and International Organization at the Faculty of Law of the University of Geneva, as discussant. The second session “High-level segment: Investment facilitation: What do we hear from foreign investors and investment promotion agencies and what to do about it?” was chaired by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI, and included the following speakers: H.E. Gabriel Curtis, Minister of Investments and Public-Private Partnerships, Guinea, Hon. Betty C. Maina, Cabinet Secretary, Ministry of Industrialization, Trade and Enterprise Development, Kenya, H.E. Otunba Adeniyi Adebayo, Minister of Industry, Trade and Investment, Federal Republic of Nigeria,<sup>163</sup>Hon. Clare Akamanzi, Chief Executive Officer, Development Board, Rwanda, and Hon. Ebrahim Patel, Minister of Trade and Industry, South Africa. The session included the following discussants: Yofi Grant, Chief Executive Officer, Ghana Investment Promotion Centre, Henry Loewendahl, CEO of Wavteq, and Geoffrey White, Chief Executive Officer, Africa, Agility. Concluding remarks were made by Anna-Katharina Hornidge, Director, DIE.

The second day of the roundtable addressing “Key Elements of Investment Facilitation for Development” included the following speakers. The welcome address was made by Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC. Makane Moïse Mbengue, provided a presentation on “Setting the scene and reporting back: Key challenges of regional investment policy-making”. The first session “Key investment facilitation measures for development” was chaired by Sean Doherty, Head, International Trade and Investment, World Economic Forum, and included the following Speakers: Roslyn Ng'eno, Senior Investment Expert, African Union Commission, Aschalaew Tadesse, Director of Investment Promotion of the Ethiopian Investment Commission, and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum. The session included Simon Galpin, Senior Advisor and former Managing Director, Bahrain Economic Development Board, as discussant. The second session “Institutional mechanisms to enhance investment facilitation to sustainable development” was chaired by Axel Berger and included the following speakers: Anabel Gonzalez, Nonresident Senior Fellow, Peterson Institute for International Economics (PIIE), Ndanga Kamau, President, International Chamber of Commerce Africa Commission, and Ivan Nimac, Global Lead, Investment Policy and Promotion, World Bank Group. The session included the following discussants: Sabine Ulrike Dall'Omo, President, Africa, Siemens, and

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<sup>163</sup> Remarks were provided by Yewande Sadiku, Executive Secretary and Chief Executive Officer, Nigerian Investment Promotion Commission.

Yewande Sadiku, Executive Secretary and Chief Executive Officer, Nigerian *Investment Promotion Commission*. Concluding remarks were made by Karl P. Sauvart.

## Highlights

### Investment facilitation for development in the AfCFTA

The AfCFTA has 54 signatories out of 55 AU Member states. The AfCFTA is poised to play a crucial role in revitalising African economies and boosting FDI. The phase II negotiations of the AfCFTA include a continent-wide Investment Protocol that is set to be concluded in December 2021.

Investment facilitation will constitute an instrumental part of the AfCFTA Investment Protocol. The Pan-African Investment Code, the Common Market for Eastern and Southern Africa Common Investment Agreement and the Southern African Development Community Finance and Investment Protocol were cited as examples of IIAs that include provisions on investment facilitation that will serve as templates for the AfCFTA going forward. In order to achieve the full potential of the AfCFTA Investment Protocol, it is important to engage with investors through investment partnerships, increased transparency and the reduction of red tape and complex regulations. There needs to be ownership of the AfCFTA by governments, users, stakeholders, and civil society groups. These various parties need to come together to pool resources and expertise to understand which policies and practices increase the quality and quantity of FDI and how investment facilitation frameworks can effectively be implemented. Technical assistance and capacity building will play a key role in ensuring effective reforms for sustainable development. There needs to be a focus on technology, with the goal of the AfCFTA becoming a digital free trade area.

It was pointed out in analyses undertaken by UNECA and DIE that the economic benefits of implementing investment facilitation reforms are sizeable and can help African countries promote international FDI and intra-African investment that the continent needs to achieve its desired development goals. In an effort to redress this, the envisaged outcomes of the AfCFTA Investment Protocol negotiations will be the adoption of a harmonised and simplified regulatory regime based on transparency, predictability, inclusiveness, and cooperation.

Effective investment facilitation policies will be key to Africa's economic recovery. Previous attempts by African countries to develop policies to attract FDI have failed at increasing investment flows due to numerous reasons. These include a lack of proper legal and administrative frameworks to implement policies, as well as a lack of sufficient technical assistance and capacity building to implement such policies. In this respect, it is important to note that investment facilitation is not only about making it easier for investors to invest, but—importantly—also about building, enhancing and improving institutions to support investors and international cooperation in the interest of promoting development.

The following factors were identified as ones that African countries should take into account in designing and negotiating the AfCFTA Investment Protocol:

**Quality of investment:** Pay more attention to the quality of investment and promote responsible investment; factor in appropriate responses to the impacts of the Covid-19 pandemic.

**Dispute prevention:** Focus on amicable resolution of investment disputes by shifting emphasis from investment protection to investment facilitation. Investment facilitation reinforces and stimulates stronger relations between host countries and investors and focuses on preventing disputes through its cooperative approach.

**Increased policy space:** Provide host countries with greater regulatory space and flexibilities by recognising the right of states to regulate in pursuit of national development objectives and public interests.

**Transparency and predictability:** Ensure transparent and predictable investment rules that will make implementation more effective.

**CSR obligations:** Involve the private sector in the Investment Protocol negotiations to ensure that the underlined framework is informed by its experience. The Protocol should also encompass CSR standards for investors, to ensure fairness.

**Harmonisation of frameworks:** Harness interlinkages between the Investment Protocol and other parts of the AfCFTA (particularly competition policy, intellectual property, e-commerce), international law and domestic legislations. Aspire to establish and strengthen complementarities and linkages by ensuring that the AfCFTA Investment Protocol builds synergies with similar initiatives and processes underway such as the WTO negotiations on an IFD Agreement.

**The creation of a functional Common Investment Area:** Efforts should be made to increase cooperation and peer learning to build capacities and stronger institutions required to effectively support the establishment of a functional Common African Investment Area.

**Support of the AfCFTA Secretariat:** Strengthen the AfCFTA Secretariat and ensure that the implementation of the AfCFTA is all-encompassing and inclusive of women, youth and MSMEs.

### **Participation of African Countries in the IFD Agreement negotiations**

The WTO is making steady progress in the IFD Agreement negotiations. To date, 20 out of a total 106 WTO Members participating in the negotiations are from Africa. Despite reservations<sup>164</sup> that some African countries have regarding the on-going processes in the WTO, it is important that more African countries participate to ensure that the continent's needs and interests are well represented and its concerns are effectively addressed. As part of this discussion, it was stated that the WTO negotiations must address the risk of adopting obligations that are unattainable for countries that do not have the capacity in terms of institutions and structures. The negotiations should be as inclusive as possible, preferably with the participation of all WTO Members. It was suggested that the AfCFTA Secretariat could exchange views and experiences with the WTO Secretariat on Africa's experiences with investment facilitation reforms.

### **Investment facilitation national initiatives to reform the investment climate**

Four main recommendations were presented to improve the investment climate:

**Improve the business climate by making investment administration more efficient:** It was emphasized that "ease of doing business" and economic growth are strongly correlated and that governments should undertake more investment facilitation efforts that make the business climate more efficient. This can include streamlining laws and regulations to ensure competitiveness and to modernise investment and industry specific codes in sectors that are particularly interesting for investors, including mining and other extractives, information and communications technology, infrastructure, banking, and tourism. Other efforts to modernise government processes and procedures for investors and businesses include government administration of licenses, permits and visas.

**Political stability and policy predictability:** It was emphasized that ensuring transparency and political stability with predictable regulatory and administrative frameworks are crucial for driving investment facilitation. The discussions highlighted the importance of a whole-of-government approach that ensures an effective implementation of investment facilitation reforms. Investment facilitation was additionally recommended to be addressed by governments as a continuous process, where systems, such as ministerial committees, should be put in place to agree on appropriate initiatives towards achieving more competitiveness and facilitating FDI. It was noted that more needs to be done to ensure security, diminish corruption and enhance the sharing of policy information with stakeholders. It was further recommended to implement open policy frameworks that help to attract more skilled labour.

**Implementing institutions to facilitate investments:** Governments should establish institutions that gather all the relevant information, and they should create mechanisms to centralize interactions with investors and

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<sup>164</sup> These were identified as including: the broad scope of application; the broad definition of measure and investment; wide sectoral coverage; use of mandatory language; and the relationship between investment facilitation and the Services Protocol.



thereby enhance investment facilitation, such as one-stop-shops or business councils that enable businesses to register, adjust mortgages, seek work permits, obtain banking services as well as to obtain the relevant information on intellectual property rights. It was also recommended that, within the one-stop-shops to dedicate, if possible, one person to each business in order to establish communication on a regular basis and build trust-based relations.

**Infrastructure development and digitalisation:** Infrastructure development was strongly emphasised as key to investment facilitation. New commercial ports, airports, railways, roads, and electricity supply contribute to logistically interconnect the African continent and the rest of the world. This is important for connecting global supply chains as well as enhance intra-African investment flows. Governments were further advised to invest in digital solutions that are strong enablers of business and governance efficiency, both in relation to the establishment of businesses and their management, as this simplifies administrative procedures.

### **Key investment facilitation measures for development**

It was suggested that previous attempts by African countries to develop policies to attract FDI focused too much on an “investment protection” model that was too confrontational, rather than investment facilitation. The following key investment facilitation measures were discussed as being particularly supportive for development:

**One-stop shops:** Many investors fall between the cracks of different governmental organizations within a country and are required to fill the same forms in different agencies. This issue can be solved through “one-stop shops”, in which company registration is dealt with under one roof. There can be a lead organization that handholds investors throughout the entire journey. This can also involve the cooperation of investment organizations in investors’ home countries.

**Consistency and predictability:** Local and provincial agencies sometimes lack the knowledge or understanding of all the obligations the national government has undertaken. This could be avoided by hosting workshops with local and provincial authorities that deal with investment issues, to build capacity and make sure that information exists at the local level.

**Investment grievance mechanism with an early warning system:** There is a need for a mechanism that captures grievances and resolves them before they escalate into legal disputes. This should preferably be in the form of an institutional mechanism entrenched in law. It can also include a registry of grievances, providing accountability by identifying the number of investments and jobs saved, as well as negative reputational effects that were prevented. Implementing grievance mechanisms is an important tool to foster reinvestment opportunities as well as attract new FDI. Governments should promote the creation of a workable and user-friendly grievance management system based on coordination and a clear division of roles and responsibilities within the government when dealing with investors’ grievances. Furthermore, capacity must be built to establish such an institutional mechanism, which could take place in IPAs.

**Quality investment:** There should be impact assessments and requirements that investments have positive spill-over effects, such as job creation and environmental protection. These should come with a clear roadmap that includes performance pledges and goals to be delivered within a certain timeframe. Ghana is establishing a “recognized sustainable investor” mechanism through which investors commit to responsible business conduct and making best efforts to enhance certain FDI sustainability characteristics, in return for additional investment facilitation measures.

**Mutually beneficial cooperation among countries:** The AfCFTA Secretariat will be identifying comparative advantages within African countries by looking at regional value chains. It will seek to find one country’s value-added that can then feed into the productive capacities of other countries. African economies may split certain activities among different countries and promote themselves together.

**Movement of investments across the continent:** Investments should be able to fluidly go from country to country within Africa. There are three tiers of regulations and policies – national, bilateral and regional – which need to be harmonized to reduce regulatory fragmentation and enhance predictability.

**Public-private dialogue mechanisms:** It is important to partner with the private sector in the implementation of the IFD Agreement and AfCFTA agreements to ensure investment facilitation efforts respond to the actual needs of the private sector, including small and medium-size enterprises and contribute to the sustainable development goals of the continent. Public-private dialogues could include establishing mechanisms that enable governments to understand the needs of the private sector through, e.g., one-stop-shops, chambers of commerce or setting up investment councils that bring in the relevant stakeholders.

**Technical assistance and capacity building:** To ensure effective implementation of an investment facilitation framework, it is important that the negotiating parties commit to facilitate dissemination of knowledge, technical assistance and capacity building. Each government must assess its own needs in this matter, to develop long term capabilities for facilitating investment.

**Implementation:** To bring about the effective and timely implementation of an agreement, governments can aid this process by establishing a trust fund that will support developing countries in the negotiations, facilitate the dissemination of knowledge and pave the way for adopting and implementing investment facilitation frameworks. The activities of such a dedicated facility could include donor matchmaking, operating a funding programme, organize national workshops to address specific training needs to implement the agreement, and regional workshops that can incorporate dimensions of peer-to-peer learning as well as a dedicated website to disseminate information. Other key recommendations to ensure a successful implementation of an IFD Agreement include ensuring and harnessing reliable data, transparency and monitoring progress based on results-based management.

## High-Level Regional Roundtable on the IFD Agreement Negotiations: Perspectives from Asian and Pacific economies

30 March 2021

The High-Level Regional Roundtable was co-organized by the ITC, the DIE, the ASEAN, the ESCAP, and the WEF. This Roundtable was organised in the framework of the Investment Facilitation for Development project, jointly implemented by ITC and DIE.

The Roundtable offered a platform for a strategic exchange on the dynamic policy discussions and negotiations on investment facilitation for development among a select group of high-level policy makers, government officials, investment promotion agencies, and private sector representatives, as well as eminent academic scholars, focused on Asia and Pacific. The Roundtable offered an opportunity to reflect on the potential benefits and challenges of international frameworks on investment facilitation for development, to help negotiators ensure that their countries' international engagement is in line with their sustainable development strategies as well as national and regional reform agenda.

Opening addresses were provided by Yann Duval, Officer-in-Charge, Trade, Investment and Innovation Division, ESCAP; Armida Salsiah Alisjahbana, Executive Secretary, ESCAP; Dato Lim Jock Hoi, Secretary General, ASEAN; Pamela Coke-Hamilton, Executive Director, ITC; Anna-Katharina Hornidge, Director, DIE; and Børge Brende, President, WEF. Guest addresses were made by Yi Xiaozhun, Deputy Director General, WTO; and Rebecca Fatima Sta Maria, Executive Director, APEC Secretariat.

The first Session and High-level segment "The WTO negotiations of an Investment Facilitation Framework for Development: What is at stake for Asian and Pacific economies?", was chaired by Joo-Ok Lee, Head of Asia Pacific, WEF, and included the following speakers: Mathias Francke, Ambassador, Permanent Representative of Chile to the WTO and Coordinator of the Structured Discussions on Investment Facilitation for Development; H.E. Faiyaz Siddiq Koya, Minister for Commerce, Trade, Tourism and Transport, Republic of Fiji; H.E. James Bule, Minister of Tourism, Commerce, Trade and Ni-Vanuatu Business, Vanuatu; H.E. Chea Vuthy, Deputy Secretary General, Council for the Development of Cambodia, Cambodia; H.E. Li Chenggang, Ambassador, Permanent Representative of China to the WTO; H.E. Syamsul B. Siregar, Deputy II Permanent Representative, Ambassador of Indonesia to the WTO; and H.E. Rashidi Said, Ambassador, Permanent Representative of Malaysia to the WTO. The session included the following discussants: Craig Burchell, Senior Vice President, Global Trade Affairs, Public Affairs & Communications Dept., Huawei Technologies Co., Ltd. and Wenhua Shan, Dean, School of Law & School of International Education, Xi'an Jiaotong University.

The second session "Key issues related to investment facilitation in Asian and Pacific economies", was chaired by Marc Proksch, Chief of Investment and Enterprise Development Section, Trade, Investment and Innovation Division, ESCAP, and included the following speakers: Manjiao Chi, Professor and Founding Director, Centre for International Economic Law and Policy (CIELP), Law School, University of International Business and Economics (UIBE), China; Zoryana Olekseyuk, Senior Researcher, DIE; and Deborah Elms, Executive Director, Asian Trade Centre, President, Asia Business Trade Association.

The third session "Key institutional mechanisms and measures for enhancing sustainable development", was chaired by Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC, and included the following speakers: Ivan Nimac, Global Lead, Investment Policy and Promotion, World Bank Group; Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF; Michael Lim, Executive Director, Crowe Malaysia. The session included the following discussants: Rifat Parvez, Additional Secretary, Board of Investment, Pakistan and Clarence Hoot, Managing Director, Investment Promotion Authority, Papua New Guinea. Concluding remarks were provided by Zhanar Aitzhanova, Ambassador, Permanent Representative of Mission of Kazakhstan to the WTO.

## Highlights

### **The significance of a WTO IFD Agreement**

The COVID-19 pandemic has reversed much of the Asia and Pacific region's progress on the 2030 Agenda for Sustainable Development. It is also complicating key aspects of economic globalization, shocking global and regional supply chains and disrupting international trade and flows of FDI. Lockdown measures resulted in global FDI flows plummeting by 42% last year, to a low of US\$859 billion. Developing countries in Asia and the Pacific were more resilient with respect to FDI outflows to developing Asia, only mildly dropping by 4%. The severity of the impact on FDI flows varied by sub-region in Asia and the Pacific.

Revitalizing FDI inflows requires effective policy interventions by states and concerted mutual cooperation among states. The IFD Agreement is a framework for negotiating and implementing such actions. It aims to create an effective investment facilitation regime by promoting a transparent and predictable regulatory environment, making investment-related information more easily available, reducing red tape, helping investors to navigate complex regulations, and helping them to amicably resolve investor complaints. Such a framework would provide a boost in confidence to both domestic and foreign investors. Improving the investment facilitation ecosystem would send a positive signal to both foreign and domestic investors.

Asian and Pacific economies have been at the forefront of new collaborative approaches on investment facilitation. They have been pioneering both voluntary and legally binding frameworks and instruments and utilizing bilateral, national and mega-regional levels for implementing investment facilitation measures. The IFD Agreement can further help unlock investment flows to the region's economies, thereby stimulating regional recovery.

### **The state of play of the WTO negotiations on an IFD Agreement**

Currently, over 100 WTO Members participate in the IFD Agreement negotiations. The negotiations benefit from wide geographic representation, with many developing and LDC Members participating. Participating WTO Members have been discussing the following areas in relation to investment facilitation: improving the transparency and predictability of investment measures; simplifying and speeding up administrative procedures; strengthening the dialogue between governments and investors, and between host and home country governments; and promoting the uptake by companies of responsible business conduct practices, as well as fighting corruption. Participating members generally see special and differential treatment as an important element of the future framework and see the trade facilitation agreement as a good model in this regard.

Negotiations on the IFD Agreement began in September of 2020. Twenty-six draft proposals and written contributions have been received so far. A draft with a revised, streamlined text of the agreement has been prepared, based on these proposals and on discussions held during the negotiations. This draft continues to evolve in substance, while serving to inform discussions among members. There has also been a clear agreement among members that any future agreement will not cover market access, investment protection and ISDS. Further work is, however, needed in several areas, including the promotion of sustainable and responsible investment, single information portals, domestic supplier databases, domestic regulatory coherence, and special and differential treatment to strengthen the contribution of an IFD Agreement to sustainable FDI attraction and retainment.

### **The state of play and priorities for an IFD Agreement in Asia and the Pacific**

The Asia and Pacific region is becoming increasingly receptive to investment facilitation concepts and measures. This is demonstrated by the increasing number of investment and trade facilitation treaties in the region.

Asian and Pacific economies have different levels of compatibilities in their existing investment facilitation treaties, and some of the treaties include more investment facilitation provisions. Data show that developed countries in the Asia and Pacific region have initiated many more agreements with investment facilitation provisions than developing countries in the region.

In terms of priorities for the region, enhancing single window entries and one-stop shop services is important for improving investment facilitation. To this end, the digitalization of these services, especially with regard to investment approval processes, is important. Relatedly, governments should enhance information and communications technology (ICT) infrastructure and access and availability to digital technologies. To this end, it is encouraging that the IFD Agreement provides enhanced avenues for the use of ICT and e-portals.

Several speakers highlighted the importance of including the private sector in country-level and regional discussions of investment facilitation, noting that its input should, where possible, be included in drafting and designing policies aimed at improving investment climates through investment facilitation. Priority should be placed on building long-term partnerships with the private sector, especially with companies that are looking to invest with a long-term outlook. Establishing a mechanism for regular communication between business and governments and to promote public-private partnerships would support this and also help attract and facilitate investment.

Speakers also emphasized that an IFD Agreement must especially take into consideration the capacity of developing and LDC economies in the region. These economies will have to undertake policy reforms to implement investment facilitation measures. It is therefore important to consider what technical and financial assistance they will need in the future to implement the IFD Agreement and include capacity building commitments in the framework. Speakers highlighted that while a degree of flexibility should be left in the framework so as not to compel countries to act before they are ready or able to commit to certain measures, too much flexibility in provisions could make it harder for investors to see what the actual rules are on the ground in any given market at any given moment. Furthermore, too much flexibility may especially be difficult for small and medium-sized enterprises (SMEs) as they struggle the most with inconsistent application provisions.

### **The opportunities and challenges of an IFD Agreement in Asia and the Pacific**

The aim of the IFD Agreement is to set up a more transparent, efficient and investment-friendly business climate and to make it easier for foreign investors to invest, to conduct their day-to-day business and to expand their existing investments. The IFD Agreement will complement and reinforce individual Members' efforts to facilitate investment, for example, by creating a clear and consistent global benchmark for investment facilitation. Elements such as transparency of investment measures as well as streamlining and accelerating administrative procedures will boost confidence among investors. Domestic investment facilitation reforms will better ensure that international commitments are implemented. A global forum to promote investment facilitation practices could help reduce policy uncertainties, sending a positive signal to investors, enhancing cross-border cooperation and mitigating potential disputes.

The Asia and Pacific region performs relatively well on the investment facilitation index created by DIE, which maps the adoption of investment facilitation measures at the country level. Although scores vary considerably by country, the region as a whole scored an average of 1.2, suggesting that the region is indeed ready for an IFD Agreement. Because such a framework would hold the highest reform potential for low- and middle-income countries engaged in the negotiations, it is expected that these countries will gain the most from a multilateral framework on investment facilitation.

Discussions focused on three key challenges:

**The need for international law on investment facilitation versus domestic law:** Some countries in the region still remain to be convinced that international law and multilateral norms would be more efficient, and that the WTO is the most effective platform for addressing these issues and for enabling countries to boost their attractiveness for investment.

**The relationship between the IFD Agreement and other investment treaties:** A key concern of many Asian and Pacific countries is the relationship between the IFD Agreement and other investment treaties. Although it has been made clear from the outset that the IFD Agreement would not cover ISDS, many countries are still concerned that there could be an increase in potential cases as a result of spillover and linkages with other investment treaties. Although there have been limited examples of this occurring with

other agreements, the issue needs to be better addressed to ease the concerns of current participants as well as non-participants of the negotiations.

**Managing the interests of Asia and Pacific countries:** While there is a high level of consensus on a wider range of existing investment facilitation measures outside the Asia and Pacific region, disparate views of Members of the Asia and the Pacific region is to be expected, given that the region is much larger than other regions and very diverse in terms of size, level of development, economic structures, etc. A key challenge that remains is how to merge interests of different countries on certain issues, on a provision-by-provision basis.

### **Key institutional mechanisms and measures for enhancing sustainable development**

The following institutional mechanisms and investment facilitation measures were elaborated on as key provisions to be included in an IFD Agreement for promoting FDI flows and enhancing sustainable development.

**Dispute prevention management:** Investor grievance management is a basic investment facilitation measure. The establishment of grievance management mechanisms would be useful for both developed and developing countries. An effective grievance management mechanism helps to prevent disputes by identifying and resolving investment-related issues early. World Bank surveys show that, typically, when a dispute arises, the foreign investor attempts to interact with the government to try to resolve the problem. Moreover, investors have high levels of dissatisfaction with how governmental agencies deal with their grievances when there is no institutional structure in place for dealing with grievances. This leads to high levels of withdrawals and cancellations of investment, leading to the closure of operations. The World Bank developed an investor grievance management tool that can be implemented by government agencies to achieve a minimum institutional capacity to identify, track and manage conflicts between governmental agencies and investors, thereby helping to avoid escalation of grievances into legal disputes. Typically, such a tool should be implemented by an investment promotion agency (IPA) and/or some other governmental body responsible for FDI. Currently, investor grievance management mechanisms do not exist in most countries. With the World Bank tool, governmental agencies could attempt to resolve grievances that could result in ISDS, or could be operationally disruptive and could lead to investor divestment, or which could represent a political or reputational risk. It is important to develop a coordination protocol between agencies to recognize, capture and track grievances starting at an early stage.

**Risk-based approvals:** Policymakers should consider risk-based assessment, whereby low-risk investment projects are approved with more limited, if any, need for assessment, while high-risk projects receive careful assessment. Governments may consider limiting the requirement of obtaining authorization to categories associated with higher risk.

**Ex-ante conditional approval for SMEs:** Under this measure, authorization is given to SMEs to start operations without the requirement of approvals from the government for an initial period of time. This can help encourage FDI by SMEs, given that they have fewer resources to cover high costs of foreign establishment. India, for instance, has recently adopted such an approach for SMEs to be able to invest for up to 36 months without the same approval requirements.

**Silence is consent:** Such a mechanism could include granting permits or licenses automatically if no government action is taken within statutory time limits. Many economies have found this to be an important measure for approvals, not to get stuck in the administrative process, while also providing authorities to retain policy control if they proactively indicate that they require more time to evaluate a certain proposal.

**IPA-IPA cooperation:** Governments can support not only inward FDI but outward FDI as well, and partnerships between IPAs from different economies could support two-way flows of investments, leading to win-win outcomes.

**Linkages between foreign investors and suppliers:** Connecting foreign investors to domestic suppliers of goods and services facilitates investment decisions and activities. Supplier linkages provide direct benefits to contracted firms, while also dispersing the benefits of investment widely within the domestic economy, thereby enhancing the development dimension of investment. Linkages can be facilitated through supplier

databases that include sustainability dimensions; an approach Cambodia is pioneering in the region. Governments should develop supplier development programmes to allow suppliers to provide quality goods and services at the cost, quality and scale required by foreign investors. In this regard, the World Bank operates a supplier development programme.

**Behavioural and targeted incentives:** Incentives should be offered to induce particular investment behaviour or activity that is aligned with development goals and priorities. Clear criteria can help ensure that policy objectives are realized in practice. Clear criteria underpin 'smart incentives' that achieve policy objectives in an efficient manner.

### **Looking forward**

The IFD Agreement negotiations must remain open and transparent with broad participation of WTO Members. The focus should also be placed on ensuring that the sustainable development of economies is a key element of the framework. Cooperative and collaborative action is needed to move the multilateral framework forward. Enhanced international cooperation, information sharing and the exchange of best practices will be essential to creating a more transparent, efficient and predictable environment for facilitating cross-border investment. Relatedly, it would be beneficial to hold more awareness-raising sessions with non-participating WTO Members, to keep them abreast of developments during the negotiation rounds and to also provide them with a platform to share their concerns.

It would also be useful to consider enhancing regulatory coherence for investment facilitation at the regional level in the Asia and Pacific region. This could in turn serve as a starting point or foundation for participating Members in the IFD Agreement negotiations. The countries in the Asia Pacific are well positioned to shape a future of investment facilitation framework that reflects their interests and needs. An IFD Agreement would add value to current national and regional efforts by promoting good practices. In addition, an IFD Agreement would act as a catalyst in facilitating technical assistance and capacity building in the region.

## High-Level Regional Roundtable on the Benefits and Challenges of an IFD Agreement for Latin American Economies

6 May 2021

The High-Level Regional Roundtable was co-organized by the ITC, the DIE, the ECLAC, and the WEF, in the framework of the Investment Facilitation for Development project, jointly implemented by the ITC and the DIE.

The Roundtable offered a platform for a strategic exchange on the negotiations on investment facilitation currently taking place among more than 100 Members of the WTO. Specifically, it provided an opportunity for policymakers to reflect on the potential benefits and challenges of the negotiations. This discussion was particularly relevant, given that the Latin America and Caribbean region has been one of the regions worst hit by the COVID-19 pandemic, with a 7.1% GDP drop in 2020 and a sharp deterioration of economic and social indicators. Against this background, the region needs to attract more FDI to support its recovery, following the large drop in FDI inflows in 2020. FDI should also contribute to a more sustainable development path, *inter alia* by helping to diversify the region's economic structure and lessening its dependence on extractive activities.

Opening addresses were made by Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC; Alicia Bárcena, Executive Secretary, ECLAC; Pamela Coke-Hamilton, Executive Director, ITC; Anna-Katharina Hornidge, Director, DIE; and Børge Brende, President, WEF. The guest address was made by Ngozi Okonjo-Iweala, Director-General, WTO (by video message).

The first session "The WTO negotiations of an Investment Facilitation Framework for Development: What is at stake for Latin American countries", was chaired by Alicia Bárcena, Executive Secretary, Economic Commission for Latin America and the Caribbean and included the following speakers: H.E. Mathias Francke, Ambassador, Permanent Representative of Chile to the WTO, Coordinator of the Structured Discussions on Investment Facilitation for Development; H.E. Andres Valenciano Yamuni, Minister of Foreign Trade, Costa Rica; H.E. Carola B. Ramón, Undersecretary of Multilateral and Bilateral Economic Negotiations of the Minister of Foreign Affairs, International Trade and Worship, Argentina; H.E. Sarquis J. B. Sarquis, Secretary for Foreign Trade and Economic Affairs, Ministry of External Relations, Brazil; H.E. Laura Valdivieso, Vice-Minister for Foreign Trade, Ministry of Commerce, Industry and Tourism of Colombia; and H.E. Luz Maria de la Mora, Undersecretary of Foreign Trade, Secretariat of Economy of Mexico. The session included the following discussants: Javier Ernesto Galdámez, Investment Director, Export and Investment Promotion Agency of El Salvador (PROESA) and Rodolfo Spielmann, Head of Latin America, CPP Investments.

The second session "Key issues related to investment facilitation in Latin America", was chaired by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI, and included the following speakers: H.E. José Alejandro Rojas, Minister for the Facilitation of Private Investments, Panama; H.E. Claudia Eugenia Cornejo Mohme, Minister of Foreign Trade and Tourism of Peru; H.E. Rodrigo Yáñez, Vice Minister of Trade, Ministry of Foreign Affairs, Chile; Axel Berger, Senior Researcher, DIE. The session included the following discussants: Jaime Miller, Executive Director, Uruguay XXI; Daniel Marteleto Godinho, Director, WEG; Bernardo Larrain Matte, Chairperson, Sociedad de Fomento Fabril (SOFOFA); and Anabel González, Non-resident Senior Fellow, Peterson Institute for International Economics. Concluding remarks were made by Fabrizio Operti, Manager, Integration and Trade Sector, IDB.

### Highlights

The discussions during the roundtable focused on the following three main points, which will be elaborated below.

- There is a high level of support in the region from policymakers, investment promotion agencies and the private sector for an investment facilitation agenda, including support for the IFD Agreement negotiations at the WTO.
- The roundtable elaborated on key investment facilitation measures that should be included in the IFD Agreement such as transparency, streamlining of administrative procedures, the establishment of a single window, and dispute prevention mechanisms. Some of the concrete proposals that were



mentioned have a high potential to promote sustainable development, such as the establishment of linkage programmes between local suppliers and foreign investors, including the development of supplier databases (which can include sustainability dimensions), and promotion of responsible business conduct by foreign investors through an explicit reference to internationally recognized standards.

- The IFD Agreement should include mechanisms to ensure an adequate provision of technical assistance and capacity building to help developing and least developed countries to implement the obligations under the framework.

### **Participation of Latin American countries in the IFD Agreement negotiations**

The IFD discussions have been chaired from the outset by WTO ambassadors of Latin American countries (first Argentina, then Colombia and now Chile). Moreover, the majority of Latin American countries are participants in the ongoing negotiations, and several of them have tabled text proposals. Other countries from the region that are currently observers are closely following the negotiations and are considering an active participation in the structured discussions. The point was made that a future IFD Agreement may help Latin American countries implement more ambitious reforms in this area. Several government authorities expressed their countries' preference for a multilateral agreement. To that effect, they highlighted the importance of encouraging as many developing countries as possible to join the negotiations, to make sure their interests are considered. Private sector representatives were active in the roundtable and expressed their support for the WTO negotiations, providing their experience on measures that can both increase FDI flows and their development impact.

It was noted that Latin American countries have also been very active and innovative in promoting an investment facilitation agenda at the regional level. Examples are the MERCOSUR Protocol on Investment Facilitation and the Pacific Alliance Investment Facilitation Initiative. Beyond participation in multilateral, regional and bilateral negotiations, many Latin American countries are implementing a wide range of investment facilitation measures developed at the national level to attract FDI flows and enhance the contribution of FDI to sustainable development. The relevance of FDI inflows for the post-pandemic recovery was stressed by several countries.

### **The IFD Agreement negotiations and key investment facilitation measures for development**

The point was made that several provisions of the future agreement are well understood by participants and have received broad support (thus, they can be considered widely accepted). Among these are the provisions on transparency and the simplification of investment procedures, the establishment of focal points, regulatory coherence, coordination between and within economies on investment policies and facilitation measures, and responsible business conduct. More work is needed on, inter alia, the scope of the agreement, certain definitions, special and differential treatment, sustainable FDI provisions, consultation and stakeholder engagement mechanisms, and anti-corruption measures. A group of Members is working on revised and alternative proposals, including the facilitation of the movement of investors and insulating the IFD Agreement from other international investment agreements, also referred to as the "firewall". In July 2021, there will be a stocktaking exercise when the possible deliverables for the WTO 12th Ministerial Conference will be discussed.

Several government officials referred to their expectations about the negotiations. All countries shared the view that a future WTO agreement should not only help developing countries attract greater FDI inflows but also increase the contribution of FDI to the sustainable development of host countries. Countries shared the view that an IFD Agreement should not reduce national policy space to regulate. In this regard, there was appreciation for the distinctive aspect of cooperation between investors and governments that has guided the IFD Agreement negotiations and this principle was considered fundamental for a successful outcome.

The following measures were suggested for inclusion in the IFD Agreement:

**Establishment of coordination mechanisms:** The agreement should address the establishment of coordination mechanisms among different ministries and agencies dealing with FDI at all government levels (national, state, local). In addition, such coordination should also be established between host and home governments in order to facilitate two-way investment flows, foreign investors and local suppliers.

**Single window and one-stop shops:** Following the model of the trade single window included in the WTO Trade Facilitation Agreement (TFA), investment facilitation single windows are starting to be implemented in several Latin American countries to facilitate the interaction between foreign investors and government agencies. Investment single windows, also known as one-stop shops, are a useful instrument as long as they replace multiple steps and do not themselves become additional steps (“one more stop”).

**Aftercare services:** The institutionalization of aftercare services for foreign investors, for example through aftercare dialogues, can help investment agencies improve the likelihood of reinvestment and avoid divestment if there are grievances that arise, by identifying, addressing and resolving them, as well as assisting investors in their ongoing operations.

**Stakeholder dialogue:** It would be desirable to encourage the establishment of a mechanism to provide interested parties an opportunity to comment on proposed laws, regulations and policies or changes to existing ones prior to their implementation and with sufficient advance notice to be able to provide input, thus increasing the predictability, considered a crucial dimension of investment facilitation efforts.

**Transparency, simplifying and expediting of administrative procedures:** Simplifying and expediting procedures for applications and approvals of investment projects at all levels should be encouraged. In addition, Members should consider introducing silent consent administrative procedures to facilitate investment. Under the concept of “silent consent”, authorization is automatically granted to investors where the competent authority fails to act within the specified time period required under its laws and regulations, unless investors have been notified otherwise. A complementary approach is risk-based administrative approval, whereby low-risk investments can be approved with light review and higher-risk investments with more thorough review. It was also noted that the process of obtaining visas should be more transparent and the negotiation of minimum standards could be encouraged, for example, regarding the expiration time of such documents. These measures can be particularly important to support and facilitate FDI by SMEs, since they have fewer resources to consider and implement FDI decisions. Investment approvals of SMEs can also be directly expedited as an investment facilitation measure.

**Linkage programmes:** IFD Agreement provisions should include programmes to support the creation of linkages between foreign investors and potential local suppliers, including local supplier databases and programmes targeted at enabling them to comply with the quality and quantity requirements (and other specifications) of foreign investors. Such supplier databases can include sustainability dimensions, allowing investors to contract with firms that operate sustainably and thus both motivate and reward such operations. Databases can also include potential investment projects in the host country.

**Dispute prevention:** The IFD Agreement should include provisions aimed at preventing disputes between foreign investors and host governments, for example through an investment ombudsperson and “early warning” mechanisms.

**Responsible business conduct:** The IFD Agreement should include provisions to promote responsible business conduct by foreign investors, for example, through an explicit reference to such internationally recognized standards as the United Nations Guiding Principles on Business and Human Rights and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. The future agreement should contain the obligation by host countries not to lower their environmental standards to attract FDI.

**Recognized Sustainable Investor:** Creating a category for a “Recognized Sustainable Investor” (similar to the Authorized Operator in the TFA) would be desirable. This involves granting additional investment facilitation benefits to investors with a good track record in terms of sustainability.

**Technical assistance and capacity building under the IFD Agreement:** All government panelists stressed that the IFD Agreement must include mechanisms to ensure the adequate provision of technical assistance and capacity building to help developing and least developed countries to implement its provisions and ensure the agreement can generate positive effects in practice. This will be essential not only to achieve the IFD Agreement goals, but also to ensure the participation of additional countries in the agreement. In this regard, as well as in terms of special and differential treatment more generally, the TFA constitutes an important reference.

## Annex III: Capacity-building workshops – Reports

### Virtual capacity-building workshop: Opportunities and challenges of establishing an IFD Agreement in the WTO: Concrete measures for an IFD Agreement

11 December 2019

#### Overview

The Bertelsmann Stiftung, the ITC, the DIE and the World Economic Forum co-organized an expert workshop at the World Trade Organization. Among the participants were WTO delegates and representatives from IPAs, academia, the private sector, non-governmental organizations and international organizations. The results of the workshop were reported to the WTO Structured Discussions on Investment Facilitation for Development on 12 December 2019.

The workshop sought to identify key, actionable measures that governments can take to facilitate investment flows, as well as maximize these flows' sustainable development impact. The objective was to obtain input from practitioners that could be of use to the Structured Discussions of WTO Members. This report is meant to be a resource for delegates developing the Investment Facilitation Framework for Development in the WTO. In addition, draft texts are being developed for key measures to facilitate their possible inclusion as provisions in a Framework. The results will be published in due course.

The welcome address was provided by Marion Jansen, Chief Economist and Director, Division of Market Development, ITC. The opening session was chaired by Karl P. Sauvant. The keynote addresses were provided by Ambassador Eduardo Gálvez, Permanent Representative, Mission of Chile to the WTO, and Chair of the Structured Discussions, and Ambassador Zhang Xiangchen, Permanent Representative, Mission of the People's Republic of China to the WTO.

The workshop included four sessions:

1. 'Identifying key, concrete and actionable investment facilitation measures' was chaired by Matthew Stephenson and included Bostjan Skalar, Executive Director and Chief Executive Officer, World Association of Investment Promotion Agencies, and Judith Walker, Marketing and Operations Director, Wavteq. Comments were made by Hanna Tatarchenko Welgacz, Coordinator of the Innovation Investment Division at Apex-Brasil; Sarvathullah Mathari, Managing Director, Hurera Leather and Shoes Uganda Limited; Kavaljit Singh, Director, Madhyam, a public policy research institute, India; and Ivan Nimac, Global Lead, Investment Policy and Promotion, World Bank Group.
2. 'Maximizing the contribution of investment facilitation to sustainable development' was chaired by Karl P. Sauvant and included the presentation of a discussion note. Comments were made by Hassan Jallow, Chief Executive Officer, The Gambia Investment and Exports Promotion Agency; Andreas Dressler, Managing Director, Location Decisions; Manjiao Chi, Professor and Founding Director, Centre for International Economic Law and Policy, School of Law, University of International Business and Economics; Khalil Hamdani, Board Member, CUTS International; and Ghita Roelans, Head, Multinational Enterprise and Enterprise Engagement Unit, ILO.
3. 'Understanding the opportunities and challenges for developing countries to negotiate and implement an international framework' was chaired by Axel Berger, and included a presentation of a discussion note by Berger and Ali Dadkhah, Dadkhah Consulting. Comments were made by Sophal Suon, Director of Investment Promotion and Public Affairs, Cambodia; Nathalie Bernasconi, Group Director, Economic Law and Policy, International Institute for Sustainable Development; and Mohammad Saeed, Senior Trade Facilitation Adviser, ITC.
4. 'Capturing the main takeaways from the day's discussion' was chaired by Axel Berger, and included Yofi Grant, Chief Executive Officer, Ghana Investment Promotion Centre, Office of the President; Crispin Conroy, Director, ICC Representative, Geneva; Manuel Chacón, Counsellor, Permanent Mission of Colombia to the WTO; and Felix Imhof, Deputy Head, International Investment and Multinational Enterprises, State Secretariat for Economic Affairs of Switzerland. Closing remarks were made by Andreas Esche, Director Megatrends Programme, Bertelsmann Stiftung.

Background notes were prepared and circulated a week in advance of the workshop, namely, for session 1: [Enhancing FDI performance: practical measures for FDI success](#)<sup>165</sup> and [What can Governments do to facilitate investment? A menu of the most important measures identified through surveys](#);<sup>166</sup> for session 2: [Advancing sustainable development by facilitating sustainable FDI, promoting CSR, designating recognized sustainable investors, and giving home countries a role](#);<sup>167</sup> and for session 3: [Challenges of negotiating and implementing an international investment facilitation framework](#).<sup>168</sup>

Each session began with a brief presentation of these notes followed by comments from discussants representing IPAs, international investors, academia, NGOs and international organizations. The floor was then opened for questions, which provided insights in a lively and frank exchange.

The workshop confirmed that important areas of investment facilitation are: transparency and predictability of investment measures; streamlining and speeding up administrative procedures and requirements; enhancing international cooperation, information sharing and the exchange of best practices; and the development dimension.

Participants emphasized that, as the objective of investment facilitation is development, giving full attention to this issue is particularly important to obtain broad support for an Investment Facilitation Framework, including from developing countries and civil society. Key measures identified were relayed to the WTO Structured Discussions in summary form on 12 December 2019.<sup>169</sup>

## Highlights

This report focuses on measures that may not have yet been considered.

### **Facilitate access to business visas, perhaps in the form of green channels**

Challenges related to speedily and easily acquiring visas for business travel can be an impediment to investment. This is particularly the case when there are variations in visa policy among neighbouring economies, with those economies that have a more attractive visa and work permit policy – from the perspective of foreign investors – having an easier time in facilitating investment. Beyond business visas, access to work permits for high-skilled expatriates can also be a measure to facilitate investment.

### **Provide project evaluation assistance to evaluate large-scale investment project proposals**

IPAs and other government officials in developing countries often do not have the multidisciplinary technical capacity to properly evaluate investment project proposals, especially when they involve large-scale investments with returns planned over the long term and with significant impact on development. Participants offered real-life examples where lack of capacity led to a freeze in the approval of a planned investment as government officials were concerned that they might have misevaluated and made a mistake. As a result, project evaluation assistance could be of significant help in facilitating investment under a Framework's technical assistance provisions.<sup>170</sup>

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<sup>165</sup> Loewendahl, H. & Walker, J. (2019). Enhancing FDI performance: practical measures for FDI success.

<sup>166</sup> Omic, A. and Stephenson, M. (2019). What Can Governments Do to Facilitate Investment? WAIPA and World Economic Forum. Last accessed on 10 March 2021 from [http://www3.weforum.org/docs/WEF\\_Investment\\_Facilitation\\_2019.pdf](http://www3.weforum.org/docs/WEF_Investment_Facilitation_2019.pdf)

<sup>167</sup> See above footnote 91, Sauvants K. and Gabor E. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3496967](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3496967)

<sup>168</sup> Berger, A. and Dadkhah, A. (2019). Challenges of negotiating and implementing an international investment facilitation framework. Last accessed on 10 March 2021 from [https://www.die-gdi.de/fileadmin/user\\_upload/pdfs/Sonstige/Challenges\\_of\\_negotiating\\_and\\_implementing\\_an\\_international\\_investment\\_facilitation\\_framework\\_5.12.2019.pdf](https://www.die-gdi.de/fileadmin/user_upload/pdfs/Sonstige/Challenges_of_negotiating_and_implementing_an_international_investment_facilitation_framework_5.12.2019.pdf).

<sup>169</sup> Sauvants, P. K. (2019). Report to the Structured Discussions on Investment Facilitation WTO. Held at the WTO, Geneva. Last accessed 10 March 2021 from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3505634#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3505634#).

<sup>170</sup> While such assistance is available in principle, the organizations providing it – especially the African Legal Support Facility (<https://www.afslf.org/>), CONNEX Support Unit (<https://www.connex-unit.org/en/whoweare/>) and the International Senior Lawyers Project (<https://islp.org/>) – are under-resourced and therefore unable to provide all the support that is required.

### **Create grievance mechanisms to address investment-related challenges, avoiding grievances from escalating into investment disputes and encouraging reinvestment**

Dedicated mechanisms to address investment-related challenges help investors resolve issues without resorting to legal channels, which add cost and often result in irrevocably strained relationships between investors and host country governments. Ombudspersons can be part of such mechanisms, acting as neutral third-party mediators to help settle differences. The mechanism can proactively track and identify recurrent types and sources of challenges to help address issues at their root. This type of grievance mechanism will not only facilitate new investment but also re-investment.

### **Adopt a ‘silent yes’ mechanism for administrative approvals**

One of the most favoured measures to facilitate investment – both for firms and some policymakers – is the adoption of a ‘silent yes’ for administrative approvals, whereby approval is automatically granted after a certain period of time, absent intervention by authorities. Such mechanisms have proven effective in speeding up administrative procedures and requirements in a number of economies, and therefore policymakers seeking to improve and reform systems often embrace them. However, others have expressed concern that they might lose control of the approval process. Such a mechanism would need to be designed so that officials can request more time if needed, thereby maintaining oversight and control. The key is that the default is set such that approval will take place absent proactive intervention, rather than the other way around, where the default requires proactive intervention for approval to take place.

### **Increase transparency of investment incentives and encourage smart incentives to target sustainable investment**

The publication of investment incentives facilitates investment while simultaneously creating more predictability and less scope for rent seeking. This information is particularly important for SMEs, which may have fewer resources for internationalization, as well as fewer resources to find information. An increasing number of economies are publishing investment incentives online through an incentives inventory.

Incentives can also be effective for the promotion of the SDGs. In designing an incentive system, three qualities are important: simplicity, efficiency and transparency. A more targeted use of incentives – as already done by a number of governments – may result in lower fiscal outlays or forgone revenue, as well as potentially higher quality FDI because the investment received matches the sustainable development strategy of host economies. This trend at the domestic level could be supported by an international framework on investment facilitation for development.

### **Foster linkages by creating databases of local suppliers and support supplier-development programmes**

Foreign investors report that, when deciding to enter or expand their investments, finding domestic firms to supply goods and services at the right cost, quality and volume can sometimes be difficult – and the availability of local suppliers is often an important FDI determinant. A measure to help foreign firms identify and contract with domestic firms – overcoming such information asymmetry – could play an important role in facilitating investment. IPAs, domestic business or professional associations could manage such lists because foreign investors often have contact with IPAs and seek to contact suppliers of professional services (lawyers, accountants, marketing professionals, etc.).

A number of countries have successfully implemented supplier-development programmes, which can help increase the capacity of domestic suppliers to contract with foreign firms. Such programmes would be a key complementary effort by helping to increase the number of firms that are linkage-ready and hence could be included in a database or list, thus increasing the potential development benefits from investment.

### **Increase transparency of support measures in home economies to outward investors and link measures to a positive development impact in host economies**

Home-economy governments transparently outlining their measures to support outward FDI (OFDI) is increasingly important to facilitate investment, given that economies are becoming simultaneously the destination and source of investment flows. This is particularly important to SMEs, for which this kind of support can make a difference to internationalization.

In addition, home-economy governments are increasingly adopting guidelines for their firms to undertake OFDI sustainably, or making home country measures (HCMs) conditional on the development impact in host economies. Examples include making HCMs conditional on environmental and social impact assessments. An international investment facilitation framework could further promote the adoption of such measures.

### **Encourage international investors to prepare and observe CSR statements and to commit to observing internationally agreed standards of responsible business conduct**

Both firms and IPAs identify sustainability as increasingly important in their investment decision-making. Many firms have corporate social responsibility (CSR) statements and have pledged to observe internationally agreed standards of responsible business conduct that are meant to guide their investments, including by better managing investment projects in host economies.

The alignment of domestic laws and regulations with internationally accepted standards of responsible business conduct can facilitate investment for both economic and normative reasons: it can reduce uncertainty, risk and cost while making host economies more attractive to investors seeking to invest according to sustainable investment principles. As a result, governments can play a role in providing clear standards and principles to firms as to how to carry out investment by signing up to international standards.

The best known and most important of these standards – backed by a consensus of governments – are the UN Guiding Principles on Business and Human Rights,<sup>171</sup> the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy<sup>172</sup> and the OECD Guidelines for Multinational Enterprises.<sup>173</sup> In addition, various private-sector institutions have developed their own guidelines, such as the International Chamber of Commerce's Guidelines for International Investment<sup>174</sup> and guidelines formulated by industry groups.

Accordingly, an investment facilitation framework could require governments to encourage investors undertaking FDI from their jurisdictions to adopt and observe CSR commitments and widely publicize them. Such a requirement could extend to the provision of information on the extent to which these investors have pledged to observe international instruments dealing with responsible business conduct.

Examples of text to operationalize CSR principles in international investment agreements can be found in one of the background papers prepared for the workshop.<sup>175</sup>

### **Create a category of 'recognized sustainable investor' to incentivize sustainable investment**

Creating a special category of 'recognized sustainable investor' (RSI) could help governments to influence investors to invest in a manner that is in line with sustainable investment and observe CSR guidelines and international standards of responsible business conduct, as discussed above.

An RSI category could consist of three parts: It would establish basic criteria that all investors must meet to qualify; it would allow for country-specific sustainability characteristics,<sup>176</sup> established by each host country, which investors would commit to use reasonable efforts to ensure that their investments fulfil; and it would grant special benefits beyond those generally available to investors to qualifying investors.

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<sup>171</sup> UN, Guiding Principles on Business and Human Rights, UN Doc. HR/PUB/11/04, (2011). Last accessed 10 March 2021 from [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>172</sup> ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, at 3 (5th ed. 2017). Last accessed 10 March 2021 from [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf).

<sup>173</sup> OECD, Guidelines for Multinational Enterprises (2008). Last accessed 10 March 2021 from <http://www.oecd.org/investment/mne/1922428.pdf>.

<sup>174</sup> International Chamber of Commerce, Guidelines for International Investment (2016). Last accessed 10 March 2021 from <https://iccwbo.org/publication/icc-guidelines-international-investment-2016>.

<sup>175</sup> Sauvart K. and Gabor E., *op cit.*, pp. 7-11.

<sup>176</sup> Sauvart P. K. and Mann H. (2019). Making FDI more sustainable: Towards an indicative list of FDI sustainability characteristics. *Journal of World Investment & Trade*, vol. 20 pp. 916-952. Last accessed on 10 March 2021 from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3509771#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3509771#).

An RSI category could also encourage coordination between firms and (host and home) IPAs on sustainable investment, while providing additional facilitation services to firms with a proven record of sustainable behaviour, building on the precedent of the 'Authorized Operator' provision in the Trade Facilitation Agreement.

The example of a text to operationalize the RSI measure can be found in one of the background papers prepared for the workshop.<sup>177</sup>

### **Establish mechanisms to facilitate coordination on investment policy and measures among government agencies, between national and subnational institutions, and between the government and the private sector**

Investors report that a lack of coordination among government agencies leads to mixed signals, lost time or conflicting decisions. Investors also report that challenges can arise because of different interpretations of investment policy and measures between national and subnational institutions. In addition, the number of subnational investment institutions is growing rapidly.

Having a mechanism for alignment of policies and measures among different domestic agencies would therefore increase investor confidence that domestic policies will be adopted and implemented rationally and effectively, facilitating firm investment decision-making. Having a mechanism for alignment between national and subnational institutions in the implementation of investment policy and measures would likewise facilitate firm investment decision-making. Similarly, a mechanism to facilitate public-private coordination can ensure that the implementation of policies and measures is designed to achieve the intended goals because they are developed in consultation with the users of those measures, namely firms. Importantly, such a mechanism may wish to involve foreign and domestic firms to ensure various perspectives and interests are addressed. Such a mechanism can provide assurances to firms that, when issues arise, there will be ways to raise and address them with policymakers.

### **Create dialogue opportunities within a committee on investment facilitation for development**

A potential committee on investment facilitation for development could facilitate dialogue and cooperation among Members. For instance, dialogue – and exchanges of experience – could be fostered between host and home economies on their respective investment facilitation agendas and how to cooperate to facilitate sustainable FDI flows. Dialogues could also be fostered between the government members of the committee and external stakeholders (especially IPAs and international investors). Building bridges between governments and stakeholders could begin during the negotiations phase of a Framework on Investment Facilitation for Development, for example by extending invitations to IPAs and international investors to consult with delegates in the Structured Discussions about the usefulness of various investment facilitation measures.

### **Facilitating voluntary peer reviews of the implementation of a Framework on Investment Facilitation for Development**

One way to increase the likelihood that a Framework makes a tangible difference in facilitating investment and increases development impact is through economies agreeing to undergo voluntary peer reviews of the implementation of their commitments. Peer review is an accepted part of implementation and monitoring of WTO commitments through periodic Trade Policy Reviews.<sup>178</sup> Peer review of the implementation of a Framework on Investment Facilitation for Development would be voluntary and could take place within a potential WTO Committee on Investment Facilitation for Development, which could be established as part of an agreement on a Framework.

The organizers look forward to continuing to provide input into the WTO's work on investment facilitation for development, through both inputs into the process and technical feedback as a Framework develops.

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<sup>177</sup> Sauvant K. and Gabor E., *op cit.*, pp. 14-16.

<sup>178</sup> WTO, *Implementation and Monitoring*. Last accessed 10 March 2021 from [https://www.wto.org/english/tratop\\_e/monitor\\_e/monitor\\_e.htm](https://www.wto.org/english/tratop_e/monitor_e/monitor_e.htm).



## Virtual capacity-building workshop: Concrete measures to facilitate the flow of sustainable FDI

11 March 2020

### Overview

This online workshop aimed to provide perspectives on issues relating to investment facilitation for development. Special attention was given to ombudsperson-type and grievance-management mechanisms within governments. These perspectives are meant to enrich the negotiations of a multilateral framework on investment facilitation for development in the WTO.

The workshop's discussion drew on the practical experiences of those most directly engaged in investment facilitation, namely FDI service providers, investment promotion agencies, representatives of international organizations providing technical assistance in FDI matters, and other experts.

The opening, objectives and keynotes were provided by Dorothy Tembo, Executive Director a.i., ITC; Roberto Azevêdo, Director-General, WTO; Ambassador Mathias Francke, Coordinator of the Structured Discussions on Investment Facilitation for Development; Ambassador Zhang Xiangchen, Permanent Representative, Mission of the People's Republic of China to the WTO; Ambassador Maria de Jesus Veiga Miranda, Permanent Representative, Mission of Cabo Verde to the United Nations Office and other international organizations; and Nicolás Palau Van Hissenhoven, Deputy Permanent Representative, Mission of Colombia to the WTO.

The meeting included four sessions that were moderated by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI, and Axel Berger, Senior Researcher, DIE:

- Session 1 identified key investment facilitation measures through the experience of FDI services providers, and included a presentation of the inventory by Khalil Hamdani, Visiting Professor, Lahore School of Economics, Pakistan. Discussion starters were Henry Loewendahl, Chief Executive Officer of Wavteq; Sebastian Reil, Senior FDI Consultant at FDI Center; Douglas van den Berghe, Vice-President Advisory, Conway Inc.; and Maria Fernanda Sanchez, Investment Promotion Manager, LATAM – ProColombia.
- Session 2 identified key investment facilitation measures through the experience of international organizations, and included the following discussion starters: Ivan Nimac, Global Lead, Investment Policy and Promotion, World Bank Group; Ana Novik, Head of the Investment Division, OECD; and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum.
- Session 3 Ombudsperson-type functions/mechanisms, included presentations by Kim Sung-Jin, Foreign Investment Ombudsperson, Republic of Korea; and Samo S. Gonçalves, Second Secretary, Mission of Brazil to the WTO. Discussion starters were Mohammad Baba, Deputy Director, Investor Relations, Investor Relations Department, Nigerian Investment Promotion Commission; Kathryn Dovey, Manager, Responsible Business Conduct Unit, OECD; and Abdul Hannan, Adviser, Federation of Bangladesh Chambers of Commerce and Industry.
- Session 4 explored grievance-management mechanisms within governments, included a presentation by Ivan Nimac, Global Lead, Investment Policy and Promotion, World Bank Group. Discussion starters were Marion Jansen, Chief Economist and Director, Division of Market Development, ITC; and Mais Khlaifat, Director, Legal Services, Jordan Investment Commission. Closing remarks were provided by Karl P. Sauvart, Columbia University/CCSI, and Axel Berger, DIE.

The discussions were informed by 'An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?'. The draft inventory will be updated in light of the discussions, as well as input from experts collected in other meetings; it will be made available to negotiators of the multilateral framework on investment facilitation for development.



The discussions integrated a diverse set of stakeholder perspectives, with speakers representing IPAs, international investors, academia, civil society, and international organizations exchanging opinions in real-time. This left ample time and opportunity for questions from the audience. The workshop was carried out in the framework of a joint project of ITC and DIE on Investment Facilitation for Development.

## Highlights

### **A multilateral framework on investment facilitation for development should provide clarity on the role of IPAs, ombudsperson-type agencies, ombudsperson institutions and OSS**

Speakers highlighted the need to distinguish the core functions of IPAs, ombudspersons and one-stop-shops (OSS) even though, in practice, these functions may be incorporated in one institution. Clear lines need to be drawn between organizations that promote investment and organizations that regulate investment and may also deal with grievances of investors.

It can be problematic for IPAs to also have monitoring and control functions, noted some speakers. IPA mandates should focus on investment facilitation and promotion, policy advocacy and providing a platform through which the private sector would comment on existing or proposed investment policies.

However, in many countries IPAs are involved in policy and regulation alongside FDI facilitation and promotion. While this does not necessarily involve creating three specific institutional arrangements for these functions, it is important to differentiate the general mandates and responsibilities of each. This overlap needs to be addressed through better inter-agency coordination.

Some speakers encouraged establishing IPAs that incorporate the function of an OSS, as demonstrated by the examples of Brazil and Nigeria, where physical and structural proximity offer simplified and streamlined processes. The example of Brazil suggests that an electronic single window could include focal and inquiry point functions.

A multilateral investment facilitation framework for development could suggest concrete measures to guide the delegation and distribution of responsibilities among different agencies. Moreover, the technical assistance and capacity-building component of the framework could include provisions to assist economies in implementing investment facilitation measures optimally.

It was also suggested that IPAs should be regarded as key implementers of many investment facilitation measures, including the ombudsperson and OSS mechanisms.

### **A multilateral framework could include provisions that encourage Members to put in place a grievance mechanism**

Speakers stressed the importance of introducing mechanisms that help retain existing investments, which is more cost-effective than attracting new investment. Therefore, there should be dedicated measures for establishing grievance mechanisms in a multilateral framework on investment facilitation for development, in addition to regular aftercare services such as responding to investor enquiries, assisting investors in obtaining information and resolving investment-related difficulties.

Having grievance mechanisms that deal specifically with political risk challenges would enable countries to better manage the concerns of foreign investors in case of changes in regulations or legal frameworks. When effectively implemented, such mechanisms could significantly reduce the escalation of grievances into disputes, including investor-state disputes.

A key consideration in the implementation of grievance mechanisms should be the tracking and capturing of data on received and processed grievance cases. These data could be utilized to measure the performance of grievance mechanisms. More importantly, these data could inform policymakers by offering a diagnosis on the most problematic areas in the current investment environment by observing the number of grievances raised per area. A grievance mechanism could be implemented through several models that involve different agencies, such as focal points and IPAs. Nonetheless, grievances could be addressed by a dedicated agency that is often named by the ombudsperson's office.

### **Ombudsperson-type agencies need to be independent and impartial**

For an ombudsperson to effectively address the grievances of foreign investors, it is imperative that the ombudsperson enjoy a high level of independence and impartiality. In Korea, for example, an ombudsperson office was established following the Asian financial crisis at the turn of the millennium.

The Korean ombudsperson deals with grievances and issues related to FDI, including taxation, human resources, intellectual property, environment, finance, construction, tariffs and investment incentives. According to the Ombudsperson of Korea, Kim Sung-Jin, the primary function of the Korean Ombudsperson is grievance management, followed by the suggestions for FDI policy-making.

The Korean Ombudsperson addresses grievances through three approaches: Legislative improvements, which involve the enactment or amendment of laws and regulations; administrative interventions, which explore solutions within existing regulations in cooperation with local institutions; and the 'home doctor', which involves the ombudsperson addressing the grievance by mobilizing their local network and exploring special arrangements.

This example shows that the ombudsperson's non-official legal status allows for addressing issues of investors vis-à-vis different authorities. In particular, the home-doctor approach seeks to resolve a grievance by liaising with relevant officials to develop an arrangement to address a grievance on an individual basis. This approach is especially relevant when an ombudsperson is approached with grievances that are not directly addressed by existing regulations. For an effective home-doctor process, an ombudsperson should be equipped with access to a network of high-level public officials.

In the Brazilian example, the ombudsperson is a member of the foreign trade board, which includes high-level representation from all ministries.

### **Implementation of investment facilitation requires a coordinated approach**

Speakers consistently stressed the importance of a coordinated approach for implementing investment facilitation measures. One example is the enactment of a regulatory tool that brings together relevant authorities with the commitment to implement investment facilitation measures. Another example is the appointment of a national investment facilitation committee to monitor implementation and mobilize political actors as needed. The committee could play a similar role to that of National Trade Facilitation Committees in implementing the WTO Trade Facilitation Agreement. To support the subsequent implementation of a multilateral framework, governmental and non-governmental stakeholders should be involved in the negotiation process.

### **Input from civil society and users of existing investment facilitation mechanisms should be sought**

The views and concerns of civil society and potential users of investment facilitation mechanisms, such as foreign investors and national companies investing abroad, should be sought when formulating a country's negotiations agenda. This would inform the formulation of investment facilitation measures and ensure that investment facilitation provisions are geared towards fulfilling the needs of stakeholders.

Civil society involvement could help ensure that measures promoting sustainable development are part of negotiations. A multilateral framework on investment facilitation could promote sustainable development by including provisions that allow for and encourage incentives for sustainable FDI.

### **Recognized sustainable investor**

Establishing a 'recognized sustainable investor' (RSI) category would enable economies to incentivize foreign investors who have a positive track record in supporting sustainable development by undertaking sustainable FDI, including by observing CSR principles.

The idea of an RSI draws on the Authorized Operator provisions of the Trade Facilitation Agreement. Some speakers argued that many governments are open and willing to engage in this measure as it aligns with their sustainable development strategies and promotes smart incentives as opposed to *carte blanche*

approaches. Nonetheless, the implications of a most-favoured-nation obligation for RSIs should be explored, perhaps aided by insight from the Trade Facilitation Agreement.

**A multilateral framework should include home country measures covering outward FDI**

Investment facilitation measures could also address outward investment, especially in countries that have extensive regulatory requirements for outward investment. These measures could promote CSR requirements, including environmental standards. Furthermore, measures relating to financing are quite relevant to outward investment. Outward investment measures are already present in some international investment agreements, including the recent bilateral agreement between Brazil and India.

## Virtual capacity-building workshop: Increasing the development impact of an IFD Agreement: Concrete measures to facilitate sustainable FDI and CSR

12 May 2020

### Overview

This workshop was organized in the framework of the Investment Facilitation for Development project carried out by ITC and DIE. The workshop was designed for WTO delegates dealing with investment facilitation matters, as well as government representatives from capitals. It was chaired by Axel Berger, Senior Researcher, DIE; and Karl P. Sauvant, Columbia University/CCSI.

The workshop aimed to build capacity for the negotiations of a multilateral framework on investment facilitation for development at the WTO. It will be followed by a second workshop later in the year on the development dimension of a multilateral framework on investment facilitation for development, and will focus on issues related to the implementation of investment facilitation measures.

The discussions were informed by 'An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?'. The draft inventory will be updated in light of the discussions during the workshop, as well as other work undertaken within the ITC-DIE project.

Rajesh Aggarwal, Chief, Trade Facilitation and Policy for Business Section, ITC, explained that FDI will need to be an element of post-COVID-19 economic reconstruction. The repercussions of the pandemic are likely to trigger competition in developing countries and least developed countries to attract FDI.

Ambassador Mathias Francke highlighted that investment facilitation will contribute to efforts to counter the COVID-19 economic impact and that many economies are implementing investment facilitation measures. He gave an overview of the WTO discussion on investment facilitation for development, and informed participants about the draft negotiations text, which contains the proposed investment facilitation provisions. He said that, while formal negotiations are on hold, China, the EU, Japan and Turkey have submitted proposals on investment facilitation.

Axel Berger chaired the first session, "Identifying key investment facilitation measures to facilitate the flow of sustainable FDI", with input by Hilina Getachew, Chief of Staff to the Commissioner, Ethiopian Investment Commission; Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI; and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum.

Karl P. Sauvant chaired the second session, A provision on corporate social responsibility in a multilateral framework on investment facilitation for development, with input by Valéria Mendes Costa Paranhos, First Secretary, Ministry of Foreign Affairs, Brazil; Ana Novik, Head of the Investment Division, OECD; and Carlo Pettinato, Head of Unit, Investment, Directorate General for Trade, European Commission. Axel Berger and Karl P. Sauvant made final remarks and closed the session.

### Highlights

#### **'Recognized sustainable investor' provision**

A 'recognized sustainable investor' provision is an instrument that could promote sustainable FDI. In such a scheme, special benefits are given to investors who meet certain criteria. This includes investors who observe internationally agreed instruments of responsible business conduct (such as the UN Guiding Principles on Business and Human Rights, the ILO MNE Declaration and the OECD Guidelines for Multinational Enterprises); observe their own CSR statements to make the best effort to contribute to sustainable development; and make best efforts to contribute to country-specific FDI characteristics.

The special benefits could include red carpet services, which involve assigning individual case officers to help investors resolve difficulties; reductions in costs and complexities in obtaining licences; and assistance in establishing backward linkages with domestic suppliers. Qualifying investors also gain the reputational advantage of being designated as recognized sustainable investors. Providing extra benefits when meeting

special criteria has been included in the WTO TFA, Article 7.1, where authorized operators who meet certain criteria are provided with additional facilitation measures.

The discussion explored whether the status of a recognized sustainable investor is granted only in connection with a specific investment or if it applies to all investments made by the investor in a given country and granted with that status. This question is pertinent to cases where a foreign investor has made several investments in a country.

### Facilitating sustainable FDI

Key measures to facilitate the flow of sustainable FDI include:

1. **Fostering linkages.** Having capable local suppliers facilitates the operations of foreign investors, but it is exceptionally important for development that linkages between foreign investors and local suppliers are established, as this helps the development of the domestic enterprise sector, the bedrock of development. Linkages can be garnered through supplier databases, and supplier development programmes can help prepare local enterprises to become suppliers to foreign investors.
2. **Use of environmental and social impact assessments, *ex ante*,** to ensure that any potential negative impacts are identified and addressed. A survey by the World Association of Investment Promotion Agencies and the World Bank in 2019 found that half of surveyed IPAs evaluate investments for such impacts before deciding to provide support, be it through services or the approval of grants.<sup>179</sup> Investors increasingly use such assessments, especially for large-scale projects; their use should be encouraged and facilitated.
3. **Adopting regulations to promote standards,** including quality standards and standards for responsible business conduct. Such standards could contribute to the increase of sustainable FDI.
4. **Behavioural incentives** contingent on certain actions by investors, such as training, increase the development impact of FDI. The recognized sustainable investor category is one way to operationalize behavioural investment incentives.
5. **Supporting outward FDI through home country measures.** Outward FDI can benefit home countries in various ways, including by increasing exports and acquiring new technologies. Investment facilitation should therefore be seen as facilitating a two-way flow of investment, inward and outward. Home country measures are particularly important for outward investing SMEs. They should be made transparent. Moreover, they can be linked to the facilitation of sustainable FDI by requiring outward investors to undertake developmental, environmental and other impact assessments. For example, the World Bank's Multilateral Investment Guarantee Agency provides guarantees for outward FDI only when it is carried out according to predetermined environmental and social standards.
6. **Fostering partnerships between and among IPAs** that help to promote sustainable FDI outcomes. Such partnerships could provide learning opportunities. Memoranda of understanding between IPAs are becoming more frequent.
7. **Aftercare** is a crucial investment facilitation measure to retain investment. In 2019, reinvestment accounted for almost half of FDI flows. This measure has not yet been included in the draft framework; nonetheless, the inventory circulated for the workshop includes in its annexes some initial elements that may be useful to support aftercare.

### A practitioner's perspective from Ethiopia

While a multilateral framework on investment facilitation for development should include sustainable investment criteria that allow for directly advancing development, it should also allow for flexibility to adapt to changes. The Ethiopian IPA's top priority is creating decent jobs, contributing to foreign exchange reserves and aligning with international environmental standards. Moreover, investment facilitation policy should address the development needs regionally and nationally.

The multilateral framework should also guide countries on how to establish linkages, as there is limited knowledge on how to transfer skills and knowledge from foreign affiliates to local enterprises. Such guidance

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<sup>179</sup> WAIPA (2019). Overview of Investment Promotion. Last accessed 10 March 2021 from <https://waipa.org/waipa-content/uploads/Overview-of-Investment-Promotion-2019.pdf>.

could include explanation of the best modalities and practices. It is worth noting that the Ethiopian IPA is focused on providing quality aftercare services.

With regard to incentives and a recognized sustainable investor scheme, special benefits could include giving businesses customs duty privileges and providing for lower minimum capital requirements. Incentives should be targeted to development goals and be based on performance, i.e. benefits should only be provided upon meeting key performance indicators. Therefore, an effective monitoring system of FDI should be put in place to verify, for example, that recognized sustainable investors are not only announcing CSR policies, but also implementing them and, in this manner, contribute to the sustainable development of host countries.

But it is not enough to incentivize. Investors also need active government support to take advantage of incentives. For example, foreign investors usually struggle to localize and contextualize their CSR efforts. A multilateral framework helping IPAs to facilitate FDI and supporting them in contextualizing their CSR efforts is important. Investors are proactive in asking IPAs to acknowledge, incentivize or recognize their CSR contribution; however, it is still difficult for IPAs to provide recognition without a clear set of criteria.

### **Examples of CSR provisions in international and regional frameworks**

The OECD is studying responsible business conduct (RBC) in investment treaties. RBC addresses the sustainable development aspect of investment, and includes avoiding adverse impact on host countries. It also includes addressing societal values and needs beyond what is stated in laws and regulations, such as the concerns voiced by intergovernmental organizations, local communities, trade unions and the media, as well as those raised in the workplace. Many recent treaties include provisions on CSR and RBC.

The most common approach within treaties is to encourage investors to observe internationally recognized standards of CSR and RBC in their practice and internal policy. Treaties often mention the international investment standards. For example, the Pacific Alliance in 2014 encouraged enterprises operating in their territories to voluntarily adopt internationally recognized standards of CSR, taking into account the OECD Guidelines for Multinational Enterprises.

Another example from 2014 is the Foreign Investment Promotion and Protection Agreement between Canada and Côte d'Ivoire that encourages enterprises operating in their territories voluntarily to incorporate internationally recognized standards on CSR and RBC. The same is observable in the preamble of the EU-Canada Comprehensive Economic and Trade Agreement, the Colombia BIT model and the Brazilian Investment cooperation and facilitation treaties. The Common Market for Eastern and Southern Africa (COMESA) also has a similar provision and mentions human rights.

The Morocco-Nigeria bilateral investment treaty has a full article on CSR that establishes explicitly in a full provision on investment responsibility that investors should not only comply with applicable national laws and regulations, but also try to make a maximum feasible contribution to the sustainable development of the host state. The Dutch Model BIT is also quite comprehensive as it includes provisions on CSR and RBC and goes further into issues relating to potential negative impacts of investor conduct and due diligence.

Brazil's Cooperation and Facilitation Investment Agreements are not concluded only for the purpose of increasing the flow of FDI, but also to promote development. Therefore, CSR provisions in its CFIA are a way to outline the kind of investment that the parties would like to receive. Nonetheless, there should be balance between development and business practices.

On one hand, foreign investors should ensure that their business operations do not have negative impacts on the host society. On the other hand, investment may be affected if forced to contribute to the host country through requirements that are not part of its expertise. Therefore, to advance development through FDI, there is a shared responsibility between host countries and home countries in promoting and incentivizing sustainable and responsible FDI.

In 2018, Brazil sent a communication to the WTO containing a proposal for a framework on investment facilitation for development.<sup>180</sup> Article 18 of this proposal addresses CSR. There are two main aspects in this

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<sup>180</sup> Structured Discussions on Investment Facilitation, Communication from Brazil (JOB/GC/169).

Article. First, the Article makes the compliance with CSR and sustainable FDI standards voluntary. Second, the Article contains best endeavour language, which states that investors and their investments ‘... *shall endeavour to comply with the following voluntary principles and standards of corporate social responsibility, in accordance with the laws adopted by the host Member and with Members’ international commitments on this matter ...*’. This is evident in the clear use of language such as *shall endeavour* as opposed to *should*, which introduces an obligation to make efforts, but leaves the compliance voluntary and commensurate with the capacity of foreign investors.

The EU Commission, on its part, does not think it is advisable to reproduce or summarize the content of CSR and RBC principles contained in internationally agreed international investment instruments, such as the UN Guiding Principles on Business and Human Rights, the ILO MNE Declaration and the OECD Guidelines for Multinational Enterprises. The reason advanced is that these instruments are comprehensive, well elaborated and clearly define what is expected of investors, in much greater detail than could be done in an investment facilitation framework. Moreover, these instruments are comprehensive and accepted by many, if not all, WTO Members.

In terms of the institutional dimension, the EU Commission suggests that the future WTO Investment Facilitation Committee could provide a platform to exchange best practices on due diligence, where there is a high need for the exchange of information on how to facilitate the uptake of responsible investment. A WTO Investment Facilitation Committee could also provide a platform to discuss and coordinate technical assistance and capacity-building needs and efforts.

The EU Commission also says that it is important to address the issue of illicit financial flows, as evidence shows that illicit financial flows make the financial sector unattractive for investment. Investment facilitation measures relating to transparency, for instance, could reduce the possibility of illicit financial flows.

The EU proposal makes reference to international instruments, such as OECD guidelines for MNEs. Nonetheless, during the discussion it was argued that most developing countries are not part of that instrument and therefore would have difficulty to refer to it in an investment facilitation framework.

## Virtual capacity-building workshop: Implementation challenges for an IFD Agreement

23 September 2020

### Overview

This workshop was organized in the framework of the Investment Facilitation for Development project, jointly implemented by ITC and DIE. The workshop was co-organized with the World Association of Investment Promotion Agencies and the World Economic Forum.

The workshop was designed for WTO delegates dealing with investment facilitation matters, as well as for government representatives from capitals. The workshop was meant to help build capacity for negotiations of a multilateral framework on investment facilitation for development at the WTO. The discussions were informed by 'An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?' referred to herein as the inventory. The inventory will be updated in light of the discussions during the workshop, as well as other work undertaken within the ITC-DIE project.

Rajesh Aggarwal, Chief, Trade Facilitation and Policy for Business Section, ITC gave the opening address, followed by a keynote speech by Mathias Francke, Ambassador-designate of Chile to the WTO, Coordinator of the Structured Discussions on Investment Facilitation for Development.

The first session, 'Additional, concrete investment facilitation measures', focused on new measures that have not yet been included in the draft negotiations text of the WTO Structured Discussions on Investment Facilitation for Development. It was chaired by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI, and included Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF; Khalil Hamdani, Visiting Professor, Lahore School of Economics, Pakistan; Mia Mikic, Director, Trade, Investment and Innovation Division, United Nations Economic and Social Commission for Asia and the Pacific; and Crispin Conroy, Representative Director to Geneva, ICC.

The second session, 'Learning from experience for the implementation of a multilateral framework', reviewed experiences from the implementation of investment facilitation measures in bilateral and regional agreements and trade facilitation measures to draw lessons for the design of a multilateral framework on investment facilitation for development. It was chaired by Axel Berger, Senior Researcher, DIE, and included Boubacar Zakari Wargo, Minister of the Niger High Council of Investment and Chief Executive Officer of ANPIPS; Daniela Oliveira Rodrigues, Strategic Partnership Coordinator, Undersecretariat of Foreign Investments, Executive Secretariat of CAMEX, Ministry of Economy, Brazil; Helen Chang, Project Officer, WTO Trade Facilitation Committee; Parasram Gopaul, Counsellor, Permanent Mission of Mauritius to the WTO; and Carlo Pettinato, Head of Unit, Investment, Directorate General for Trade, European Commission. Bostjan Skalar, World Association of Investment Promotion Agencies, provided concluding remarks.

### Highlights\*

#### **General input for the negotiations of a multilateral framework on investment facilitation for development**

- **Development goals of the IFD Agreement:** The IFD Agreement should contain a clear development dimension, including concerning technical assistance and capacity building for developing countries and especially LDCs. The development dimension should be included in the preamble of the framework and be directly addressed in the text itself. This will show that the objective of development is reflected in all provisions of the framework, further indicating that the most development-friendly interpretation should be applied to the framework provisions and country obligations.
- **Importance of facilitating the entire life cycle of the investment:** The IFD Agreement should cover all aspects and stages of investment facilitation. The investment life cycle includes attraction; entry

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\* Note: For the purposes of this report, the terms economy and country are used interchangeably.



and establishment; retention and expansion, including aftercare; linkages and spillovers; and possible divestiture.

- **Language and terminology:** The mechanisms included in the framework (e.g. focal points, contact points, ombudsperson) should be defined and used with consistent terminology.
- **Implementation resources:** Technical assistance should be provided to support prioritized investment facilitation measures identified.
- **Stakeholder participation:** Governments should engage with investors and others to enhance the long-term development impact on the host and home economies. Civil society participation at the national level could be strengthened. A WTO committee on investment facilitation should allow for participation by investors and other stakeholders.
- **Interaction with trade:** As countries have a national committee on trade facilitation, a corresponding national committee on investment facilitation would ensure that the two processes proceed in a complementary manner.

### New general investment facilitation measures

New general investment facilitation measures refer to concrete, actionable investment facilitation measures that have not yet been considered in the WTO Structured Discussions and may be particularly useful for investment facilitation. The following priority measures were highlighted:

- **Provide for risk-based approvals as part of authorization procedures:** Policymakers may consider risk-based assessments, whereby low-risk investment projects are approved with more limited, if any, need for assessment, while high-risk projects receive careful and in-depth assessment.
- **Grant permits or licences automatically if no government action is taken within statutory time limits:** The aim is to help unlock applications that get stuck during administrative review. The approach should be clear to avoid placing the investor in a grey zone, which could give rise to later disagreement. Georgia has adopted this measure and states that it has been a 'game changer' for attracting and facilitating investment.
- **Track complaints through an investment grievance mechanism or 'early warning system' to address complaints before they become formal grievances; establish time frames for addressing complaints:** A grievance mechanism is important for addressing complaints and detecting patterns that can help identify a problem's origin and address it at the root. As much of investment is reinvestment, addressing grievances at an early stage will assist in generating reinvestment.
- **Make publicly available lists of support measures for outward investors through online portals and notification to the WTO:** There is no explicit reference in the Structured Discussions to outward FDI measures. Such a reference may boost two-way flows and provide a more balanced framework.
- **Facilitate investment through partnerships between investment authorities in different economies, including helping investors find bankable projects quickly:** IPAs are increasingly signing memoranda of understanding with other IPAs to facilitate knowledge sharing and two-way investment, indicating interest in mutually beneficial collaboration. The WTO framework can support and generalize such efforts through addressing opportunities for partnership between investment authorities in different economies. Such partnership can be operationalized through a programme of joint activities.
- **Digital measures as facilitators of investment:** Digital measures are especially important in the post COVID-19 world. Such measures may include blockchain and artificial intelligence, which may bring new opportunities to improve 'single window' efficiency and transparency. IPAs may use digital measures for investor onboarding through virtual site visits, hosting online investor conferences and one-on-one meetings. (See the Digitalization chapter of the Inventory for additional measures.) As

most of the Structured Discussions took place before the pandemic, digital facilitation measures may need to receive more attention and be addressed specifically.

### Sustainability-focused investment facilitation measures

Sustainability-focused investment facilitation measures highlight measures that directly help to increase the development impact of FDI. The following priority measures were highlighted:

- **Administration of incentives, promoting the use of ‘smart’ incentives:** Transparency, efficient use, and targeted ‘smart’ incentives ensure that the incentives provided support the development goals of the country, and are used strategically. Incentives must be linked to the outcomes the country wants to achieve. One approach is to create a ‘recognized sustainable investor’ category that incentivizes and rewards investors who invest sustainably, possibly guided by an indicative list of FDI sustainability characteristics. Around 100 developing countries have tax incentives and other programmes to advance sustainability goals; however, they are still at a discovery stage of this practice. Only by interacting with investors and community stakeholders can governments determine how well the policies work and whether better policies can be adopted.
- **Increasing linkages between investors and domestic suppliers:** Build and maintain a database of local enterprises to help investors identify potential suppliers, with the information freely available to all. Creating domestic supplier databases provides matchmaking and overcomes information asymmetry. Such databases should include development and sustainability indicators/information, i.e. whether the domestic firm operates according to sustainability principles; this will allow for sustainability-focused investors to contract with those suppliers while incentivizing others to shift their operations to meet sustainability-related preferences of investors, thereby creating a virtuous cycle. Maintaining and updating such databases can be done by coordinating with business associations that keep updates on their members.
- **Impact analysis of the projects:** Assess the potential development impact projects through *ex ante* impact assessments to ensure they align with sustainable development goals.

### Provisions for enhancing implementation in developing countries

- **Inclusivity:** Elements of inclusivity should be covered, including gender equality. Providing investment facilitation measures can also open the door for SMEs. An implementation framework can help attract SMEs, which is important because most IPAs focus on attracting the same or only large MNEs.
- **Monitoring:** The quality of sustainable investment should be monitored. An alliance of national committees could be established with responsibility for monitoring the commitment to sustainability and the impact of incentives.
- **Outward FDI:** Clear guidelines on CSR and responsible business conduct to outward investors should be provided. For sectors with high development/environmental sensitivities, such investor education could be made mandatory. Host countries should understand the standards that investors need to follow in their home countries.
- **Co-responsibility:** Seeking co-responsibility with respect to the performance of partnerships between foreign and local investors will help develop trust and stability. Such relationships can strengthen supply chains, making them more resilient to shocks, such as the COVID-19 pandemic.
- **National investment facilitation committees:** Similar to those for trade facilitation, these committees are a potential platform for stakeholder participation. The establishment of such bodies should facilitate the implementation of the IFD Agreement, promote domestic coordination (including over technical assistance and capacity building) and serve as a platform of dialogue with stakeholders. Local private sector and civil society participation is essential for orienting and improving implementation. National committees for trade facilitation can serve as role models.

### Private-sector perspective on key investment facilitation measures

- **Establish a mechanism for public-private dialogue:** Investors need to participate regularly in the investment facilitation dialogue with respect to regulations and implementation measures. Such dialogues should be practical, helping them to understand the country regulations and how things work in practice, and providing government officials with investors' point of view, especially in a post-COVID-19 world where investors face greater uncertainty. Dialogues on policy and regulatory frameworks will improve the selection and implementation of policies and regulations so that they efficiently and transparently achieve their objectives.
- **Private-sector engagement in an investment committee:** Investors should have a regular role in investment committees, which should focus not only on facilitation, but also on other developments of FDI.
- **Standardized guidelines on sustainability and corporate responsibility are important.**
- **Facilitating the entry of persons in connection with foreign investments:** To ensure the promotion of productive FDI, transparent, clear and timely processes are needed to enable investors to bring key personnel. Immigration issues should be considered from a practical business perspective. Increasingly, IPAs are competing for mobile talent in addition to FDI, so a business-friendly visa regime is important. COVID-19 has shown how to hasten the process of visa issuance for essential medical personnel. Likewise, business visas and work permits could be facilitated in accordance with country investment and development priorities. For instance, priority investors may be offered green channels for receiving visa and work permits.
- **Facilitate cooperation and coordination between national and subnational IPAs:** Subnational IPAs have an important role in many countries, but coordination is needed to understand sectoral priorities and ensure transparency and communication with investors. Strategic discussion at the national and sub-national level of IPAs can help to identify priority sectors, and provide clear and transparent administration procedures.
- **Establish aftercare mechanisms to facilitate and improve the investment climate and deal with any issues:** There should be mechanisms of dialogue between investors and IPAs to provide ongoing value. Aftercare dialogue can help investment agencies support the likelihood of reinvestment and avoid divestment if there is an issue that arises by addressing and resolving said issue.

### Lessons from the implementation of investment facilitation measures

- **Implementation:** After enacting investment policies and regulations, the public sector may not have the resources and knowledge to determine and then support investments that would be in the country's development interests.
- **One-stop shop:** Investment agencies operate 'one-stop shops' to help investors interface with government departments. In practice, many other ministries are involved that are not coordinated.
- **Cross-border cooperation:** Certain countries have developed joint committees that manage the relationship between countries and provide a platform for sharing experiences and managing expectations.
- **Direct investment ombudsperson (DIO):** Brazil's model of a DIO establishes a close relationship between investors and governments, and is responsible for improving the investment environment and institutional dialogue. The DIO supports and guides investors, recommends solutions for investors and provides investment advocacy in light of a national investment plan.

### Lessons from the implementation of the TFA and the role of technical assistance

The TFA implementation process offers experiences that should be considered by negotiators of investment facilitation. TFA includes mechanisms that are intended to provide technical support to countries, including their national trade facilitation committees and the TFA facility database. Other options, such as networking

and country needs for technical assistance, evolve over time. In practice, developing countries and LDCs often do not know who to contact or what assistance is available, even though such information is available on the WTO website and in the TFA facility database.

- **Networking is crucial to better access knowledge and technical assistance:** Countries need to know the contact point for technical assistance and what assistance is available. These information gaps can be overcome by networking in order to share experience and best practices; facilitated by workshops or by directly contacting the WTO Secretariat. There are numerous bilateral interactions between countries and the WTO. In the TFA case, countries created a small fund to allow experts from developing countries to participate in TFA negotiations in Geneva.
- **Country needs for technical assistance evolve over time:** It may be relatively easy to develop a needs assessment programme, but the implementation stage is more difficult. Country technical assistance needs evolve and have different stages. Factors that countries cannot foresee during negotiations often appear during implementation. The TF facility was established during the negotiations and continues to bring capital officials to the Committee meetings. The facility is the last resort, and Members prioritize bilateral communication. The negotiations of an IFD Agreement can learn from the TFA experience and, in particular, the benefits that were derived from having needs assessments during the negotiations, carried out with funds made available for this purpose.

#### **How special and different treatment should be reflected in an IFD Agreement**

COVID-19 has exposed the gap between developing and developed countries in terms of investment facilitation capacity. IPAs will need to help address investors' changing needs due to the pandemic. The response capacity of IPAs is different due to limited resources in developing countries. In contrast, most developed countries have increased their digital measures in response to travel restrictions; however, almost half of the IPAs in developing countries provided little or no information on digital channels.

- **Capacity building and technical assistance:** The TFA approach attracted attention because it addressed developing country Members' concerns. TFA recognizes the need for donors to assist with capacity building and technical assistance, especially with regard to firm commitments. As in the TFA, technical assistance should be evaluated for the specific needs of each developing country and LDC. The WTO Secretariat must make sure that it has an up-to-date database of the technical assistance available. From the developing countries' point of view, it is important to include in the IFD Agreement a firm commitment for technical assistance to help implement measures under the framework. The idea of an implementation fund managed by the WTO was raised, as an option of last resort, if international organizations or donors do not have sufficient resources. Most developing countries have IF measures in place, and implementation does not always require resources so much as political will.
- **Implementation stages:** Both GATS and TFA implementation stages were raised as possible models for the IFD Agreement. There was a discussion of the possibility of bringing in a fourth implementation category for Members who cannot take certain commitments at this point of time, but will at a later point be able to start the implementation stage. This approach was questioned by a participant who stated that, contrary to TFA, there is no development rationale not to implement IFD Agreement provisions. The framework has a different incentive, which is to attract FDI.

## Virtual capacity-building workshop: Looking back and looking forward

11 December 2020

### Overview

This workshop was organized in the framework of the investment facilitation for development project, jointly implemented by ITC and DIE. It was organized to provide input for the ongoing WTO negotiations on an IFD Agreement. The session provided an analysis of the status of the negotiations and addressed key issues that should be considered in further work on an IFD Agreement to achieve an outcome that will be broadly acceptable to Members. The workshop was open to WTO delegates, government representatives and representatives from investment promotion agencies, the private sector, civil society and academia.

Opening remarks were provided by Pamela Coke-Hamilton, Executive Director, ITC, and Yi Xiaozhun, Deputy Director-General, WTO, followed by a keynote by Otunba Adeniyi Adebayo, Minister of Industry, Trade and Investment of the Federal Republic of Nigeria.

The first session, 'What has been achieved, obstacles and the way forward', was chaired by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI, and included Mathias Francke, Ambassador-designate of Chile to the WTO, Coordinator of the Structured Discussions on Investment Facilitation for Development; Zhang Xiangchen, Ambassador and Permanent Representative of China to the WTO and coordinator of the Friends of Investment Facilitation Group; Luiz Cesar Gasser, Ambassador and Director at the Department of Services and Industry Promotion at the Brazilian Ministry of Foreign Affairs; Hiddo Houben, Deputy Head of Delegation of the European Union to the WTO; Grata Endah Werdaningtyas, Ambassador, Permanent Mission of the Republic of Indonesia to the UN, WTO and other International Organizations in Geneva; and Usha Chandnee Dwarka-Canabady, Ambassador and Permanent Representative of Mauritius to the WTO.

Discussion starters included Makane Moïse Mbengue, Professor and Director of the Department of Public International Law and International Organization at the Faculty of Law of the University of Geneva; Michelle Rattón Sanchez Badin, Professor, Getulio Vargas Foundation, Brazil; and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum. Concluding remarks were provided by Anna-Katharina Hornidge, Director, DIE.

### Highlights

#### The significance of an IFD Agreement

- **COVID-19 and its implications on FDI flows:** According to the latest global investment trends monitor of UNCTAD, global FDI flows fell by 49% in the first half of 2020 compared to the same period in 2019, due to the economic fallout from the pandemic. The decrease in FDI flows for the full year was projected to be 30% to 40%. The world, and particularly the developing world, needs investment to fuel growth and development. Since a fundamental component of the recovery will be to boost FDI, the significance of the IFD Agreement is crucial. A successful outcome in the IFD discussions can contribute to revitalizing the global investment landscape through enhanced transparency and predictability, streamlined procedures and strengthened international cooperation. These measures are especially important due to the current limitations on cross-border travel. Potential investors will benefit more from information that can be accessed easily and with procedures that can be carried out online.
- **Domestic reforms and efficient investment policies:** The establishment of an IFD Agreement that incentivizes 'good' investment facilitation practices at the global level could guide domestic reforms and inspire effective investment policies. A more efficient approach to investment facilitation in each country will encourage a more rational use of available resources for attracting investment and enhance their contribution to sustainable development.
- **Trade and investment:** Investment facilitation should be understood not solely in the context of investment, but also against the backdrop of the promotion of world trade. Investment and trade are interrelated and mutually reinforcing, particularly in the framework of global value chains. Trade

requires and promotes greater investment, and investment in turn promotes greater trade among countries.

- **The WTO and the multilateral system:** The initiative is moving forward at a crucial moment for the WTO and the multilateral trading system. It is the first time that negotiations of this magnitude have emerged from a proposal initiated by a group of developing countries, which have provided a large portion of the written proposals and contributions. Progress to date proves that Members can find in the WTO a platform for negotiating rules that will promote the expansion of trade and investment, and hence of development. Updating the WTO rule book will also ensure that it remains relevant and responsive for the economy of the 21st century in general, and for the post-pandemic environment in particular.

### **The state of play of the WTO negotiations on an IFD Agreement**

The aim of an IFD Agreement is to foster closer international cooperation and create a more transparent, efficient and predictable environment that will underpin cross-border flows of investment for the sustainable development of economies and attainment of the 2030 Agenda for Sustainable Development. Currently, 106 WTO Members are participating in the negotiations. In December 2019, WTO Members participating in the IFD Agreement negotiations agreed that on March 2020 the group would start negotiations on a draft text.

Due to the pandemic, the negotiations were delayed. However, during the 10 months of delay, 16 Members submitted proposals and text contributions. At this point, the group has been able to hold, in total, 16 days of meetings covering the IFD Agreement draft text and Members' proposals, as well as three additional days of intersessional conceptual discussions.

The current draft negotiations text reflects ideas to promote and facilitate investment, which include providing greater transparency provisions to ensure predictability; providing measures to simplify and to expedite the admission of investment procedures in investment life cycles; and promoting cooperation in facilitating and building a healthy environment for investment.

Some of the proposals reviewed during the workshop include different management techniques for assessing low- and high-risk investment projects while considering their impact on the environment, health, and safety and security, among other issues of concern; a 'silence is consent' principle to speed up application processing, i.e. if a local authority does not provide feedback within a certain period of time, the permit would be deemed to be granted; and a Business Obstacle Alert Mechanism, which allows a person to register constraints he/she faces in doing business and provides a platform for dialogue between investors and policymakers.

A group of Members are working on revised proposals and alternative proposals, including facilitation of the movement of investors and insulating the investment facilitation agreement from other international investment agreements, also referred to as the 'firewall'. More work is needed on the scope of the agreement, certain definitions, and special and differential treatment and sustainable investment provisions. Once resumed, the negotiations will focus on these provisions and Member proposals. Certain ideas on the instruments and institutional structures require more analysis, particularly to find the balance between the benefits for investors and the burden on governmental agencies.

The next phase should focus on consolidating and developing the existing text rather than adding new proposals. In general, there has been good progress and the first phase of the negotiations is seen as a success. The last meeting included discussions about the preamble and objectives of the agreement. Concepts and objectives repeated in the last meeting include:

- Facilitating investment flows and creating a better economic environment for foreign investors;
- Sustainable development is the ultimate objective;
- The needs of developing and least developed countries should be addressed, particularly in terms of technical assistance and capacity building;
- The scope of the discussions does not include market access, investment protection or investor-state dispute settlement;

- The process needs to be open, transparent and inclusive.

### The challenges of an IFD Agreement

- **Reaching a concrete outcome by MC12:** Given that the negotiations are taking place against a challenging political environment, Members should be prepared for intense negotiations, and need to increase their engagement, work to streamline the text, seek common ground and show flexibility to reach concrete outcomes by MC12.
- **Scope of an IFD Agreement:** Members need to understand of what is and is not covered by the agreement, and agree on the language for the ‘firewall’ to insulate the IFD Agreement from international investment agreements. The experience of Members with ISDS cases understandably makes them cautious, and those concerns need to be alleviated.
- **Fragmentation:** Many governments have formulated investment facilitation provisions in domestic legislation, bilateral investment treaties and regional and mega-regional trade and investment agreements. The relationship between existing international investment agreements and the IFD Agreement is unclear. There may be a need to formulate a principle of non-regression to ensure that investment facilitation provisions that are advanced will not be affected or diminished by the IFD Agreement.
- **Implementation:** Implementing facilitation measures requires financial and technical cooperation as well as capacity building. The IFD Agreement should include investment facilitation measures that represent the agenda of the Committee and clarify potential implementation challenges. Although WTO does not traditionally involve stakeholders in its discussions, public-private collaboration could support implementation, as private-sector investors can identify what works well. TFA is currently supported by the Global Alliance for Trade Facilitation, which has more than a dozen economy-level and regional projects. An evaluation of these projects has found significant gains in terms of time and costs saved. The World Economic Forum proposes to launch a global alliance for investment facilitation, the EASI Alliance: Enabling Action for Sustainable Investment, which would bring together business, governments, and organizations with expertise to help implement the IFD Agreement.
- **Increase the number of participants:** Almost two-thirds of WTO Members are formally participating in IFD Agreement negotiations. Initially, the IFD Agreement was a plurilateral initiative, but the process has a pro-multilateral approach. The participating Members strive to build confidence among the membership in an open, transparent and inclusive manner. This approach has proven effective; however, to arrive at a multilateral agreement, it is important to include additional Members, particularly from developing countries, and take their needs into account. Given some Members’ experiences with ISDS, they are cautious about approaching IFD Agreement negotiations. Members also have a great interest to understand how this framework will affect their obligations under other international investment agreements.

### Conclusions

- **Address concerns:** The IFD Agreement takes into account the needs, opportunities and challenges of developing countries and especially LDCs. It excludes issues of market access, investment protection and ISDS. Some participants suggested that the framework should also exclude ISDS and state-to-state adjudication. There is an opportunity to ensure that the framework will be based on alternative means of dispute settlement, such as mediation and early prevention mechanisms.
- **Build a firewall between the IFD Agreement and IIAs:** There is a common understanding of the need to build a firewall between the multilateral framework and other international investment agreements.
- **Facilitate sustainable investment and development:** Estimates suggest that the pool of capital that could be invested according to environmental, social and corporate governance (ESG) principles is growing rapidly. The framework aims to increase investment, but should also help economies target and facilitate sustainable investment. Both the preamble of the IFD Agreement and certain provisions in the agreement need to integrate sustainability objectives. Several proposals are tackling

sustainability and development aspects of the framework. For example, supplier databases could include sustainability dimensions on the firms listed, such as commitment to environmental management, training and gender equality. This would allow institutional investors to more easily invest in firms that follow ESG principles. Not only might it facilitate sustainable investment, but if ESG firms receive more investment, it could incentivize others to shift operations to ESG to qualify for such investment. Another measure could be faster approvals or targeted aftercare for investors who commit to contribute to development. The narrative of responsible business conduct is also gaining traction in the ongoing negotiations: an option was raised of establishing a WTO committee to assume a transparency function with respect to non-compliance by investors or a mechanism for non-responsible investors at the WTO level, based on dialogue and mediation measures between governments and the private sector. Development-friendly elements of the framework will be critical in ensuring cross-border investment flows that enhance the growth and development prospects of developing countries. Offering a clear developmental dimension to the framework would help to expand participation by WTO Members in this process.

- **The added value of an IFD Agreement:** The negotiations should respond to the question of the added value that may be created by this process compared to the other investment frameworks in various trade agreements. The investment facilitation measures in the framework and negotiations at the WTO level add innovative tools to the 'old' investment regime of protection. The IFD Agreement has an important role as it can facilitate cross-border investment by providing transparency and predictability, which can generate unambiguous economic benefits in terms of MSME growth, poverty reduction, job creation, expansion of productive capacity, and trade.
- **WTO institutional issues:** Members will need to address pertinent institutional issues such as concerning the integration of the (plurilateral) framework into the WTO agenda. Dealing with this challenge is paramount in order to strengthen the multilateral trading system.
- **Technical assistance and capacity building:** Similar to what was done during the TFA negotiations and during the TFA implementation period, technical assistance and capacity building have a key role in the IFD Agreement. Members should share best practices and experiences with one another. Technical assistance should be provided for a gap analysis, identifying capacity building needs, and designing and implementing institutional and regulatory reforms for investment facilitation. The exchange information and expertise is critical in helping developing-country administrations to identify their implementation gaps and comparative advantages, and what mechanisms are needed to develop their investment regime. It was stated that the workshops and webinars held throughout this year have contributed substantially to a better understanding of many crucial issues related to the design of the framework on investment facilitation for development.



## Virtual capacity-building workshop: IFD Agreement: hearing from practitioners

11 December 2020

### Overview

The workshop was organized in the framework of the Investment Facilitation for Development project, jointly implemented by the ITC and DIE. It provided practitioners' perspectives on investment facilitation measures, especially those which directly contribute to advancing the development of host countries. It aimed to provide input for the WTO negotiations on an IFD Agreement and to facilitate joint learning and capacity building among delegates, government officials and practitioners. The workshop was held under the Chatham House Rule to facilitate open and results-oriented discussions.

Opening remarks were provided by Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC. The first session, 'Hearing from practitioners', was chaired Axel Berger, Senior Researcher, DIE, and included Simon Galpin, Senior Adviser and former Managing Director, Bahrain Economic Development Board; Frederico Marchiori, Head of Institutional Relations, Oxiteno; Markus Thill, President, Africa; Robert Bosch; and Douglas Van Den Berghe, Chief Executive Officer of NxtZones and FDI 4.0. Discussion starters were Ana Novik, Head, Investment Division, OECD; Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI; and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF. Concluding remarks were provided by Axel Berger.

### Highlights

#### Key measures that enhance investment facilitation

- **Simplify company registration and licensing requirements for foreign investors:** Governments should set up a clear framework for registering foreign investors, mapping the process from beginning to the end. The investment promotion agency should manage and facilitate the investor's journey through each step of the investment. A published licensing process – in several UN languages for accessibility – should describe the amount of time each step should take and the requirements that companies need to fulfil.
- **Transparency of home country measures:** From the investor's perspective it is important to understand regulations and programmes for foreign investment assistance of their home country. This can be particularly important for SMEs. More attention to home country measures would balance the IFD Agreement by encouraging obligations not only for host countries, but also for home countries.
- **Incentives:** Some countries provide targeted incentives to promote sustainable investment. However, as incentives can often appear arbitrary, they should be linked directly to sustainable and development outcomes. This approach will help companies to make informed choices on scaling up certain investments in light of such incentives. Incentives should be transparent so that investors understand the eligibility criteria and application process.
- **Aftercare:** There are two types of aftercare services: proactive, which involves assigning an account manager to maintain contact with strategic investors and to be available to solve problems, while also encouraging them to expand or upgrade their business – this is especially important as countries manage the investment downturn due to the pandemic; and reactive, which involves creating a help desk or an ombudsperson role to deal with complaints and concerns of investors, as well as an alert mechanism for involving senior officials.
- **Links with education:** Creating employment opportunities within the host economy and fostering links with universities and training institutes can help secure internships and employment opportunities for graduates. Foreign investors may fund excellency centres and scholarships. Educational institutes should consult with foreign investors on shaping a curriculum to include subjects relevant for expanding job markets.
- **Partnership between IPAs:** Partnerships between IPAs would facilitate inward and outward FDI flows. Such partnerships can involve working together to identify appropriate FDI projects.

- **Sustainable investment and CSR:** Some of the measures that are in the framework may be constructed in ways that would enhance sustainable development. For example, databases on local suppliers could include sustainability characteristics, thus facilitating the flow of investment to firms that operate sustainably. Incentives could be targeted to reward investors who act more sustainably. Transparency should be implemented by investors themselves. More statistics are needed on the added value of FDI – such as how many jobs have been created, and the salaries foreign investors are paying within the economy – to understand their contributions. It would make sense to have a clause in the IFD Agreement encouraging Members to require companies to publicize their CSR statements and their conformance with those statements. CSR statements may not be sufficient and host countries may need to perform their own due diligence on companies' impact. The development aspects of an IFD Agreement can be enhanced if they are linked to other government policies such as education, SMEs and trade. At the country level, the promotion of sustainable development within the IFD Agreement needs to be complemented by sustainable development policies in other areas of government and private-sector activities.
- **Capacity building in developing countries:** Developing countries may lack the capacity for establishing and implementing investment facilitation measures. An IFD Agreement should include commitments for technical assistance on implementing investment facilitation measures. From the business perspective, this will enhance a more competitive and level playing field. Capacity building could include technical support in areas of need assessment and implementation, as well as assistance in developing a national investment promotion strategy and regional cooperation among IPAs (sharing experience, technical support).

#### **Investment facilitation measures from the business perspective**

- **Speed up procedures:** Measures to reduce bureaucracy and speed up procedures are critical for businesses, especially as supply chain delays can affect investors' decisions to invest in a particular location.
- **Work visas:** Access to long-term work visas is necessary for businesses. Without them, company executives are often forced to regularly travel in and out of the host country, which generates unnecessary costs.
- **Strengthen channels of communication and assistance for businesses:** Focal points can centralize the regulatory process and reduce the volume of procedures that businesses are required to follow. IPAs should not only be in charge of attracting new investors, but also serve as the focal point to fast-track investments. However, if IPAs are too focused on the front end of their activity, such as investment promotion, imaging and marketing, they may not be able to meet their goal of assisting investors in practical ways.
- **Link investment and trade measures:** In business operations, there is no distinction between investment and trade. This link should be reflected in the IFD Agreement.
- **Digitalization:** Many IPAs are digitalizing their marketing and outreach strategies. But digitalization should also play a role in investment facilitation. For example, digital portals allow investors to monitor, track and trace their application status, including a checklist of the process that indicates the next steps and time frames. In addition, there has been an increase in digital FDI, usually driven by young entrepreneurs and smaller firms that grow through collaboration and partnership rather than competition. IPAs need to address these companies' unique investment facilitation needs.
- **Business advisory council/board:** Business advisory board members can be used as IPA ambassadors and advocates for the host economy, and assist with policy advocacy issues in other parts of the government.
- **Supplier development programmes:** Host countries are encouraged to create linkage programmes between local suppliers and foreign affiliates. Foreign affiliates prefer a well-developed local supply network, something considered key in investment decisions.

## Annex IV: Public webinars – Reports

### Public webinar: The negotiation of an IFD Agreement

11 February 2020

#### Overview

This webinar explored issues related to the negotiations of an IFF. It is part of the Investment Facilitation for Development project implemented by the ITC and DIE, and was chaired by Karl P. Sauvart, Columbia University/CCSI. His remarks were followed by a welcome by Matthew Wilson, Chief Adviser to the Executive Director and Deputy Executive Director of the ITC, who introduced the main issues to be addressed in the current discussions on investment facilitation for development.

The webinar included input from Axel Berger, Senior Researcher, DIE; Felipe Henríquez, Counsellor at the Permanent Mission of Chile to the WTO and a key adviser to the chair of the Structured Discussion; Matthew Stephenson, Policy and Community Lead for International Trade and Investment at the World Economic Forum; and Zixuan Zhou, Third Secretary at the Permanent Mission of China to the WTO and the focal point for China's engagement in the Structured Discussions on Investment Facilitation for Development at the WTO. Ms. Zhou is also responsible for coordinating the Friends of Investment Facilitation for Development.

#### Highlights

##### **What should be addressed prior to negotiations?**

Negotiations of an IFD Agreement are challenging in the context of the WTO, partly because they address highly technical investment-related measures. Hence, the input of capital-based experts and expertise from IPAs and other investment-related institutions is important, as well as input from civil society and private-sector representatives.

Panellists highlighted that an IFD Agreement should be flexible enough to facilitate the implementation of the agreement by developing and least-developed countries. In that context, it is important to consider a model for technical assistance and capacity building that supports these countries in this respect. To ensure a common understanding of the scope of an IFD Agreement, several issues need to be clarified. First, it should focus on all sectors. Second, the legal framework should be determined, for example, as a stand-alone multilateral or a plurilateral agreement. Finally, if dispute settlement in the context of this framework is to be addressed, how should it be drafted? For example, TFA makes reference to the WTO Dispute Settlement Understanding.

Making the Streamlined Text publicly available is desirable to ensure transparency. This could include the perspective of stakeholders in the Structured Discussions.

##### **Potential IFD Agreement implementation challenges**

One challenge of implementing an IFD Agreement is that developing countries have great capacity challenges in implementing investment facilitation measures. Therefore, negotiators should identify and understand the specific needs of implementing developing countries.

Ensuring effective implementation of all countries would contribute to reaching the SDGs. For example, investors could make greater efforts to source locally and increase local employment training. A good example of a measure that promotes sustainable FDI is the recognized sustainable investor scheme. Another example could be a measure on facilitating linkages between investors, local firms and institutions through databases and supplier-developer programmes.

On the issue of domestic coherence, an IFD Agreement should accommodate Members with federal state structures where permissions and licences are required by investors from government bodies at multiple levels. For example, single window mechanisms may not be as readily applicable in the context of federal

systems. In general, an IFD Agreement should enhance intra-state coordination between national and sub-national governments.

There are several obstacles to reaching and implementing an IFD Agreement, such as the lack of resources to negotiate the framework and, eventually, implement the investment facilitation measures. The WTO Missions of some WTO Members are understaffed, which could explain why some LDCs and Caribbean Members have not yet signed the joint statement.

### **Supporting domestic reform in developing and least developed countries**

The investment facilitation discussions in the WTO represent a new approach to international investment governance. The technical focus of the negotiations has the potential to address key impediments to FDI, such as predictability, transparency and ease of regulatory environments.

The DIE's Investment Facilitation Index, which maps the implementation of investment facilitation at country level, shows that developing countries have considerably lower implementation rates of investment facilitation measures than their developed counterparts. A multilateral framework can be used to support domestic reforms in developing countries. Furthermore, an IFD Agreement can be used to promote knowledge-sharing of best practices on investment facilitation. Thus, an IFD Agreement constitutes a critical opportunity to advance SDGs.

### **Promoting sustainable FDI**

Advancing sustainable development should be an integral part of a future IFD Agreement. Panellists emphasized that the issue of sustainable development is one of the main reasons that developing countries brought investment facilitation to the WTO. Panellists also emphasized that a multilateral framework should protect the host countries' right to regulate foreign investments. Sustainable development is a process as well as an outcome. If incentives were to be implemented to attract investors, continuous assessments would have to be carried out on the benefits for the host economy.

### **Prioritizing a dialogue on investment facilitation for development before the 12th Ministerial Conference**

Participants reaffirmed that increased public dialogue on a multilateral framework on investment facilitation for development help to inform the negotiations. They also stressed the importance of participation by developing country Members in the negotiations, as this will ensure an outcome that is beneficial to all countries. Finally, participants highlighted that another priority is to ensure stronger engagement from non-governmental organizations.

## Public webinar: The extent to which an IFD Agreement could contribute to quality FDI flows

19 March 2020

### Overview

This webinar is part of a series on a multilateral framework on investment facilitation for development being negotiated at WTO. Its aim was to explore the extent to which a multilateral framework on investment facilitation for development could contribute to promoting the quantity and quality of FDI flows; thus, contributing to sustainable development in host countries. Special consideration was given to measures related to CSR.

The webinar is part of the Investment Facilitation for Development project implemented by ITC and DIE, and was chaired by Axel Berger, Senior Researcher, DIE, with a keynote address by Rajesh Aggarwal, Chief of Trade Facilitation and Policy for Business, ITC. The panellists were Evan Gabor, Columbia Law School; Samo S. Gonçalves, Second Secretary, Mission of Brazil to the WTO; Felipe Henríquez, Counsellor at the Permanent Mission of Chile to the WTO and Adviser to the Coordinator of the Structured Discussions; Premila Nazareth Satyanand, Non-Resident Senior Fellow at India's National Council of Applied Economic Research; Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI; and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF.

Felipe Henríquez briefed participants on the progress of the Structured Discussions to date. He explained that the negotiations are based on the Streamlined Text; which incorporates many proposals submitted by Members in the past years. The EU submitted a proposal in February, and submissions from China, Japan and Turkey are expected. The initiative has gained momentum with more Members joining, including Bahrain and the Philippines, which brings the total number of participating Members to 100.

However, due to the pandemic and associated precautionary measures, the first round of negotiations scheduled in March 2020 was suspended, along with other WTO meetings, until the end of April. The 12th Ministerial Conference in Kazakhstan was also suspended.

### Highlights

#### **Investment facilitation measures can maximize the impact of FDI for sustainable development**

As the discussions evolved, deeper issues related to the different stages of FDI are now on the table. These include the impact of value chains established by foreign investors and the observation of standards related to development, including CSR and protection of the environment.

Governments should play an active role in ensuring that FDI transfers expertise and value to local economies through facilitating linkages. Such linkages could also be beneficial to investors. Using local talent and production would shorten the value chain for investors, saving them resources and time. Linkages could be made with local suppliers, educational institutions or host communities. Economies can promote sustainable FDI by including criteria related to linkages in their investment authorizations processes.

Economies could also consider criteria that are based on the history of investors. Impact assessments that evaluate performance *ex-post* are useful tools to check the impact of FDI on society.

Promoting sustainable FDI could also involve the home countries of investors, which are often in a stronger position to support FDI. Within an international framework, home country measures would also ensure political balance in an agreement. This could be achieved by putting in place measures in a multilateral framework that promote the contribution of outward investment to development.

Furthermore, measures addressing standards of conduct should be brought to the table, such as labour, governance, environment and management (e.g. OECD and ILO standards). This could also apply to home-country/outward investment measures. The Dutch and the Colombia BIT models, as well as the EU-Canada agreement, are relevant examples.

A multilateral framework on investment facilitation for development could provide for measures that help policymakers implement sustainable FDI standards and simultaneously facilitate cross-border investment. These tools build on similar obligations from WTO agreements as well as IIAs. Such tools include the recognized sustainable investor and CSR requirements for obtaining authorization to invest.

### **The recognized sustainable investor category could be an effective policy tool to incentivize sustainable FDI**

In an RSI scheme, qualifying investors are offered benefits beyond those granted by a framework to all investors, upon their compliance with certain criteria related to sustainable FDI and CSR. Upon obtaining this status, the benefits provided to investors could include priority access to licences and tax incentives. Guidelines for these benefits could be outlined in a multilateral framework on investment facilitation for development.

It may be important to consider making sustainability standards – traditionally used in incentive schemes – obligatory, notably environmental standards. But, politically speaking, this would reduce the chance of a framework reaching consensus. This is especially true since there are few bilateral and regional investment agreements that include such binding measures.

### **The implementation of domestic laws on CSR has challenges of its own**

Implementation of policy tools could take different forms when applied domestically. For example, India has enacted a law that introduces obligations for companies to comply with CSR regulations. These regulations include the obligation for certain firms to establish a CSR committee and to reserve 2% of their profits for certain types of CSR activities. However, since these types of CSR activities are not necessarily related to the operations of the firms undertaking them, they are not necessarily implemented efficiently and sustainably.

Drawing from India's example, a multilateral framework on investment facilitation for development could use a similar model, but link any CSR activities directly to the operations of investors. It is worth noting that the Indian law only applies to firms in India (including foreign affiliates) and does not cover the foreign affiliates of Indian multinational enterprises.

### **Including CSR provisions in international investment agreements is becoming more common**

Few investment facilitation measures have been part of IIAs in the past. In the last decade, however, more IIAs have been incorporating provisions concerning development, CSR and investment facilitation. CSR and general sustainable development provisions are becoming a trend in IIAs. The WTO should stay within this trend and ensure that a multilateral framework goes beyond increasing the flow of FDI.

For example, Brazilian bilateral agreements signed with Mozambique and Angola have a substantial section on CSR. These provisions were developed and articulated further in Brazil's agreement with India. Brazil brought these provisions to the WTO negotiations and they can be found in Article 18 of the Brazilian submission for an investment facilitation framework.

It may also be argued that sustainable FDI measures in a framework would enhance the acceptability of a multilateral framework on investment facilitation for development. The inclusion of such measures would increase the chance of such an agreement reaching consensus, since many governments are interested in advancing their sustainable development and a strong development dimension would likely garner more support from stakeholders.

## Public webinar: Main challenges in implementing an IFD Agreement and how to address them

30 April 2020

### Overview

This webinar is part of a series on a multilateral framework on investment facilitation for development being negotiated at WTO. The series is part of the Investment Facilitation for Development project implemented by ITC and DIE. The webinar's aim was to identify the main challenges in implementing an investment facilitation framework for development and explore how these challenges could be addressed in a multilateral instrument.

Marion Jansen, Director of the Division for Market Development, ITC, highlighted that UNCTAD expects FDI flows to decrease by 30% to 40%, which would constitute a serious threat to businesses worldwide. Being the only development agency that is fully dedicated to supporting the internationalization of SMEs, the ITC is well aware that the stakeholders most vulnerable to instabilities in access to finance are SMEs.

Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI, chaired the webinar, with input by Felipe Henríquez, Counsellor at the Permanent Mission of Chile to the WTO and Adviser to the Coordinator of the Structured Discussions; Axel Berger, Senior Researcher, DIE; Bernard Hoekman, Professor, European University Institute; Anabel González, Non-Resident Senior Fellow, Peterson Institute for International Economics; and Ambassador Alexandre Guido Lopes Parola, Permanent Representative of Brazil to the WTO.

### Highlights

#### **The state of play of the Structured Discussions**

Felipe Henríquez briefed participants on the progress of the Structured Discussions on Investment Facilitation for Development. He explained that a stocktaking meeting for investment facilitation in 2019 resulted in the decision to begin formal negotiations in March 2020. In the stocktaking event, the participating Members asked the coordinator to prepare a Streamlined Text. Due to the pandemic and associated precautionary measures, all sessions that were scheduled to start in March 2020 were suspended, at least until the end of May.

Under these challenging circumstances, the coordination has been assessing options to maintain progress while ensuring that the discussions remain open, inclusive and transparent. The Chair has encouraged all delegations to submit written proposals, as it would help in preparing for the negotiations.

So far, submissions were received from the European Union, China, Japan and Turkey. The Coordinator has prepared a draft negotiations text that incorporates the Streamlined Text and the proposals submitted by Members to date. The first draft negotiations text was circulated on 20 February 2020. The purpose of the draft negotiations text is to facilitate the assessment by Members and assist Members in conducting consultations and outreach efforts. The draft negotiations text will be revised in light of additional text proposals by Members. Mr. Henríquez concluded with the affirmation that the negotiating group has gained momentum with more Members joining, the most recent being Morocco. The new draft negotiations text can only be made public if and when all participants in the Structured Discussions agree to do so.

#### **Adoption of investment facilitation measures in countries**

Axel Berger reported that DIE has developed the Investment Facilitation Index (IFI). It covers 117 measures that are deemed investment facilitation measures and maps their implementation across 87 countries. The study focuses on measures applied domestically and does not cover bilateral investment treaties and investor-state contracts.

The IFI measures implementation in countries at different development levels, indicating in this manner the extent of reforms that may be needed. Figure 1 provides an overview of the results, where the grey bars indicate the existing level of implementation of investment facilitation measures. It shows that low-income countries have implemented fewer measures compared with high-income countries.



The index also displays the number of measures that would have to be implemented by countries in case they sign up to a middle range (in red) or comprehensive scenario of an IFD Agreement (in orange). As shown in Figure 1, the required policy reforms are the highest in developing and least developed countries, which signifies that there is a substantial need for technical assistance and capacity building in those countries.

The comprehensive set of measures covered in the IFI include, for example, the establishment of a national investment website, the establishment of enquiry points and the notification to the WTO of laws, regulations and administrative procedures of general applications.

Figure 1 Scenarios for the 69 WTO Members that have signed the WTO Joint Ministerial Statement on *investment facilitation*

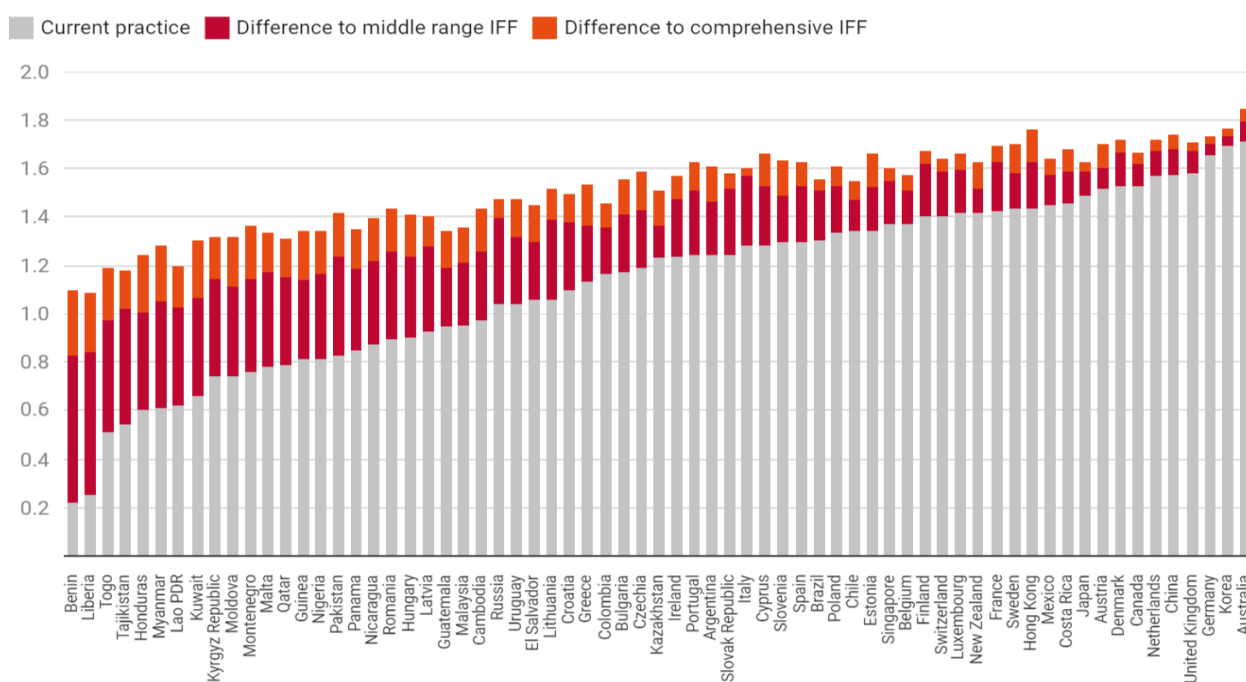


Chart: Axel Berger, German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE) - Created with Datawrapper

**Note Source:** German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)

### The role of special and differential treatment

Bernard Hoekman observed that the term 'special and differential treatment' evokes several interpretations from the history of the WTO, many of which are irrelevant in the context of investment facilitation. The most notable interpretation is associated with different levels of obligations relevant to market access, where developing countries do less and developed countries do more. This would not be the case for a multilateral framework on investment facilitation for development; rather, such a framework would focus on utilizing investment for development and taking into account the specific needs of signatories.

Therefore, the focus of the discussions should be on identifying the best approaches to increase an investment's contribution to development. Towards that end, the discussions should respond to questions such as how investment flows can be increased and how the quality of investment can be improved.

There is a significant disparity in the levels of capacity among economies that are trying to move forward the discussions on investment facilitation for development. To address the heterogeneity of capacity levels, the multilateral framework should establish rules that apply to all economies but are flexible enough to accommodate the various economies.



The implementation of investment facilitation measures could be costly, especially for those related to e-government. One of the features in the proposals for a framework for investment facilitation for development is encouraging cooperation among economies to learn from the best practices of implementation in other countries. However, there may not be a standard example that works for all economies.

Special and differential treatment could take the form of technical assistance to help Members implement the commitments they have undertaken in light of their own objectives and capacities. It is important that the WTO Investment Facilitation Committee becomes a coordination mechanism for the implementation of the multilateral framework, as well as a knowledge hub for the exchange of best practices among economies.

### **The role of technical assistance and capacity building**

Capacity building is essential to effective negotiation and implementation. The objective is to leave no Member behind, especially considering that developing and least developed countries are in dire need of investment to achieve their development goals. This requires participation of capital-based representatives of developing countries and least developed countries in the negotiations of the framework, grounding the negotiations in the reality of individual countries.

Therefore, a trust fund should be established to support inclusive negotiations that benefit from the active participation of all Members. This would pave the way for the subsequent implementation of a multilateral framework, as Members who were active in its negotiation would be familiar with its commitments.

Having an agreement in place would help induce donors, partners and international organization to increase their engagement and their levels of funding to provide technical assistance. While there are initiatives underway that seek to increase engagement, the conclusion of a multilateral framework would catalyse these initiatives and bring additional focus to them.

A coordination role could be played by WTO. For example, a facility for coordination should be operational as soon as the framework is adopted. WTO could also help Members in their self-assessments of potential needs. Other coordination activities could include matchmaking with donors, regional and sub-regional workshops and a dedicated website for the exchange of information.

The following considerations should be taken into account when designing and implementing technical assistance and capacity building:

- The perspective and capacity of the private sector should be included, as private investors have ground-level knowledge of facilitating FDI flows;
- Reliable data on international investment facilitation;
- Transparency and monitoring of the progress and performance of technical assistance and capacity building contributes to the successful implementation of investment facilitation measures.

### **Institutional arrangements: Committee on Investment Facilitation**

An investment facilitation framework would represent an important contribution towards improving the business and investment environment for developing and least developed economies, as well as for advanced economies. Brazil is committed to the initiative and hopes for an ambitious instrument that not only improves the business environment for investment, but also pays full attention to the development dimension.

The Committee on Investment Facilitation is covered in chapter 7 of the draft negotiations text, which is concerned with institutional arrangements and final provisions. The main functions of such a Committee will be:

- Sharing information and experiences, as well as the identification of best practices;
- Preparation of reports on investment facilitation measures undertaken to implement the framework;

- Maintaining close dialogue ties with organizations such as ITC, UNCTAD, OECD and the World Bank;
- Establishing a mechanism to manage technical assistant and investment facility contributions.

Without technical assistance, least developed countries would not be able to reap the full benefits of the framework. The Trade Facilitation Facility, created at the request of developing and least developing country Members, has helped ensure that all Members receive the assistance necessary to benefit from the TFA. In the discussions about investment facilitation for development, all Members agree on creating an investment facilitation committee, but they are still unsure of its functions.

## Public webinar: How an IFD Agreement could be integrated into the WTO system and how it relates to other agreements

28 May 2020

### Overview

This webinar is part of a series on a multilateral framework on investment facilitation for development being negotiated at WTO. The series is part of the Investment Facilitation for Development project implemented by ITC and DIE. The webinar's aim was to address the issue of how such an international framework could be integrated into the WTO system and how it relates to other agreements.

The webinar was chaired by Axel Berger, Senior Researcher, DIE, with opening remarks by Marion Jansen, Director of the Division for Market Development, ITC, and input by Ambassador Mathias Francke of Chile, Coordinator of the Structured Discussions on Investment Facilitation for Development; Rolf Adlung, independent trade policy analyst, former Counsellor, Trade in Services Division at the WTO; and Sherry Stephenson, Member PECC Services Network, Independent Consultant.

### Highlights

#### **Integrating a framework on investment facilitation for development into the WTO rulebook**

It is no longer appropriate to divide the economy in silos where trade in goods, trade in services and investment are regarded separately. The WTO offers a framework to discuss these issues coherently. Negotiating disciplines on investment facilitation for development within WTO would ensure a high level of consistency across sectors and Members. This includes SME-related provisions that could be an integral part of an IFD Agreement, as they are in the TFA. Moreover, the WTO Secretariat has significant experience and capacity to provide technical assistance and capacity building for developing countries.

There are two options to deal with an IFD Agreement: It could be applied either on a plurilateral basis, binding only on the signatories, or horizontally across all WTO Members. In any case, the negotiations would be governed by the Marrakesh Agreement Establishing the World Trade Organization, in particular Articles IX and X, as well as paragraph 34 of the Nairobi Ministerial Declaration.<sup>181</sup> As envisaged in the Joint Ministerial Statement on Investment Facilitation, issues concerning market access, investment protection and investor-state dispute settlement will not be addressed.

Concerning the structure of a future agreement, there are essentially two options.

The first entails the creation of an IFD Agreement that consists of two largely independent sections. One section would deal with services (GATS-based), building mainly on enhanced GATS commitments with an administrative and procedural focus. The second would cover all other sectors. Concerning the former section, the main instruments to consider are commitments under GATS Article XVIII, i.e. the additional commitments on issues not falling under Articles XVI and XVII (market access and national treatment).

An accord should be achievable among interested Members, at least in the form of an MFN-based open plurilateral agreement since the underlying legal structure – in the form of GATS – already exists. An important challenge remains, however: the creation of a counterpart for non-service sectors. In the current political environment, it is difficult to conceive of a consensus-based modification of the WTO Agreement that would extend investment-related disciplines to all sectors.

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<sup>181</sup> Nairobi Ministerial Declaration (2015), WT/MIN(15)/DEC. 'While we concur that officials should prioritize work where results have not yet been achieved, some wish to identify and discuss other issues for negotiation; others do not. Any decision to launch negotiations multilaterally on such issues would need to be agreed by all Members.'

The second option would consist of the creation of a comprehensive agreement on investment facilitation that is equally applicable across all sectors. In turn, this might require profound structural and definitional adjustments of the services-related parts. Recent preferential trade agreements may serve as a model.

### **Potential overlaps and inconsistencies**

One of the primary differences between GATS and the proposed IFD Agreement are the respective approaches to special and differential treatment. The GATS implies that less developed countries, reflecting their individual economic conditions, may undertake fewer commitments on market access and national treatment and attach more limitations than economically advanced countries. Yet, the obligations (mostly of a regulatory and administrative nature) that are triggered by the existence of such commitments, and any horizontally applicable obligations, such as the creation of enquiry points, remain essentially the same for all Members. In contrast, under the proposed IFD Agreement, special and differential treatment would consist of LDCs and other developing countries being entitled to self-designate the implementation needs in terms of time, technical assistance for most treaty obligations; similar to the innovative approach adopted in TFA. These include certain regulatory and other requirements all Members are expected to meet from day one under GATS.

### **Interrelationship between the negotiations and domestic regulation disciplines**

Domestic regulations, as covered by GATS, consist of measures that affect services trade, but do not limit market access and national treatment in the sense of Articles XVI and XVII. The respective disciplines are contained in GATS Article VI. However, since certain provisions exist in rudimentary form only, an outstanding mandate provides for further negotiations on qualification requirements and procedures, licensing requirements and technical standards.

The respective negotiations commenced after WTO came into force in 1995. In the absence of tangible progress, a subset of WTO Members sought to move ahead in the form of a plurilateral undertaking under a Joint Ministerial Statement on Services Domestic Regulation of December 2017. In 2019, this plurilateral effort resulted in a draft reference paper (WT/MIN(17)/7/Rev.2), which focuses on procedural/administrative matters, including transparency-related obligations, governing the supply of a service rather than on the substantive requirements to be met.

The domestic regulation disciplines under negotiation almost inevitably overlap with those arising under the proposed IFD Agreement, and the same is true for the participating Members. Yet, there are almost twice as many delegations involved in the negotiations on investment facilitation as those negotiating a reference paper with regulatory disciplines. It appears that there have not been joint meetings between the two groups of WTO Members, and it is unclear if there has been coordination between the respective participants.

Both negotiations aim at establishing disciplines that make services trade more transparent, streamlined and predictable. The issues discussed include publication and availability of information, enquiry points/contact points, opportunity for comments on submissions, time frames and the processing of applications for licences, fees and charges, authorization procedures, acceptance of electronic applications, periodic review/examination, open and transparent processes, and impartiality and independence.

It is not clear if the language and scope of measures being proposed for the same issue are coherent in both negotiations. There may be contradictory or incompatible elements in the two drafts. For example, time frames for the consideration of applications for investment approvals differ between both texts. Moreover, there is redundancy in the draft texts. For example, two sets of enquiry points may be expected to cover the same measures at the national level. Redundancy could also be caused by two mechanisms for the implementation of similar measures.

### **An intensive exchange of information is recommended**

Challenges exist in negotiating a framework on investment facilitation for development that is both compatible with existing WTO agreements (especially in terms of various consistency issues) and acceptable to all WTO Members at least in the form of an open plurilateral agreement. What appears important in the circumstances, therefore, is an intensive exchange of information between the two groups of negotiators, with a view towards exploring the full range of the issues involved and, hopefully, developing a common approach towards successful outcomes.

## Public webinar: What we can learn from regional initiatives on investment facilitation

5 October 2020

### Overview

This webinar is part of a series on a multilateral framework on investment facilitation for development being negotiated at WTO. The series is part of the Investment Facilitation for Development project implemented by ITC and DIE. The webinar addressed the relationship between regional initiatives and WTO negotiations on investment facilitation for development. The discussion emphasized the importance of bringing regional experience on investment facilitation into WTO discussions as it can provide relevant, practical lessons.

The webinar was moderated by Axel Berger, Senior Researcher, DIE, with an introduction by Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC. The panel comprised Rebecca Fatima Sta Maria, Executive Director, APEC Secretariat; Makane Moïse Mbengue, Professor and Director, Department of Public International Law and International Organization, Faculty of Law of the University of Geneva; Gustavo Méndez, Director for Investment and Trade Disciplines, Ministry of Foreign Affairs, International Trade and Worship, Argentina; and Julián Zuluaga, Professor of International Economic Law at Externado University of Colombia. Concluding remarks were made by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI

### Highlights

#### Lessons from the APEC Investment Facilitation Action Plan

The APEC does not develop binding commitments on investment facilitation. Its Investment Facilitation Action Plan includes principles that were adopted to help the region be more competitive and attractive for foreign investors. The principles of the Action Plan include transparency, predictability, consistency, ongoing interaction with the business community, and sharing of experiences among Members.

- **Business engagement:** APEC has a private-sector arm, the APEC Business Advisory Council (ABAC). The mandate of ABAC is to advise governments and APEC officials on business-sector priorities and concerns, including on investment. The Council meets four times per year, and its representatives attend senior officials' meetings, the annual ministerial meeting and sectoral ministerial meetings.
- **Review and implementation:** APEC has a policy support unit within the secretariat that assists the Members in tracking all the initiatives that have been put in place to ensure that the Action Plan is being implemented. The latest review report was published in December 2019. Such reports share best practices and track IF measures implemented by Members. The review process also compares best practices from IPAs in different economies. Such best practices have included supporting the resolution of disputes online and smart visa programmes to attract specific experts in certain sectors. Another important dimension of the review process is tracking investments after investors receive incentives.

#### Lessons from African regional initiatives

The first African regional initiative on IF can be traced to 2006 when the Southern African Development Community (SADC) adopted its protocol on investment. Besides SADC, the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Common market of Eastern and Southern Africa (COMESA) have active initiatives on IF provisions. Several elements are dominant in all the initiatives:

- **Focus on sustainable development:** There is a consensus that investment facilitation should target quality investment. As part of the regional initiatives, sustainable development factors are integrated both as an objective and as specific measures. In addition, many investment agreements in the region list development goals that investments should help to achieve. Investment agreements also indicate that investment facilitation measures should be correlated to development goals. This correlation includes focusing on providing incentives to investors that contribute to development. One participant

mentioned that the objective of the future African Continental Free Trade Area (AfCFTA) Investment Protocol is to focus on investment facilitation that goes hand-in-hand with development. The issues from the African perspective include information sharing, capacity building and technical assistance. These three elements could foster a consensual continental investment facilitation framework. Another participant said that sustainable development needs to be emphasized better in the IFD Agreement and such reference should be made in its preamble.

- **Investor obligations/focus on responsible investors:** The initiatives have a balanced approach to investment facilitation, which encourages investment subject to accountability criteria. From this perspective, investment facilitation and investors' obligations go hand in hand.
- **Bottom-up approach:** Most regional initiatives have a bottom-up approach, which means that the formulation and implementation of regulations such as transparency and simplification of project approvals should be determined at the national level. The regional initiatives dictate the spirit of investment facilitation, but the actual rules are developed at the national level by IPAs.
- **Dispute prevention and mitigation:** There is a strong perception in the African region that investment facilitation should not follow traditional ISDS or WTO dispute settlement approaches, especially in the context of an IFD Agreement. Governments should establish a more collaborative process with investors. One dispute settlement prevention mechanism is based on establishing an ombudsperson. This approach is relevant in the context of the AfCFTA Investment Protocol, where there is an emphasis on drafting a provision that establishes dispute prevention and mitigation procedures.
- **Home country measures:** Home countries should facilitate and encourage responsible investment. Investment facilitation frameworks should not ignore the role of home countries in this regard, nor should they focus only on host states. Sustainable development entails inherently the responsibility and involvement of home states. This includes ensuring that their investors operate in a manner that is sustainable and aligned with host states' development goals.
- **Good practice sharing:** A platform for regional corporation and information sharing between IPAs was discussed in SADC. However, the creation of such a network cannot be imposed on governments. In this regard, technical assistance can help by providing information on how national structures can facilitate each other and create such a platform.

### Lessons from the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol

This Protocol, in force only for Uruguay and Brazil, shifts the focus from traditional investment protection or promotion to specific investment facilitation measures, including transparency, consistency, 'focal points' or 'ombudspersons' and procedures for dispute prevention. Argentina ratified the Protocol but has yet to implement it.

The Protocol includes institutional governance, exercised by the Focal Points and the Joint Commission, which work in parallel in relation to the implementation of investment facilitation measures. Under the Protocol, the Joint Commission needs to consult with both the private sector and civil society. The Focal Points support investors in the navigation of the countries' systems and regulations. Focal Points with the involvement of the Joint Commission are responsible for risk mitigation and dispute prevention. They need to pay attention to problems that investors encounter and try to solve them. The Argentinian Ministry of Foreign Affairs intends to launch a platform that will include all the information necessary for any investor to enter into the country. An investor from any home state will be able to use the platform to work directly with provincial IPAs, in a manner that will be coordinated with the Ministry of Foreign Affairs.

### Lessons from the Pacific Alliance

The investment facilitation initiative of the Pacific Alliance includes three action points: receiving investor input on how to improve and facilitate investment in the region; systematizing and creating an agenda to improve the investment climate; and monitoring implementation progress using objective criteria. IPAs and the World Bank play an important role in supporting the mechanism to monitor progress. In addition, private-sector involvement has been a key part of the process, as private-sector players know their own practical needs as well as the obstacles they face. However, the initiative is non-binding, with high dependency of political will. One challenge is that countries perceive each other as competitors and, consequently, are not oriented towards sharing good practices.

## Public webinar: The potential added-value of an IFD Agreement

19 January 2021

### Overview

This webinar is part of a series on a multilateral framework on investment facilitation for development being negotiated at WTO. The series is part of the Investment Facilitation for Development project implemented by ITC and DIE. The discussion emphasized that the principal purpose of an IFD Agreement is to further increase FDI flows for development and enhance international cooperation in the investment area.

The webinar was moderated by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI, with an introduction by Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC. The webinar included Zoryana Olekseyuk, Senior Researcher, DIE; Nathalie Bernasconi-Osterwalder, Executive Director, IISD Europe; Jansen Calamita, Head of Investment Law and Policy, Centre for International Law, and Research Associate Professor (CIL), Faculty of Law, National University of Singapore; Anabel González, Non-Resident Senior Fellow, Peterson Institute for International Economics; Yewande Sadiku, Executive Secretary and Chief Executive Officer, Nigerian Investment Promotion Commission; and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF. Concluding remarks were made by Axel Berger, Senior Researcher, DIE.

### Highlights

#### Potential welfare gains from different IFD Agreement scenarios

Results from a DIE draft study on the potential welfare gains from different IFD Agreement scenarios were introduced during the webinar. The research is based on DIE's Investment Facilitation Index, which, in its current stage, covers 86 economies. The study showed that developing countries with low levels of current investment facilitation practice would benefit the most from the implementation of IFD Agreement proposals.

The study showed that, as greater investment facilitation commitments are taken, gains increase in term of consumer welfare and GDP impact, and that the lowest and middle-income countries have the highest gains. There are some spillover gains for non-participant countries that, however, are also lower than gains from membership in an IFD Agreement. While economies have an incentive to unilaterally implement investment facilitation measures, many have not done so, especially developing countries at the lowest levels of development and with the greatest need for investment; an IFD Agreement containing strong technical assistance commitments would therefore be particularly useful for these countries.

#### Potential benefits of an IFD Agreement

- **Facilitating more sustainable FDI flows:** On the basis of the WTO draft negotiations text, there should be more focus on sustainable FDI. It is important to identify what constitutes such investment and then ask at the international level how to support and incentivize this type of investment, including through home state obligations. The IFD Agreement will likely set the floor for other investment facilitation agreements, so the standards for sustainable FDI commitments it establishes will be especially important.
- **Maintaining an inventory and benchmarks of good investment facilitation practices:** The IFD Agreement can serve as a comprehensive resource for investment facilitation good practices. Many of these are brought together in 'An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?' to which many IPAs, international organizations and private-sector representatives have contributed. The draft text of the IFD Agreement should be made available to the public and comments from stakeholders encouraged. This would help make the framework (while it is being negotiated) a benchmark of best practices for investment facilitation.
- **Helping domestic reforms:** Because of the decline in FDI flows as a result of the pandemic, countries will need to find ways to attract FDI to restart their economies, including by taking substantial investment facilitation measures and domestic reforms to promote a better business environment. A key question is how to improve the domestic regulatory environment to bring in more FDI that can contribute to sustainable growth. An international framework can drive reforms and help governments

to meet international standards for investment facilitation measures. An IFD Agreement constitutes a commitment device that can strengthen reform efforts, make them more credible and lock in existing reforms. By being a 'one-stop shop' of codified good practices for investment facilitation, the IFD Agreement can help inform and promote domestic reforms.

- **Creating home state obligations:** Transparency measures under the IFD Agreement have focused on host countries. From the investor's perspective, it is important to understand regulations and programmes for FDI assistance offered by the investor's home country. This can be particularly important for SMEs. It was stated that home countries' commitments should go beyond transparency of incentives and include enforcing CSR commitments by investors. Home countries should condition supportive investment facilitation measures for firms on following CSR practices. Giving attention to home country measures would balance the IFD Agreement by formulating obligations for both host countries and home countries.
- **Cross-border cooperation:** An IFD Agreement could allow economies to come together and set out a process to cooperate on investment facilitation practices. Host countries can identify priorities relating to investment for development, and home countries can share opportunities with a focus on development.
- **Alternative dispute prevention mechanisms:** An IFD Agreement can help countries explore and assess alternative dispute prevention mechanisms. For example, the ombudsperson mechanism was stipulated in the Brazilian model as a way to prevent disputes. There is room to explore types of dispute prevention mechanisms to ensure their effectiveness, independence and inclusiveness.
- **Technical assistance and capacity building:** The IFD Agreement can be a driver of technical assistance efforts, similar to the TFA. Strong and firm commitments for technical assistance are required. Developing countries cannot take commitments under an IFD Agreement without supportive technical assistance commitments to ensure that their commitments will be implemented. Capacity building should focus on improving investment regulatory frameworks, linking multinational enterprises with domestic firms and supporting developing countries in the digitalization and automation of investment processes and administrative infrastructures. Funding may be a problem, especially with current budget shortfalls. However, technical assistance does not require necessarily substantial funding but requires knowledge sharing and expertise. There are also supplemental initiatives that would help with implementation commitments, for example, a proposal by the World Economic Forum to launch a new global alliance for investment facilitation, the EASI Alliance: Enabling Action on Sustainable Investment. Governments would identify implementation bottlenecks and, together with businesses and international organizations with expertise, the bottlenecks will be addressed.

### Challenges for an IFD Agreement

- **Regulatory coherence:** The outcome of the negotiations needs to be coherent with existing WTO rules, ongoing WTO negotiations and the international investment regime to avoid unintended consequences and risks such as investor-state litigation. To be effective, this will need to be addressed not only in the context of the IFD Agreement, but also among the parties to specific agreements.
- **Regulatory and administrative reforms:** Depending on the disciplines that are agreed under the IFD Agreement, developing countries may need to take significant regulatory and administrative reforms. If the scope of an IFD Agreement is to cover all services and non-services sectors, capital importing countries would have to conduct extensive consultations and legal impact assessments at all levels of government. These could be not only time consuming but also complex.
- **Integration of the development perspective:** The IFD Agreement will have to sufficiently address and integrate the development perspective, including by covering home country measures and firm commitments on technical assistance. Such integration of development aspects should be in the core text, which should advance and facilitate sustainable FDI.



## Public webinar: Investment dispute prevention and management at the national level

25 February 2021

This webinar is part of a series on a multilateral framework on investment facilitation for development being negotiated at WTO. The series is part of the Investment Facilitation for Development project implemented by ITC and DIE. The webinar focused on investment dispute prevention and management at the national level, including the following issues: the function of dispute prevention and management and the various forms it can take; best practices, including specific country examples of setting up dispute prevention mechanisms; and the importance of conflict prevention and management at the national level and how such mechanisms could be reflected in the WTO IFD Agreement.

The webinar included an introduction by Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC. It was moderated by Axel Berger, Senior Researcher, DIE, and included the following speakers: Priyanka Kher, Private Sector Specialist, Investment Policy and Promotion, World Bank Group, Carlos Jose Valderrama, Attorney at Law, and Valéria Mendes Costa, First Secretary, Ministry of Foreign Affairs, Brazil. Concluding remarks were made by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

### Highlights

#### **The function of dispute prevention and management mechanisms and its various forms**

The cost of investor-state disputes, both economically and reputationally, are substantial. Based on World Bank data, political stability, macro-economic stability and the legal and regulatory environment are the top factors affecting investment decisions. Dispute prevention and management mechanisms are important not only for attracting new investment but also for the retention and expansion of investment.

The main function of effective dispute prevention and management mechanisms is to detect and address investors' grievances in a timely manner, to prevent the escalation of grievances into legal disputes. Effective dispute prevention and management mechanisms assist with the retention and expansion of investment and ensure effective implementation of investors rights.

The Investment Grievance Mechanism Tool developed by the World Bank focuses on the phase during which an investor's issue has become a grievance, but has not yet evolved into a legal dispute. The tool aims to enable host governments to set up an institutional infrastructure to identify and detect high-risk investor grievances in a timely manner, to prevent an escalation into legal disputes. The tool assists governments in two areas. The first is in helping public agencies to understand the implications of their actions for investors and for investment rules. The second area includes the development of inter-agency coordination for responding to investor issues.

From the World Bank's experience working with countries on implementing the tool, a few elements have been shown to be important for its success, including: strong political support; a strong legal system to operationalise the mechanism; a designated lead agency with high-capacity that is well-resourced to operate the mechanism; the use of data collection and analyses, which should include the entity that caused the grievance, the legal implications of the grievance and the economic impact in terms of existing investment and loss of potential investment expansion; a standardised set of operational procedures for the mechanism; and regular monitoring and evaluation.

It was noted that implementation of the tool was not necessarily expensive from previous experience. The idea is not to create a new institution, but to build the capacity of a small set of people to ensure coordination among various governmental agencies, bridge information gaps and define the process to detect and address investors grievances. One of the most important elements is the collection of data on the nature of grievances.

## **Investment dispute prevention and the management of best practices**

### **Peru case study – a national state response team**

In Peru, as part of the national investment dispute prevention state policy, a state response team was established. Part of the day-to-day work of the response team included: providing consultations regarding the interpretation of contractual clauses; reviewing the contents of communications received or sent by the state; and attending informal or formal meetings with investors seeking to address grievances.

It is important that the response team, or any specialised unit that is created to manage dispute prevention mechanisms within the state, be created by law and be empowered to carry out the following actions: negotiate on behalf of the state; control and unify public statements related to the dispute; determine responsibility of the involved entities in the dispute; request information from all public entities; and approve funds and hire professionals for the state's defence. The independence of the agency is key, as often it will need to act as a mediator to resolve issues before they evolve into legal disputes.

It is important to develop a process for dialogue within the response team. Once the response team assumes authority for a grievance, it should invite investors to a meeting to elaborate on their position. If the results of the meeting indicate there is a possibility for negotiations, the response team should initiate negotiations, with basic rules such as good faith, confidentiality and barring of future incriminating use of representations made during the negotiations. If the negotiations are successful, settlement documentation should be prepared, confirming the withdrawal of all claims by the investor. The response team is a good option for smaller states with limited economic resources because it allows them to control the relationship within a set budget.

In addition to the response team, Peru's policy on the prevention of investor disputes includes the following guidelines: public officials should exercise daily care in their dealings with foreign investors; contracts should be carefully drafted, using reliable attorneys to advise on contract preparation and negotiations rather than using contract templates; and a defence strategy should be maintained for international disputes. A well-prepared defence team paying immediate attention to threats of disputes can prevent those disputes from escalating into legal claims. It was noted that sometimes other government officials are not willing to respond to investor claims due to corruption allegations. In those cases, a legal team can meet with both parties and help them reach an agreement, by providing assessments of the legal implications and an opinion regarding an agreement by the parties.

### **Brazil case study - ombudsperson mechanism**

The Brazilian ombudsperson is an intergovernmental body. It acts as a focal point network comprised of 37 representatives from different agencies at the national and sub-national levels. The functions of the ombudsperson include: centralising response to investors through one focal point; providing recommendations to the relevant agencies regarding possibilities for improvements of their regulatory conduct; and disseminating information and investment opportunities. There are two main communications with investors that are done through the ombudsperson: requests to clarify questions regarding regulatory aspects, and requests to assist investors with problems that arise. The ombudsperson does not cover disputes that are brought to court. The total amount of foreign direct investment (FDI) that was covered in cases involving the Brazilian ombudsperson has been around \$900 million.

## **Reflecting investment dispute prevention and management mechanisms in an IFD Agreement**

**Designating a lead agency:** Members could commit themselves to setting up a conflict prevention mechanism by designating a lead agency, which beyond providing information to investors would assist in solving problems and communicating with various agencies that are related to investors' issues. A lead agency could coordinate the dialogue among the various governmental agencies. It was noted that IPAs are not always the investors' contact point and therefore they do not always know about grievances that occurred. In addition, IPAs do not always have the political mandate to coordinate responses by the different agencies. The lead agency must have political support to implement solutions, especially when responses require the involvement of other agencies.

**Investment concern mechanism:** Establishing a mechanism similar to the practice that has been developed under the WTO Sanitary and Phytosanitary Measures (SPS) agreement and the Technical Barriers to Trade (TBT) agreement is another option. The specific trade concern (STC) mechanisms that exist in the WTO SPS and TBT Committees were not foreseen in the SPS or TBT Agreements but were developed with practice. Any WTO Member that has a SPS or TBT issue with another Member, may raise the issue at the respective committee and try to resolve the issue there. Statistics show that there are hundreds of STCs brought to these Committees annually and that a large percentage of them are resolved and never go to a formal dispute. Additional alternative dispute mechanisms can be established prior to launching a formal dispute, such as a mediation process. The WTO can provide such an institutional framework.

**Awareness raising:** Members can undertake awareness raising actions on dispute prevention. Such actions could be designed to foster a new culture domestically of more dialogue and better interaction with investors—and not only for the settlement of formal disputes.

**WTO investment facilitation committee:** The WTO investment facilitation committee can act as a venue for investors' concerns. The committee should publicise the benefits of conflict prevention mechanisms. It can also work together with a training division and provide capacity building to Members to establish their own conflict management mechanisms.

## Public webinar: The WTO Investment Facilitation Framework for Development and the importance of facilitating sustainable investment for MSMEs

28 May 2021

The webinar provided an overview on the WTO negotiations on an IFD Agreement, including the benefits and challenges of a WTO outcome on investment facilitation. In addition, the webinar covered the main issues related to facilitating inward FDI, zooming in especially on MSMEs and on the development dimension.

This webinar was part of the ITC webinar series that was held between 28 May and 10 June 2021 for policymakers and others interested in emerging topics in the multilateral trade discussions. For more information, please visit: <https://www.intracen.org/itc-webinar-series/>

Opening remarks were made by Dorothy Tembo, Deputy Executive Director, ITC. The first session “The benefits and challenges of a WTO outcome on Investment Facilitation for Development” was chaired by Rajesh Aggarwal, Chief, Trade Facilitation and Policy for Business, ITC, and included the following speakers: Felipe Henriquez, Counsellor, Permanent Mission of Chile to the WTO; Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI; Yewande Sadiku, Executive Secretary/CEO, National Investment Promotion Commission, Nigeria; and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF.

The second session “MSMEs, the development dimension and the role of technical assistance” was chaired by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI, and included the following speakers: Axel Berger, Senior Researcher, German Development Institute; Alice Nikuze, Investment Marketing Analyst, Rwanda Development Board; Roslyn Ng'eno, Senior Investment Expert, AUC; and Mohammad Saeed, Senior Trade Facilitation Officer, ITC. Concluding remarks were made by Rajesh Aggarwal, Chief, Trade Facilitation and Policy for Business, ITC.

### Highlights

The discussions during the webinar focused on the following points, which are further elaborated below.

- The webinar emphasised the importance of investment facilitation in influencing international investors' locational decisions and the benefits of the IFD Agreement for developing countries and LDCs.
- Countries seek not only to achieve higher levels of FDI but better and sustainable FDI.
- Investment facilitation measures are increasingly part of international investment agreements. However, many developing countries and LDCs are far behind in implementing investment facilitation measures. Developing countries need substantial technical assistance to implement measures that will enable them to reap benefits from investment facilitation agreements. Developing countries and LDCs need to ensure that adequate technical assistance is provided to implement the agreements and should negotiate accordingly.
- Needs assessment for developing countries and LDCs should be done at an early stage that will enable countries to participate in the IFD Agreement negotiations in an informed way and will assist with the implementation the agreement on the ground.

### The benefits and challenges of a WTO outcome on Investment Facilitation for Development

**Progress and next steps for the negotiations of an IFD Agreement:** Currently, there is a draft text that includes more than 40 proposals from WTO Members from both developed and developing countries. The aim is to consolidate the draft text, ensure consistency between the different sections and reach a substantive outcome by the MC12. The current IFD Agreement includes the following main sections: improving transparency and predictability of investment measures, simplifying administrative procedures, promoting responsible business conduct, and fighting corruption. It was emphasized that special and differential treatment and technical assistance are key pillars in the initiative in order to successfully implement the agreement. In July 2021, there will be a stocktaking exercise on concrete outcome that Members expect by MC12.

**What we have learned from the ITC-DIE investment facilitation for development project?** The purpose of the ITC-DIE project is to strengthen the capacity of negotiators, policy makers, and IPAs to deal with investment facilitation matters and specifically to negotiate international agreements on investment facilitation. Such negotiations are not only taking place at the WTO, but also in bilateral and regional settings. A special focus of the project is to identify investment facilitation measures that directly contribute to sustainable FDI.

Some of the main findings of the project include the following:

- The importance of investment facilitation in influencing international investors' locational decisions. Countries seek to differentiate themselves on the basis of investment facilitation.
- Countries seek not only to achieve higher levels of FDI but better and sustainable FDI. Such FDI is commercially viable and makes a positive contribution to a country's economic, environmental and social development and takes place in the framework of fair governance mechanisms. The project identifies various ways in which the development dimension of the IFD Agreement can be strengthened.
- Not only host countries can facilitate FDI but also home countries. A growing number of home countries support outward FDI, and some countries link their outward FDI support to host country measures that directly promote development efforts. However, home country measures are not always transparent and may involve multiple institutions. Accordingly, transparency and streamlining administrative procedures regarding home country measures could be included in an investment facilitation agreement. The agreement could also promote a one-stop-shop for outward FDI.

**What do IPAs expect from the IFD Agreement?** The IFD Agreement is expected to improve transparency, streamline administrative procedures and promote sustainable development. All these are key elements that are in line with IPA strategies. However, today many IPAs in developing countries and LDCs do not have the capacity to implement the obligations that will be expected under the IFD Agreement. From an IPA's perspective, this is of concern. In addition, it was emphasized that the IFD Agreement should also include special and differential treatment provisions similar to the WTO TFA, especially with respect to implementation timelines.

#### **Promoting sustainable investment through measures directly contributing to development:**

- Linkages between foreign investors and domestic suppliers, especially MSMEs, should be fostered. Linkages can be established through supplier development programmes. Such programmes should help MSMEs acquire the skills needed to produce in the quality and scale necessary for international investors. MSMEs can also be listed in local supplier databases that can include sustainability dimensions to facilitate sustainable FDI and thus both reward and motivate sustainable operations. Cambodia, for example, has launched a supplier database with sustainability dimensions.
- Environmental and social impact assessments should be performed to ensure that potential negative impacts from investment are identified and addressed beforehand.
- Quality standards and standards relating to responsible business conduct in attracting FDI should be adopted in order to increase investment flows that will have an impact on development. It was mentioned that sometimes companies are interested in adopting responsible business conduct standards especially related to environmental issues, but they do not know how to develop such standards and need host countries to provide practical guidelines, such as in the case of carbon commitments.
- Adopting targeted incentives that are aligned with sustainable investment goals. This can be done through the Recognized Sustainable Investor category, which includes providing more support in the form of financial and non-financial incentives to investors that commit to investing sustainably.
- Providing expedited approval procedures for MSMEs. For example, some states in India allow MSMEs to invest in the country immediately, and have 36 months before they need to fulfil paperwork requirements.

A few other measures were mentioned as measures that do not directly contribute to development but help increase investment flows. Such measures include: investment grievance management mechanisms and early warning systems for investor complaints to address them before they become legal disputes; adopting a risk-based approach for investments, as not all investments are equally risky, and approval of low-risk investments may need only light review; a "silence is consent" policy for project approval; developing

partnerships between economies to develop knowledge sharing and peer learning; and supporting outward investment through home country measures. Such home country measures can be geared specifically to supporting MSMEs, such as financing feasibility studies for MSMEs.

### **MSMEs, the development dimension and the role of technical assistance**

**A gap analysis of developing countries' capacities to facilitate sustainable investment:** During the webinar the DIE Investment Facilitation Index was presented. The DIE index covers over 100 investment facilitation measures in six policy areas, and maps the implementation of investment facilitation measures at a country level of 86 WTO Members (more countries will be added). From the index it is clear that the level of implementation of investment facilitation measures is closely related to the development level of a country. Those countries that are most in need of investment facilitation measures to attract FDI have the lowest investment facilitation implementation scores. The index shows that the establishment of focal points and review received the lowest implementation score in all groups. The e-government implementation score is also low in LDCs, though higher in other groups.

**Key investment facilitation measures that require technical assistance and capacity building for implementation:** As a first step for technical assistance and capacity building, it was indicated that a needs assessment for each country regarding its implementation gaps, the time needed for implementation and the technical assistance that is required should be conducted. In addition, data collection regarding the investment facilitation measures that have the highest impact on FDI is required. The following investment facilitation measures were indicated during the webinar as measures that require technical assistance for implementation by developing countries and LDCs.

**Training of IPA officials:** Training should include investor relationship management, targeting, and proper follow-up to meet investors' needs and support their operations, including the development of promotional materials.

**Digitalization:** IPAs should access and use new technology to promote the investment environment. Digitalization assists in streamlining administrative procedures, including the establishment of single window enquiry points for all enquiries concerning investor applications.

**Assessing investment contracts:** IPAs in developing countries do not have the capacity and knowledge to evaluate contracts to ensure that stable, win-win contracts are developed. Technical assistance is needed in order to bring multi-disciplinary expertise to IPAs in order for them to assess and negotiate investment contracts.

**Dispute management mechanisms:** IPAs need assistance in establishing dispute prevention mechanisms that will identify, receive, resolve, and track investor grievances in a transparent, fair and timely manner. Dispute management mechanisms are important not only to avoid an escalation of grievances to investment disputes, but also because a large share of investments is reinvestment and investors are likely to make additional investment when their claims are addressed.

**Attracting quality and sustainable investment:** Capacity building is needed to assist IPAs in understanding how to attract quality and sustainable investment that will promote job creation, environmental protection, and promote responsible business conduct. Government officials do not always understand the concept of sustainable investment, and do not know how to identify and promote such investment.

**Stakeholder consultations:** Governments should establish mechanisms for building relationships with stakeholders, provide opportunities to share experiences, and provide investors with the opportunity to comment on new regulations and laws that effect the investment climate, and specifically to make sure that laws that relate to investment facilitation meet investors' needs.

**Policy advocacy:** Technical assistance should be provided to IPAs to enable them to undertake regulatory impact assessments by means of stakeholder consultations and provide such assessments to the relevant government authorities.

**Learning from the experience of implementing technical assistance in the TFA:** During the TFA negotiations, Members were provided with the opportunity to conduct needs assessments that enabled them to provide inputs during the negotiations based on these assessments. In addition, the needs assessment process was useful in generating momentum for the implementation of the agreement. The following main lessons were mentioned as relevant for the IFD Agreement:

- Start the gap assessment as soon as possible.
- Provide flexibility for implementation. Implementation should be within the timeframe of each country and its implementation capacity. The special and differential treatment clause in the TFA gave confidence to the WTO Members that the implementation process will be in their own time and not going to be imposed on them.
- Coordinate between government authorities at all levels. The TFA is a multiagency agreement. Similarly, the IFD Agreement requires coordination not only among different government authorities, but also between different levels of government, including national and sub national IPAs. The TFA experience shows that, to implement the agreement, there is a need for a holistic government approach that involves all relevant government agencies. It was also indicated that many times the authority that is responsible for negotiating the agreement is not the one that is responsible for its implementation. In the case of the IFD Agreement, it is important that the negotiators coordinate the technical assistance needs of the IPAs which will need technical support to implement the agreement.
- Establish Institutional mechanisms to bring all stakeholders on board. There should be institutional mechanisms in place that will ensure collaboration among regulators, IPAs and the private sector.
- Provide technical assistance for implementation. Technical expertise should be made available to ensure that developing countries and LDCs can implement the agreement. It is also important that the technical assistance that is provided be easily accessible.

## Public webinar: Implementing an Investment Facilitation Framework – Learning from the TFA experience

15 September 2021

This webinar is part of a series on a multilateral framework on investment facilitation for development being negotiated at WTO. The series is part of the Investment Facilitation for Development project implemented by ITC and DIE. The webinar focused on implementing an investment facilitation framework for development, while learning from the WTO TFA experience. The WTO IFD Agreement includes provisions related to issues such as improving the transparency and predictability of investment frameworks; streamlining procedures related to foreign investors; providing focal points for domestic regulatory coherence and cross-border cooperation; and encouraging sustainable investment. Such investment facilitation provisions are designed to increase FDI flows that contribute to development. Many developing countries, and especially LDCs, will have to make substantial efforts to implement the IFD framework, and these efforts will need to be supported by considerable technical assistance and capacity building, to ensure that host countries benefit from the agreement. The webinar addressed these issues, while discussing lessons learned from the implementation of the WTO TFA and the role of special and differential treatment.

The webinar began with an introduction by Rajesh Aggarwal, Director (oic), Division for Market Development, ITC. It was moderated by Karl P. Sauvant, Resident Senior Fellow, Columbia University, CCSI, and included the following speakers: Mathias Francke, Ambassador, Permanent Representative of Chile to the WTO, Coordinator of the Structured Discussions on Investment Facilitation for Development; Mohammad Saeed, Senior Trade Facilitation Officer, ITC; Bernard Hoekman, Professor and Director of Global Economics, Robert Schuman Centre for Advanced Studies, European University Institute, Italy; Kayula Siame, Permanent Secretary, Zambia Ministry of Higher Education; and Yardenne Kagan, Project Officer, ITC-DIE Project on Investment Facilitation for Development, ITC. Concluding remarks were provided by Axel Berger, Senior Researcher, DIE.

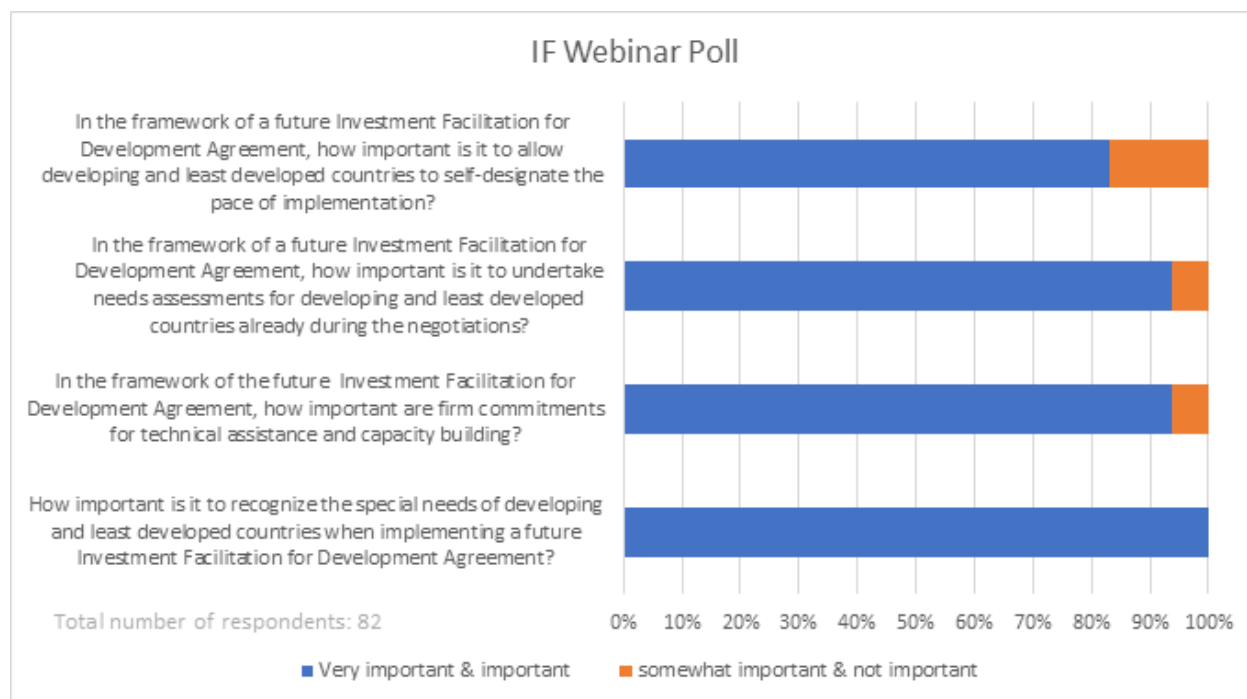
### Highlights

The discussions during the webinar focused on the following points, which are further elaborated upon below.

- Firm commitments for technical assistance and capacity building under the IFD are crucial for developing countries and LDCs in particular to be able to fully benefit from the agreement.
- Gap analyses and needs assessments are key for supporting the implementation of the agreement and should start as soon as possible.
- The special difficulties in implementing the TFA by developing countries and LDCs are explicitly recognized under the self-designation sections of the TFA. Such recognition should be explicitly included in the IFD as well.
- The implementation of the IFD requires even more technical assistance and capacity building than the TFA as it involves substantial behind-the-border reforms and regulatory changes; multiple ministries, agencies and departments; the entire life-cycle of an investment; dispute prevention and management mechanisms at the national level; strengthening investment promotion agencies (IPAs); help in establishing national investment facilitation committees; and, accordingly, self-designation when it comes to the pace of implementation that is possible.
- In order to assist WTO Members in the implementation of the agreement, an epistemic community, involving governments, IPAs, international organizations, the private sector, and other experts should be established.

During the webinar, a poll was conducted on the importance of technical assistance and capacity building for the implementation of an IFD Agreement; 82 participants responded. The results are contained in the figure below.





### Learning from the experience of implementing technical assistance in the WTO Trade Facilitation Agreement

**The need for gap analyses and needs assessments:** Gap analyses and needs assessments should take place already during the negotiating stage. Such a process will provide multiple benefits, such as ensuring effective participation in the negotiations; determining the overall compliance of WTO Members; and identifying special and differential treatment needs, including measures needing more time to be implemented and measures that require technical assistance. Under the TFA, needs assessments took place between 2008-2012. More than 100 countries participated in that process. The process was important for creating the necessity momentum for concluding the agreement and its implementation. Accordingly, gap analyses and needs assessments for developing countries and LDCs should start as soon as possible. From the developing country's experience in implementing the TFA, it was emphasized that needs assessments were also important for engaging stakeholders to help raise resources and ensure that technical assistance was provided.

**Flexibility in implementation:** Implementation should be within the timeframe of each country and its implementation capacity. The special and differential treatment clause in the TFA gave confidence to WTO Members that the implementation process would not impose timeframes that could not be met. Such flexibility in implementation encouraged other developing countries and LDCs to become signatories of the TFA. It was noted that the IFD should include a recognition of the special challenges that developing countries and LDCs face in implementing the agreement and specifically measures that facilitate sustainable FDI.

**Adopting a whole-of-government approach:** The implementation of the TFA involved multiple agencies within governments. Similarly, the IFD Agreement requires coordination not only among different government authorities, but also between different levels of government, including national and sub-national IPAs. The TFA experience shows that, to implement an agreement, there is a need for a whole-of-government approach. Such an approach involves all relevant government agencies, because the "weakest link" determines the efficiency of the process. It was indicated that a national high-level investment committee that provides overall oversight regarding the implementation process should be established. Such a committee should involve the public sector, including representatives from all relevant government levels, as well as representatives of the private sector who can discuss what is working and what needs to be done to improve the business environment. In this regard, a monitoring mechanism should be established as well. It should monitor the investment facilitation measures that have been implemented and the impact they have

had on the economy, as well as track the issues that require additional attention and resources to resolve. Such information can also serve to bring additional stakeholders on board.

**Stakeholder consultation:** In order to ensure efficient implementation, stakeholder consultations are required. Such consultations should not be on an ad hoc basis, but rather structured by institutional mechanisms to ensure collaboration among regulators, IPAs and the private sector.

**Technical assistance and capacity building:** It was emphasized that the implementation of measures under the IFD requires even more technical assistance and capacity building than the TFA, as implementation may include substantial behind-the-border reforms and regulatory changes; the involvement of multiple ministries, agencies and departments; facilitation during the entire life-cycle of investments; dispute prevention and management mechanisms at the national level; the strengthening of IPAs; and the establishment of national investment facilitation committees. Accordingly, the IFD should include self-designation clauses regarding the pace of implementation and firm commitments for technical assistance and capacity building. Such commitments are crucial for developing countries and LDCs to be able to fully benefit from the agreement. Implementation assistance should not only be available, but should be easily accessible. In this regard, similar to the TFA, a Central Technical Assistance Fund should be established. It was noted that it is also important to establish performance indicators for implementation; this will generate credibility not only for donors but for the private sector as well. Performance indicators will also enable governments to track the progress of implementation.

### **Operationalizing implementation in the context of the IFD Agreement**

The TFA was perhaps the first WTO agreement to take implementation dimensions seriously. Given the focus on implementation, governments agreed to follow a set of “good practice” principles, and there was a collective effort to achieve the implementation of the agreement. Accordingly, the following key inputs were provided as important for operationalizing implementation in the context of the IFD:

**Independent monitoring and evaluation:** Independent monitoring should be undertaken to evaluate the development impact of the implementation of the IFD, including its sustainable development and corporate social responsibility dimensions. Such a process requires the allocation of resources to generate the requisite information, which includes baseline investment facilitation performance indicators that are updated annually. When establishing such a process, representatives of IPAs and the international business community should be part of the deliberations to determine the entity, approach and associated governance structure.

**Establishing an epistemic community:** A mechanism that brings together all stakeholders should be established. In contrast to trade facilitation measures, investment facilitation measures should focus more on the responsibilities and conduct of investors throughout the supply chain, which was not an issue under the TFA. This requires information that can be provided from an epistemic community. To facilitate this community, the WTO Investment Facilitation Committee should hold regular sessions at which stakeholders can express their views. Such a discussion would enable an open knowledge platform to support engagement by the stakeholders concerned with FDI.

**Consider a code of conduct/reference paper:** A reference paper should be agreed upon by signatories of the IFD, laying out principles to be adhered to with regard to accession, transparency and the provision of technical assistance.

## WTO Public Forum 2021 session report: Investment Facilitation for Development: Revitalizing investment for covid-19 recovery

30 September 2021

The session reviewed the progress that has been made during almost four years of structured discussions on an IFD Agreement at the WTO. The session also provided an overview of the negotiations that will continue at the 12<sup>th</sup> Ministerial Conference at the end of the year. Finally, the session also explored how a reformed agenda on investment facilitation for development can deliver positive results for developing and LDCs, while helping countries to recover from the pandemic and to support sustainable development.

The session was chaired by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI, and included the following speakers: Dorothy Tembo, Deputy Executive Director, ITC; Mathias Franke, Ambassador of Chile to the WTO, Coordinator of the Structured Discussions on Investment Facilitation for Development; Axel Berger, Senior Researcher, DIE; and Valéria Mendes Costa, First Secretary, Ministry of Foreign Affairs, Brazil.

### Highlights

The discussions during the session focused on the points below, which are elaborated upon in the sections that follow.

- The decline in FDI flows caused by the COVID-19 pandemic represents a huge challenge for WTO Members. Countries need more sustainable FDI to restart their economies and enhance recovery.
- The IFD framework was initiated by developing countries and focuses on practical technical issues aimed at facilitating sustainable FDI. The IFD Agreement explicitly does not deal with issues such as market access, investment protection and ISDS. In addition, there is a focus on concrete investment facilitation measures that promote sustainable investment flows such as local supplier databases that link domestic firms to global value chains.
- Firm commitments for technical assistance and capacity building under the IFD are especially important for enabling developing countries and LDCs to fully benefit from the agreement.
- The implementation of the IFD requires even more technical assistance and capacity building than the WTO TFA as it involves: substantial behind-the-border reforms and regulatory changes; multiple ministries, agencies and departments; support for the entire life-cycle of an investment; dispute prevention and management mechanisms at the national level; support for IPAs; help in establishing national investment facilitation committees; and, accordingly, self-designation with respect to the pace of implementation.
- Gap analyses and needs assessments are key for supporting the implementation of the IFD Agreement and should start as soon as possible.

### **The importance of investment facilitation for development in enhancing resilience beyond COVID-19**

According to UNCTAD, global FDI contracted by 35% in 2020, compared to the previous year, due to the economic fallout from the pandemic. The world, and particularly the developing world, needs investments to enhance recovery and to achieve the UN 2030 Sustainable Development Goals.

Because a fundamental component of the recovery involves boosting FDI flows, the IFD Agreement negotiations are crucial. A successful outcome can contribute to revitalizing the global investment landscape through enhanced transparency and predictability, streamlined procedures, greater use of e-government services, and strengthened international cooperation, with a view towards advancing sustainable development. The IFD framework would provide investors with more predictability and transparency regarding the investment landscape, which is especially important for SMEs. At the same time, the IFD framework will enable host countries to benefit from more sustainable FDI.

## **The state of play of the WTO negotiations on investment facilitation for development ahead of the 12th Ministerial Conference**

It was indicated that there is currently an IFD draft text that includes an agreement on three main pillars: improving transparency and predictability of investment measures; streamlining and speeding up administrative procedures; and enhancing international cooperation and exchange of best practices. Other agreed provisions include domestic regulatory coherence, firewall provisions, the preamble, and the scope of the IFD Agreement, which excludes market access, investment protection and ISDS. In addition, there are ongoing discussions on Members' proposals relating to capacity building and technical assistance, principals for the implementation of the agreement by developing countries and LDCs, and sustainable investment provisions. The aim is to reach significant progress at the 12<sup>th</sup> WTO Ministerial Conference. It was also mentioned that at this stage it is still not clear how the IFD Agreement will be incorporated into the WTO structure.

According to a study by the DIE, which covers 117 investment facilitation measures and maps the implementation adoption of investment facilitation measures at a country level of 86 WTO Members,<sup>182</sup> developing countries, on average, have adopted fewer investment facilitation measures compared to developed countries. In fact, there is a strong correlation between the level of adoption of investment facilitation measures and the developmental status of countries. Low-income countries and countries from Sub-Saharan Africa, the Middle-East and North Africa have the lowest levels of adoption of investment facilitation measures. Consequently, WTO Members from developing economies and LDCs will need to undertake substantial reforms to implement the IFD Agreement.

The IFD Agreement will include challenging investment facilitation measures that require administrative capacity, political will, and technical and financial resources in order to implement them. Accordingly, a firm and substantial technical assistance provision should be put in place to enable countries to approve and to implement the IFD Agreement. Furthermore, it is important to have a clear understanding of the current level of implementation of investment facilitation measures in order to estimate the size and shape of technical and financial assistance requirements. This process of gap analysis and needs assessments should be conducted during the negotiation phase.

### **Strengthening the development dimension of the IFD Agreement**

The current IFD Agreement draft text includes a sustainable development dimension. The Preamble of the IFD Agreement contains direct references to sustainable development, which will possibly affect the interpretative frame of the future agreement. The current draft also includes a responsible business conduct provision that aims to signal the type of investment that WTO Members want to facilitate under the agreement. Another relevant provision under the current draft is the establishment of domestic supplier databases, which aim to promote linkages between foreign firms and domestic suppliers. This is an important tool to reduce information gaps and search costs for identifying local suppliers. The current draft also includes a special and differential treatment section, which acknowledges the need of developing and least developing Members to implement the agreement in phases.

There are also two recent proposals for sustainable FDI provisions. The first one includes adding supplier development programmes in order to increase the number of local firms that could contract with foreign investors. The second proposal includes home state obligations. The concept is that home states should also play a role in facilitating the flow of sustainable investments. In this provision, Members are encouraged to adopt certain measures to facilitate outward sustainable FDI such as impact assessments. Members should also share information on the operations of investors from their territories, including information about investor history with respect to responsible business conduct and sustainable investing.

It was stated that additional investment facilitation measures could still be included in the IFD Agreement text and some of the existing provisions could be more ambitious in order to strengthen the sustainability

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<sup>182</sup> See Axel Berger, Ali Dadkhah, Zoryana Oleksyuk, "Quantifying investment facilitation at country level: introducing a new index", Bonn: German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE), October 2019, available here: [https://www.die-gdi.de/uploads/media/DP\\_23.2021.pdf](https://www.die-gdi.de/uploads/media/DP_23.2021.pdf)

dimension of the agreement. For example, Members could provide additional investment facilitation measures to “Recognized Sustainable Investors” to incentivize investors to invest sustainably. Such investors would receive priority assistance in obtaining licenses or shortened timeframes for approvals if they met specified sustainability criteria. Such criteria could include records of compliance with local laws and regulations, appropriate supply chain management, engagement in community development, skills enhancement, etc. This scheme is similar to the TFA’s “Authorized Operators” framework.

It was also stated that domestic supplier databases could include sustainability criteria in addition to traditional information. Additional sustainability criteria could include environmental management, water usage, workplace safety, employee care, upgrading/training policies, gender equality, and quality standards/certifications. This would not only facilitate investment but would recognize and promote local firms that can provide sustainable goods and services. In addition, in the current IFD draft, technical assistance and capacity building are drafted to help developing countries implement the agreement. These provisions do not envisage enhancing Members’ ability to facilitate sustainable FDI. Such specific assistance can include, for example, developing expertise in IPAs or relevant agencies for the promotion of sustainable development-focused investments. It is important to further enhance this perspective. It was also indicated that an Investment Committee could play a prominent role to reinforce the sustainability dimension of the IFD. Members could, for instance, agree on a built-in agenda directed to promote sustainable development facilitation measures.

## Public webinar: Increasing the Development Impact of FDI: Creating linkages between foreign investors and the local economy in light of the Covid-19 pandemic

26 October 2021

### Overview

This webinar is part of a series on a multilateral framework on investment facilitation for development being negotiated at WTO. The series is part of the Investment Facilitation for Development project implemented by ITC and DIE. The webinar focused on increasing the development impact of FDI by creating linkages between foreign investors and the local economy. The webinar discussed options to maximize linkages and positive spillover effects for the host economy, including the upgrading of local firms and the design and implementation of supplier development programmes that facilitate the retention, expansion and diversification of FDI while deepening links with local suppliers.

The webinar was opened by Rajesh Aggarwal, Director (oic), Division for Market Development, ITC. It was moderated by Axel Berger, Senior Researcher, DIE, and included the following speakers: Ivan Anton Nimac, Lead Private Sector Specialist and Global Lead, World Bank; Silvia Campos, Lead of Linkages, CINDE; and Simon Galpin, Senior Advisor, OCO Global. Concluding remarks were provided by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

### Highlights

The discussions during the webinar focused on the following points, which are further elaborated upon below.

- Measures should be undertaken by governments to encourage the creation of linkages and otherwise to maximize positive spillovers from foreign affiliates to domestic firms, to upgrade local suppliers and the skills of their employees; measures include improving access to information, building stakeholder relationships, providing aftercare services, using digital means, and ensuring intergovernmental cooperation.
- Additional measures include creating focal points within the government that would be responsible for supporting the establishment of supplier development programmes and local supplier databases and that are responsible for the provision of technical assistance and capacity building to ensure the implementation of these measures.

### **Maximising linkages and positive spillover effects from FDI to domestic firms and host economies in light of the COVID-19 pandemic**

The declining FDI flows as a result of the COVID-19 pandemic have further emphasized the important role that governments and, specifically, investment promotion agencies (IPAs), have in facilitating sustainable FDI by creating linkages between foreign investors and the local economy. To build linkages that maximize spillover effects from FDI, it is important to create the right policy environment and institutions that align with the goals of incoming foreign investors, the goals of local companies and the goals of other stakeholders. During the webinar, the following elements were indicated as important for maximising linkages and positive spillover effects from FDI:

**Demand-led approach for promoting FDI linkages:** Governments should undertake an analysis of potential linkages and prioritize value chain segments in light of the comparative advantage of their economies. They should designate a responsible lead agency to identify supply chain gaps and support the development of local suppliers that may have the potential to provide inputs at the quality, price and volume required by foreign affiliates.

**Upgrading local suppliers and skills:** In order for local suppliers to meet the demand of foreign affiliates, governments should strengthen the ability of local firms to provide dedicated inputs to them. This can be done through supplier development programmes and the upgrading of the skills of employees in local firms.

In addition, access to finance for local firms should be provided in order for them to capture new opportunities and create additional jobs.

**Improving access to information:** It is important to streamline access to information on local suppliers and establish systematic mechanisms for matchmaking between foreign affiliates and domestic firms. This can include creating an online marketplace or local supplier databases to match the demand of foreign affiliates with the supply by local firms. Due to the COVID-19 pandemic, MNEs are looking to increasingly recruit locally or outsource specific tasks to local suppliers as key personnel may not be able to travel; accordingly, such marketplaces or databases are particularly important today. It was emphasized that the use of digital measures for bridging information asymmetries between foreign affiliates and domestic firms is especially beneficial. Often, a simple online spreadsheet that includes a list of foreign affiliates operating in the host country and a list of local suppliers is a good first step. It is important that such lists are updated regularly.

**Incentives:** Governments should increase the transparency of FDI incentives that promote the upgrading of local suppliers. Incentives should be targeted and time bound.

**Build stakeholder relationships:** Governments should focus on fostering relationships and trust between the public and private sectors, including foreign affiliates. In this context, it is important to ensure that there is one dedicated lead agency for promoting linkages.

**Aftercare services:** Due to the COVID-19 pandemic, companies are trying to organise their operations in a more localized form, to increase the resilience of their supply chains. Companies that are already established in a host economy may need aftercare support to assist them source locally and to ensure that they can carry on with their operations, as many supply chains have been disrupted due to the pandemic.

**Digitalization:** The COVID-19 pandemic has increased the need for governmental agencies to increasingly use digital tools to identify supply chain disruptions through online aftercare surveys or actively reaching out to foreign investors to create linkages with local suppliers. In addition, LinkedIn and other social media channels that are also available to IPAs with limited institutional and financial capacity can be used to effectively target foreign investors.

### **Linkage provisions in investment facilitation agreements**

The following provisions were mentioned as important provisions that should be included in investment facilitation agreements, such as the IFD Agreement.

*Establish focal points for creating linkages:* Include provisions for the establishment of focal points, such as IPAs, that will be responsible for facilitating linkages between foreign affiliates and the local economy.

**Local supplier databases:** When constructing local supplier databases, it is important to provide specific investment opportunities of relevance for foreign investors. It is critical that databases be updated regularly to ensure the accuracy of the information.

**Supplier development programmes:** Investment facilitation agreements should include provisions that help upgrade domestic firms and improve their readiness to supply MNEs.

**Technical assistance and capacity building:** The provision of technical assistance should be included in investment facilitation agreements and, specifically, the IFD Agreement, to ensure that countries are incentivised and supported, to implement such investment facilitation measures such as supplier databases and supplier development programmes. Such assistance does not only include the provision of financial assistance, but also the sharing of information and best practices.



## Public webinar: How to ensure a positive development impact of a future Investment Facilitation for Development Agreement? Session at the IISD Trade + Sustainability Hub virtual conference

3 December 2021

### Overview

The session on “How to ensure a positive development impact of a future Investment Facilitation for Development Agreement?”, was organized by the ITC and the DIE as part of the IISD Trade + Sustainability Hub Virtual Conference.

The session was chaired by Rajesh Aggarwal, Director (oic), Division for Market Development, ITC, and included the following speakers: Valéria Mendes Costa, First Secretary, Ministry of Foreign Affairs, Brazil; Zoryana Olekseyuk, Senior Researcher, DIE; and Karl P. Sauvant, Resident Senior Fellow, Columbia University, CCSI. Concluding remarks were made by Axel Berger, Senior Researcher, DIE.

### Highlights

The discussions during the webinar focused on the following points, which are further elaborated below.

- The current IFD Agreement draft includes a limited number of sustainable development-oriented provisions, and negotiators should aim to include more elements that will ensure the facilitation of sustainable FDI.
- Firm commitments for technical assistance and capacity building under the IFD Agreement are important for enabling developing countries and LDCs to fully benefit from the IFD Agreement. Gap analyses and need assessments for the implementation of investment measures under the IFD Agreement are critical to facilitate the implementation process; they should start as soon as possible.
- The WTO Committee on Investment Facilitation could have two possible functions that include process and substantive tasks. Regarding both aspects, the Committee could promote a pro-development agenda by putting special emphasis on the implementation of measures that not only increase FDI flows but also strengthen the development impact of FDI.

### Key development-related provisions in the current IFD Agreement draft

It was emphasised that having sustainable development-oriented provisions in the IFD Agreement is important and should be strengthened, as the current draft includes only a limited number in this respect. Negotiators should therefore include additional provisions that will ensure the facilitation of sustainable FDI.

The Preamble of the IFD Agreement draft contains direct references to sustainable development, which will possibly affect the interpretative frame of the future Agreement. In addition, the current draft has a section on sustainable investment that includes a provision on international responsible business conduct standards that aims to encourage multinational enterprises to include such principles in their operations. This section also signals the types of investment that WTO Members want to facilitate under the Agreement, and it is a reminder of the shared responsibility of investors and home countries.

Another relevant provision in the current draft is the establishment of domestic supplier databases, which would include information on domestic suppliers, with the aim of promoting linkages between foreign firms and domestic suppliers. This is an important tool to reduce information gaps and search costs for identifying local suppliers. The current draft also includes a special and differential treatment section, which acknowledges the need of developing country and LDC Members to implement the Agreement in phases and subject to technical assistance and capacity building. In this regard, it was emphasised that a firm and substantial technical assistance provision should be put in place to enable Members to implement the IFD Agreement.

There are also two proposals by WTO Members for sustainable FDI provisions. The first one suggests adding a provision on supplier development programmes to increase the number of local firms that could contract with foreign investors. The second proposal suggests including home state obligations. The concept is that



home states should also play a role in facilitating the flow of sustainable FDI, for instance, by requiring impact assessments. Members should also share information on the operations of investors from their territories, including information about investors' track record with respect to responsible business conduct and sustainable FDI.

It was stated that additional investment facilitation measures could still be included in the IFD text, and some of the existing provisions could be more ambitious in order to strengthen the sustainability dimension of the Agreement. For example, Members could provide additional investment facilitation measures to "Recognized Sustainable Investors", to incentivize foreign investors to invest sustainably. Such foreign investors could, for instance, receive priority assistance or benefit from shortened timeframes for approvals if they meet specified sustainability criteria. Such criteria could include records of compliance with local laws and regulations, appropriate supply chain management, engagement in community development, and skills enhancement. This scheme is similar to the WTO Trade Facilitation Agreement's (TFA) "Authorized Operators" framework.

### **The importance of gap analyses, need assessments and capacity building in implementing a future IFD Agreement**

According to DIE's updated version of the Investment Facilitation Index mapping the adoption of over 100 investment facilitation measures in over 140 WTO Members, developing countries, on average, have adopted fewer investment facilitation measures compared to developed countries. The Index shows that there is a strong correlation between the level of adoption of investment facilitation measures and the development status of countries.

The IFD Agreement will include investment facilitation measures that require administrative capacity, political will and technical and financial resources for implementation. Consequently, developing countries and LDCs will need to undertake substantial reforms to implement the IFD Agreement. At the same time, they stand more to gain if they are able to implement the provisions of the Agreement effectively.

Given the data of the Investment Facilitation Index, firm and substantial capacity building and technical assistance provisions should be put in place to enable Members to implement the IFD Agreement. It was emphasised that the implementation of the IFD Agreement requires even more technical assistance and capacity building than the TFA, as it involves substantial behind-the-border reforms and regulatory changes; the participation of multiple national ministries, agencies and departments, as well as sub-national FDI-competent authorities; support for the entire life-cycle of an investment; support for investment promotion agencies and other FDI-competent authorities; and help in establishing national investment facilitation committees. Furthermore, it is important to have a clear understanding of the current level of implementation of investment facilitation measures, to estimate the size and shape of technical and financial assistance that is required. This process of gap analyses and need assessments should already start during the negotiation phase of the IFD Agreement.

### **How could a pro-development agenda of the WTO Committee on Investment Facilitation look like?**

An agenda of the WTO Committee on Investment Facilitation should be guided by the provisions of the IFD Agreement that address the establishment of the Committee, with the overall goal to further the objectives of the IFD Agreement. In this regard it is important to distinguish between functions of the Committee that relate to process tasks and those that relate to substantive tasks.

Process tasks involve housekeeping matters such as rules of procedure, notification formats and periodic reviews. It also includes procedural questions, such as the coordination of technical assistance and capacity building and establishing guidelines for the implementation of the IFD Agreement. In this regard, the agenda of the Committee should put a special emphasis on the implementation of measures that not only increase FDI flows, but increase the development impact of FDI.

With respect to substantive tasks, it was suggested that it is preferable to have a built-in agenda that would provide a mandate to continue negotiations at a later stage on measures that were not included in the consensus text of the IFD Agreement. These provisions may include general investment facilitation

measures such as “silence is consent”, business obstacle alert mechanisms and risk management techniques. They could also include measures that directly contribute to sustainable development, such as supplier development programmes, a special category of a “Recognized Sustainable Investor”, *ex ante* sustainable development impact assessments for large investment projects, and the designation of a responsible business coordinator to facilitate investors relations with local stakeholders. Another set of issues that could be included as part of a built-in agenda are home country obligations that would increase the transparency of measures provided by home countries to support outward investors, focusing specifically on measures that contribute to development. Additional development-oriented measures that could be included as part of a built-in agenda are measures that promote green FDI, which are identified in the publication "[Green FDI: Encouraging carbon-neutral investment](#)", and additional measures that are identified in the ITC-DIE publication "[An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How? Second edition](#)".

The Committee should also be a source of knowledge and information sharing with respect to good practices relating to the implementation of the Agreement, gap analysis and the need assessment processes, and capacity building and technical assistance. It was also mentioned that the Committee should consider fostering an “epistemic community” that would include the private sector, leading experts, policy makers, and additional stakeholders (including civil society), to provide inputs on investment facilitation issues and on the implementation of the IFD Agreement.

## Annex V: Commentary Group meetings – Reports

### Commentary Group meeting: Investment facilitation measures to include in an IFD Agreement

26 February 2020

#### Overview

The meeting was chaired by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI; and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum. Two background documents were circulated in advance, and should be considered part of the record of the meeting: ‘An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?’ and a summary of the framework being considered in the WTO Structured Discussions on Investment Facilitation for Development (Streamlined Text).

Mr. Sauvant explained that the Commentary Group’s mandate is to elucidate the importance of investment facilitation measures in the context of a multilateral framework on investment facilitation for development at WTO. As such, members of the Group were invited to identify measures from the Streamlined Text that they found to be most important, and to identify measures that had not yet been included, drawing from the Inventory and their experience.

#### Highlights

Khalil Hamdani presented the Inventory of investment facilitation measures. Participants discussed the most important measures related to investment facilitation in light of their respective experiences. Most participants indicated that measures related to streamlining and speeding up of administrative procedures are a priority. Moreover, many identified transparency, domestic coherence and cross-border cooperation as important categories.

Participants also suggested measures that could be added to the Inventory, many of which were related to issues of domestic policy coherence and the consideration of different categories of FDI.

#### Suggested measures to add to the inventory

1. Coordination of national and sub-national regulations and their implementation;
2. Access by foreign investors to local industry associations and to a consultative process (public-private dialogue) to provide feedback on proposed new rules;
3. Consideration of specificities of three categories of investment:
  - a. Investments focused on mining and infrastructure
  - b. Investments targeting export processing zones (EPZ) and other SEZs
  - c. Investments serving the local market
4. A mechanism to follow up, through monitoring and evaluation, on whether incentives had the desired result (e.g. had the investment created jobs as expected?);
5. Aftercare services;
6. Measures to improve collaboration between public and private agencies that provide facilitation services;
7. A code of conduct for IPAs when providing services;
8. A digital ‘one-stop shop’;
9. Composition of an eventual WTO committee on investment facilitation, namely the importance of private-sector participation;
10. Red carpet service for investments, which could have a significant positive impact in the economy (similar to the recognized sustainable investor);
11. Investment guides;
12. Measures encouraging IPA-to-IPA partnerships;
13. Facilitation of visa for business entry, such as through green channels;
14. Supporting linkages between foreign and domestic firms, such as through a database, lists and supplier development programmes;

15. List of bankable projects to facilitate investment;
16. Information on outward FDI procedures and support measures;
17. 'Silent yes' for administrative approvals;
18. National investment committees (similar to national trade facilitation committees).

Several participants, including representatives from Colombia and Nigeria, shared the experience of their countries in implementing investment facilitation measures.

Most of the newly suggested measures were subsequently integrated in the draft inventory, which, in turn, was further discussed during a virtual workshop.

## Commentary Group meeting: Measures that increase the development benefits of investment flows

7 April 2020

### Overview

The meeting was chaired by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum, and included Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI; Evan Gabor, J.D. Candidate, Columbia Law School; Premila Nazareth Satyanand, Non-Resident Senior Fellow, India National Council of Applied Economic Research; Samo S. Gonçalves, Second Secretary, Permanent Mission of Brazil to the WTO; and Carlo Pettinato, Head of Unit, Investment, Directorate General for Trade, European Commission.

Three background documents were circulated in advance: 'An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?' that aims to serve as a master document of investment facilitation measures and a resource for the WTO negotiators; a summary of the first meeting; and the European Union's proposal on investment facilitation.

Matthew Stephenson discussed facilitation measures that could maximize the development impact of international investment. Karl P. Sauvant and Evan Gabor provided insight on how sustainable investment could be incentivized through the creation of a special category of investors, the recognized sustainable investor. To provide a concrete example of CSR provisions in domestic laws, Premila Nazareth Satyanand reviewed the Indian experience, after which Samo S. Gonçalves and Carlo Pettinato spoke about the lessons that could be drawn from CSR provisions in IIAs.

### Highlights

Five facilitation measures were suggested to maximize the development impact of investment flows directly, drawing from country-project experience and consultations with firms:

1. Fostering linkages between foreign investors and domestic suppliers through a database, coupled with supplier development programmes;
2. Using impact assessments on large-scale investment projects;
3. Adopting and using standards, and distinguishing between quality standards and those related to responsible business conduct, including for managing the supply chain;
4. Applying smart investment incentives, through either behavioural or targeted incentives;
5. Supporting outward FDI through home country measures and, in particular, making these measures transparent.

### Fostering partnerships

Economies can foster partnerships between foreign affiliates established in their territories and local universities and centres of excellence, to the benefit of both parties. Partnerships can also take the form of foreign investors working with local suppliers to upgrade them; for example, a case from Pakistan shows that a foreign investor in the food industry worked with local farmers to produce the volumes of milk required by the company, an effort supported by UNDP.

### Transparency on investment incentives

In many cases, investment incentives are not transparent, including those focused on facilitating sustainable FDI. An easily accessible inventory of incentives would therefore be helpful. A number of developing country governments have shown their support for this measure by publishing an incentives inventory online, such as Ghana.<sup>183</sup>

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<sup>183</sup> GIPC, 'Ghana Incentives Inventory', Accessed 12 April 2020, <https://www.gipcghana.com/press-and-media/downloads/promotional-materials/33-ghana-incentives-inventory/file.html>

### **Creating the recognized sustainable investor (RSI) category**

Akin to the TFA's commitment on establishing an authorized operator scheme, an investment facilitation framework could provide additional benefits to investors that demonstrate a high level of commitment to sustainability. This could be achieved through a special category whereby investors meeting certain criteria (observing internationally recognized standards of responsible conduct) are rewarded with additional benefits that go beyond those generally available to all investors; they would also benefit from the positive publicity of the RSI label.

Additional benefits could include access to individual case officers who would assist investors in all matters related to the establishment and operation of their projects throughout their investment life cycles; help in resolving difficulties; assistance, on a priority basis (and at reduced fees and/or charges), in obtaining licences, meeting other requirements and procedures (including the processing of applications); and simplified investment document approval and shortened time frames for approvals.

A number of questions remain concerning the implementation of such a scheme, including the duration of an RSI status, monitoring of compliance, who should grant the status, and whether a concept from the trade area can be transferred to the investment area.

### **A CSR national implementation example**

India has enacted a law that introduces obligations for companies (including foreign affiliates in India) of a certain size to adopt CSR commitments. This includes the obligation to establish a CSR committee and to allocate 2% of profits to CSR activities largely geared towards the SDGs. A number of issues have arisen concerning the implementation of the law, including that firms do not necessarily have the know-how to undertake certain activities outside their core competencies and that only half of the funds allocated for CSR activities have been spent.

An alternative implementation model could be based on assessing the contribution of a firm's business model to meeting the SDGs. For example, Unilever has provided cleaning products to rural areas in India that catered to the needs of communities with limited access to utility services, such as water and electricity. The government could also prepare a list of SDG-oriented projects to which firms could contribute, and one could think about introducing tradable CSR permits for firms that invest more in CSR activities than required.

### **CSR standards**

The EU proposal promotes the uptake of sustainable FDI standards through the use of internationally agreed instruments, such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises.

Information on such standards could be disseminated and their use could be supported, as could be their observance. On the other hand, listing CSR commitments explicitly in the text could provide further guidance. A fusion of both approaches might also be possible, citing in the WTO text a few specific CSR commitments that are drawn from the existing international standards. A key question is whether a CSR provision should focus on what WTO Members should do or what investors should do.

## Commentary Group meeting: Implementation of an IFD Agreement

7 May 2020

### Overview

The meeting focused on issues related to the implementation of a multilateral framework on investment facilitation for development; it was geared towards the technical assistance and capacity-building needs of developing economies regarding the implementation of investment facilitation measures.

The meeting was chaired by Karl P. Sauvant. A presentation was made by Khalil Hamdani, Visiting Professor, Lahore School of Economics, and former Director of UNCTAD Investment Division. Discussion starters included Douglas van den Berghe, Vice-President, Advisory, Conway Inc.; José Chinjamba, Administrator, Angolan Agency for Private Investment and Promotion of Exports; Yofi Grant, Chief Executive Officer, Ghana Investment Promotion Centre; Sophal Suon, Director, Investment Promotion and Public Affairs, Council for the Development of Cambodia; Hanna Tatarchenko Welgacz, Investment Officer, APEX-Brazil; and Philippe Yvergnaux, Director, International Cooperation, Business France. Concluding remarks were made by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF.

Four background documents were circulated in advance: An Inventory of measures; summaries of the previous meetings of the Commentary Group; and the European Union's proposal on investment facilitation.

### Highlights

**Digital:** COVID-19 has changed investment facilitation, with IPAs increasingly providing services online. As a result, future technical assistance for a WTO framework needs to ensure this type of assistance supports the provision of digital services and solutions as an integral part of investment facilitation, including through the creation of effective online interfaces and systems.

**Funding:** While traditional donors – including international organizations and governments – can play a key role in providing technical assistance, the private sector can be also be a source of funding for this assistance. There is precedent with the Global Alliance for Trade Facilitation, whereby the private sector provides in-kind support; something similar should be considered for the implementation of investment facilitation.

**Role of IPAs:** The implementation of an investment facilitation framework will require support to IPAs to effectively fulfil their functions. Examples of such functions include facilitating investment, policy advocacy and coordination between authorities. However, IPAs often lack the capacity to fulfil this role.

**Stakeholder process:** Implementation of an international framework at the national level will require mobilizing and managing a stakeholder process, including representation from the private sector and civil society. Such consultations will increase the framework's effectiveness through understanding needs and creating buy-in.

**Measuring FDI, especially sustainable FDI:** It is difficult to know if implementation is going well unless the amount and quality of FDI being mobilized can be measured. Successful implementation will therefore require the support to investment authorities to measure the quantity and quality of FDI. These authorities should be able to understand, identify and track sustainable investment or investment that follows responsible business conduct to know whether such investment flows are increasing, and not just investment flows in absolute terms. This will require concerted and targeted technical assistance.

**Aftercare:** Investment authorities should support aftercare services to help the framework translate into continued support for investor needs, rather than simply focusing on attraction and entry of FDI. Technical assistance and capacity building should concentrate on helping developing economies grow aftercare capacity.

**SMEs and linkages:** If the framework is to have the intended development effect in practice, a concerted focus on the needs of SMEs, and especially creating linkages between SMEs and foreign affiliates, is

needed. One way to support SME linkages is through a database where foreign investors can easily match with qualified domestic suppliers.

**Coordination, including national investment facilitation committees:** Coordination needs to include horizontal, intergovernmental coordination, particularly between the national and the subnational levels, and should include government-stakeholder coordination. A national investment facilitation committee, along the lines of a national trade facilitation committee, would be a key mechanism for coordination. Such a committee could coordinate national implementation efforts, as well as technical assistance and capacity building.

**Needs assessments:** Needs assessments played an important role during and after WTO TFA negotiations. It is worth understanding their role in the TFA process to see how they might help the discussions on investment facilitation. The role of TFA needs assessments evolved over time, and could be categorized into two phases: before and after the conclusion of negotiations in 2014.

In the first phase, needs assessments were aimed at raising awareness and helping national policymakers address concerns and develop consensus on the importance of the TFA. The second phase began after negotiations were concluded, and aimed to reassure national policymakers and address concerns about ratification. After 2015, the majority of needs assessments took the form of assistance in categorizing measures based on the time and technical assistance needed per measure. Funding for the needs assessments came from different economies. Over almost a decade, more than 100 assessments were delivered in the first phase and about 70 in the second phase.

**IPA–IPA partnerships and learning:** Implementation can be furthered through IPA partnerships with one another and undertaking peer-to-peer learning, which can include multiple modes of exchange and collaboration. These actions can advance identification and uptake of good practices.

**Investment facilitation facility:** The implementation and delivery of technical assistance and capacity building in TFA involved the creation of the Trade Facilitation Facility, a platform for matchmaking between economies and donors that disseminates information about the intricacies of TFA and best practices for implementing its various measures. Something similar would help the investment facilitation framework implementation by mobilizing, leveraging and coordinating technical assistance resources.

**Investment facilitation committee:** In addition to the Facility, an Investment Facilitation Committee at WTO will be a key element to monitor implementation of a framework, creating the mechanism for public-private dialogue and fine-tuning to improve the implementation process. Such a Committee allows the identification and airing of issues as they emerge, and would follow an agenda of investment facilitation even after the initial issues have been addressed.

## Main takeaways

Technical assistance and capacity building could:

- Assist economies in engaging stakeholders in streamlining processes, especially in developing e-government solutions and a single window;
- Be channelled into creating a stakeholder group, coordinated by IPAs and including the private sector; technical assistance could be provided in the form of roadmaps and guides;
- Facilitate sharing of best practices via a new website where IPAs can submit inquiries or receive online training on how to proceed with implementation efforts;
- Be channelled to develop an investor inquiry protocol, which would explain how to deal with inquiries and list the mechanisms that should be in place;
- Strengthen IPAs to facilitate sustainable FDI and help economies establish the regulatory framework necessary to promote sustainable FDI;



- Help economies develop FDI aftercare services, which may be skill and resource intensive, and build economies' capacity to create linkages, especially between SMEs and multinational enterprises;
- Be coordinated through an investment facilitation facility. There are already institutional arrangements within WTO, such as the Trade Policy Review Mechanism, which could be used to share, update and provide Members with feedback on investment facilitation efforts;
- Help economies develop systems to measure FDI flows resulting from IPA operations.

Needs assessments may be divided into two stages: The first is preparatory and should be provided as soon as possible. These needs assessments aim to raise awareness at the national level during the structured discussion and negotiations. The second stage begins after negotiations. The needs assessments at this stage are structured to help economies categorize measures, which involves evaluating the level of existing implementation of measures, estimating the time needed for implementation and calculating the type and magnitude of technical assistance and capacity building required.

Importantly, economies should develop coordination mechanisms at the national level to organize input from donors for the efficient use of technical assistance and capacity building; and they should ensure coordination between IPAs and ministerial authorities to align political will with the policy goals pursued in the negotiations. This would help prevent difficulties at the ratification stage.

National investment facilitation committees could play a pivotal role in coordinating the implementation of measures, communication with the WTO Investment Facilitation Committee and input from donors. Such committees may require the substantial mobilization of political actors and resources.

## Commentary Group meeting: Concrete investment facilitation measures that should be included in an IFD Agreement

3 July 2020

### Overview

The meeting was chaired by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum, with María Laura Sluga, General Coordinator of the Foreign Affairs Department, Argentine Chamber of Commerce and Services; Kaye Brathwaite, Chief Executive Officer, Invest Barbados; Azzan Al Busaidi, Chief Executive Officer, Ithraa, Oman; Henry Loewendahl, Group Chief Executive Officer, WAVTEQ, and Senior Vice-President representing FDI Intelligence, Financial Times; Hazem Mulhim, Chief Executive Officer, EastNets; and Philippe Yvergniaux, Director, International Cooperation, Business France. Concluding remarks were made by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

Five background documents were circulated in advance: An Inventory of Measures; summaries of the last three meetings of the Group; and a summary of the draft negotiations text of the WTO Structured Discussions on Investment Facilitation for Development.

### Highlights

Participants suggested measures that may not already be included in the Inventory, and were encouraged to provide measures that they believe are particularly helpful for increasing the development of FDI.

#### **Simplify and coordinate investment procedures**

- Establish a sound regulatory framework for issues of investment facilitation to ensure the security and reliability of regulations;
- Maintain standards of openness to facilitate the flow of capital and intermediate inputs for investors;
- Ensure adequate customer care with skilled personnel efficiently handling investor inquiries in a timely manner; lack of skill is a bottleneck for any successful customer care strategy;
- Implement a single window using emerging technologies;
- Build and maintain a database of SMEs to assist investors in identifying qualified local suppliers and facilitate linkages;
- Create a national investment facilitation committee, like those related to TFA, as a platform not only for dialogue, but also for the implementation of an IFD Agreement.

#### **Navigate the pandemic with digitalization**

- Develop a business continuity plan to provide a roadmap for the new norm of operations and adopt internet-based marketing, engagement and facilitation strategies;
- Maintain consistent, timely communication with existing and potential investors through digital platforms; and share changes in investment protocols. These new practices are expected to be implemented permanently, including through the sharing of information on the IPA webpage, social media and e-mail, and allowing feedback from investors on the information.
- Enable electronic submissions, which reduce processing times and increase overall efficiency. Examples of documents obtained online are embarkation and disembarkation certificates.

**Enhance communication through digitalization**

- Establish a digital communication platform that connects authorities, including customs clearance authorities, freight forwarders, banks and freight insurance; this system can reduce the time for clearing inwards goods at airports and ports from a few days to one day or even a few hours;
- Enable obtaining and submitting of documents and certificates online, for example, Oman has an online licences and approvals platform (Invest Easy) that allows for issuing a licence for foreign companies in fewer than two days;
- Make available value propositions online; for example, the Invest in Oman platform presents opportunities to investors and allows them to create profiles, register their companies and create linkages with Omani SMEs;
- Establish digital solutions to intra-governmental coordination; for example, the Bayan e-customs system provides effective communication and coordination across government.

**Manage outreach to investors**

- Establish fit-for-purpose investor targeting systems, such as for customer relationship management. Very few IPAs have a comprehensive database and information on existing investors;
- Ensure the availability of quality value propositions with adequate information, including sector-based value propositions with the information that investors need;
- Create inventories of investment zones and industrial parks.

**Maintain repositories and incorporate SDGs**

- Develop a dashboard of the availability of investment facilitation measures by country and IPA for benchmarking. It could incorporate indicators to provide an overview of the investment climate in terms of issues related to investment facilitation;
- Relate IPA objectives to the SDGs and evaluate the performance of investment against the SDGs;
- Address trade and investment barriers;
- Establish IPA-IPA partnerships;
- Measure the value of investment by contribution to the SDGs.

**Provide access to telecommunication services**

- Provide digital services, and which should be affordable to prevent an increase of the digital divide. This could be mitigated by working in partnership with local telecom operators to reduce the cost of access;
- Automate procedures in partnership with local data providers, such as local telecom and web services.

**Address information technology needs of foreign investors**

- Provide access to free zones accepting enterprises that are 100% foreign-owned, which could facilitate investment in countries with ownership restrictions;
- Address transfer pricing and intellectual property valuation issues, such as those faced by EastNets; this is particularly important for companies involved in the export of services (e.g. software) across borders to markets with different price schemes;

- Improve harmonization and coordination in taxation across borders (e.g. withholding tax); the low levels of cybersecurity are also common challenges for IT MNEs.

#### **Coordination and technical assistance**

- Give differential incentives for different investments;
- Encourage IPA–IPA coordination for transparency and consistency in the same regional framework;
- Include multilateral commitments for development support to implement investment facilitation measures;
- Regulate transfer pricing multilaterally;
- Strengthen aftercare.

#### **Dynamic and proactive government action**

- Mobilize governments for the implementation of investment facilitation;
- Create a comprehensive regulatory framework that is focused on attracting investment and facilitating sustainable investment;
- Enhance transparency with a view to preventing disputes.

#### **Address the needs of new FDI**

- Assign an investment ombudsperson to align foreign affiliates with government priorities;
- Pay attention to aftercare for nuances of the local cultural, economic and regulatory environment;
- Use incentives carefully; while incentives are not the most important factor in choosing investment destinations, they play a role when deciding among similar opportunities in different countries;
- Designate recognized sustainable investors.

## Commentary Group meeting: The “investment lifecycle” – investment facilitation challenges and priority measures

27 October 2020

### Overview

The meeting used an investment life cycle to identify facilitation challenges and priority measures. The life cycle covers stages of the investor journey (and can be used to guide investment facilitation, based on a vision and strategy), namely: attraction, entry and establishment, retention and expansion (including aftercare), linkages and spillovers, and divestiture.

The meeting was chaired by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI, with Ivan Nimac, Global Lead, Investment Policy and Promotion, World Bank Group, Deepak Bagla, Managing Director and Chief Executive Officer, Invest India; Frederico Marchiori, Head of Institutional Relations, Oxiteno; Markus Thill, President, Africa, Robert Bosch; Simon Galpin, Senior Adviser, Bahrain EDB; and Rishi Kapoor, Co-Chief Executive Officer, Investcorp. Concluding remarks were made by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF.

### Highlights

The following measures were proposed for the different stages of the investment life cycle.

#### Investment facilitation measures in the attraction stage

- **Establish/maintain an IPA in line with good practice principles:** IPAs are institutions for investment attraction and are usually responsible for promoting and facilitating FDI. The attraction of FDI relies on the right institutional arrangements providing key functions, and IPAs have a central part in all stages of the investment life cycle. While governmental institutions play a role in investment facilitation, their roles and responsibilities across different parts of government should be clear. IPAs should be apolitical (similar to good practice with central bank independence), operate independently, enjoy strong executive branch access and support, and benefit from financial independence. Separation of the promotion function from the regulatory function was also suggested, with IPAs focusing on the former. They should have strong governance mechanisms, and officials should have management and business experience.
- **Creating incentives inventories:** Incentives not targeted or transparent may entail cost to governments that may be higher than needed and do not realize the full benefits of the FDI obtained. Inventories of incentives can enable investors to understand the incentives available to them. Published inventories should include investment eligibility criteria, clarity on the nature of the benefit, legal sources, application process, contact information and relevant authorities. Consolidating the legal basis for incentives in the tax law can also enhance transparency. A global tax rating, which could include comparative information on tax policies for dividends, interest and capital gains, would be useful for foreign investors.
- **Improving the administration of incentives:** Enhancing transparency and administration practices can reduce the indirect costs of incentives and avoid excessive administrative costs. This requires sufficient capacity for proper administration, making sure that incentives are properly targeted and included in the FDI strategy in the first place. On the administration side, avoiding the use of discretionary incentives by specifying incentives in the relevant laws and regulations may reduce costs that render incentives unattractive, especially for smaller investors. However, while the terms to access incentives should be transparent and not discretionary, investors that bring more benefits to an economy can be given more incentives, whether financial or non-financial. Incentive policy should be set at both the central and state levels.
- **Ecosystems approach:** Under this model, the government helps investors by seeking to build complete supply chains, often with a focus on creating an appropriate local ecosystem. For example, Morocco has a programme for constructing local ecosystems for investors, to help investors more

easily obtain the resources needed to operate. Egypt established an efficient distribution network. Special economic zones can also reflect such a model.

- **‘Plug-and-play’ model:** The plug-and-play model refers to ready facilities provided by the government in terms of infrastructure (e.g. buildings), power-water-sewage connectivity, road connectivity, and approvals required to connect to the necessary utilities within a specified and short time frame so that the investing company can commence operations smoothly and quickly. For example, India is promoting such a scheme for fast-tracking investment proposals for projects having substantial foreign investment.
- **Efficiency of approval procedures:** Two important aspects of efficient approval procedures are rationalizing the approval requirements and creating approval timelines. For example, some states in India require that all approvals be granted within 30 days; absent a response from the government, the application is considered approved. In some cases, officials are personally accountable for implementing rapid approvals and may be subject to financial penalties from their pay-check for each day of an approval delay.
- **Conditional approval:** One measure adopted by many state governments in India is to authorize MSMEs to start operations without the requirement of any approvals from the government for the first 36 months of operation.
- **Digitalization of investor onboarding:** Access to the market and transparency on policies and measures should be supported by a digital platform (e.g. a website) with information for investors, updated on a daily basis or as needed. The platform should be comprehensive with a ‘three clicks rule’, which quickly guides the user to the information sought. The platform should enable online Q&A services, with responses within 72 hours. For example, the India Investment Grid provides an online platform that supports investment in India by showcasing investment opportunities across India. It connects potential investors to projects and key contacts. Most projects are governmental projects. There is a preliminary credibility check of the projects by the IPA, but afterwards it is left to investors to do their own due diligence. An option was proposed during the meeting to create a ‘market investment grid’ as a global marketplace.

#### **Investment facilitation measures in the entry and establishment stage**

- **High-level coordinating body:** A high-level body should be established to ensure coordination within the government at the national and sub-national levels, provide oversight and address major difficulties identified by investors.
- **National single window:** IPAs should provide a single window and one-stop shop for investors, and ensure problem solving from day one. IPAs should help investors to understand available incentives as well as regulations and laws. A list of clearances that are required in the form of a checklist for investors should be provided.
- **Transparency and consultation commitments:** Transparency is important for both entry and operation of investments. Governments should publish laws and regulations, provide opportunities for stakeholder consultation and ensure the availability of portals and similar mechanisms that enable investors to find important information.
- **Digitalization of entry and establishment procedures:** Digitalization of entry and establishment procedures allows streamlining of processes. It is not enough to establish a portal with online information for investors; rather, the whole entry and establishment process needs to be digitalized. For example, to establish an asset management company in India, legal documents need to be signed or submitted in person, such as those related to banking. This causes difficulties for investors, especially with the COVID-19 limitations on global travel. Governments could adopt technologies such as blockchain and artificial intelligence to improve single window efficiency and make the investment process completely online.

- **Reducing paperwork and fast-tracking establishment procedures:** Transparent, clear and timely processes can enable investors to access the market. Investors want to understand as fast as possible how to operate on the ground, which includes understanding what approvals are needed and what laws and regulations are relevant for receiving licences to invest/operate. There should also be a rationale behind requirements. In many cases, in both developing and developed countries, excessive preliminary procedures prevent the start of operations with no apparent rationale.
- **Entry of key personnel:** Immigration issues should be considered from a practical business perspective. Online e-visas should be available. Green channels to expedite business work permits for skilled non-nationals should be provided.

#### **Investment facilitation measures during the investment retention and expansion (including aftercare) stage**

- **Investment grievance mechanisms (IGMs):** IGMs should be designed to include information sharing, early alert mechanisms, assessment of grievances, problem solving, political decision-making, and the creation of a lead agency that deals with investment grievances.
- **Retention function:** IPAs should provide services in support of retention and expansion through aftercare, with IPA good practice institutional characteristics. This can help to ensure stability and allay concerns that government or top management changes will not change agreed investment policies and measures on the basis of which an investment was made. IPAs should include officials with a business background, so they know what difficulties businesses face. Such officials could be referred to as 'interpreters' between the rest of the government and investors.
- **Key account management:** Two models of key account management were described. In the first model, an investor reports on a periodic basis how much has been invested in the country or shows a record of investments and their benefits for the economy, and subsequently receives red carpet services. In the second model, the investor receives red carpet services before investing, by committing to invest in a way that will bring certain levels of benefit to the economy (e.g. a certain number of jobs). Key account support can involve having one number to call and a dedicated officer to troubleshoot issues as they arise. Some call them 'platinum investors'.
- **Advisory services:** IPAs should take on the role of consultant advisers to investors and facilitate the whole investment process to ensure predictability, stability and transparency. They know how to operate in the economy and provide advice from official channels, complementary to any advice by consultants.
- **Changing laws and regulations:** Governments are encouraged to provide advance notice of impending changes and give stakeholders an opportunity to make an input.

#### **Investment facilitation measures to support linkages and spillovers**

- **Create online supplier databases:** These can create linkages between investors and local enterprises. It could be established by the government or by partnering with local chambers of commerce or business associations, which maintain such databases. Such a database could include information on the sustainability operations of domestic firms so that ESG-minded investors can link up with suppliers that follow such approaches, as well as encouraging other suppliers to adopt ESG practices to receive contracts (Cambodia is creating such a database).
- **Provide supplier development programmes:** Such programmes aim to develop and promote linkages between multinational inward investors and local MSMEs.
- **Target sustainable investment:** Investors that create high-quality jobs creates more spillovers.
- **Partner with educational institutions:** Following a public-private partnership model through which private businesses partner with educational institutions to coordinate curricula, provide vocational training, short courses, and potentially scholarships and competitions. Such partnerships enable local

educational systems to better orient programmes towards the needs of businesses, closing the skills mismatch and contributing to employment growth.

- **Encourage linkages between foreign investors and start-ups:** Scaling up activities at the start-up level by mentorship, networking, business competitions and by creating incubators, accelerators and business development services stimulates entrepreneurial activity, link local start-ups with multinational investors and global networks, and create investment opportunities.
- **Leverage businesses as champions of economic reforms for policy advocacy initiatives:** Companies may be given direct access to ministers from different governmental offices in order to try to influence other parts of the government to drive economic reform.

#### **Measures that governments can adopt to facilitate divestment**

- **Divestment assistance and exit interviews:** Because divestment is a regular feature of corporate operations, it is a stage of the life cycle that many investors consider important before they invest in a specific location, especially investors focused on financial returns. IPAs could conduct exit interviews to understand investors' divestment decisions, and to ensure that the exit process is as user-friendly as possible. When divestment is easy, an investor is more likely to come back to make another investment.



## Commentary Group meeting: Investment conflict prevention and management

18 February 2021

The meeting focused on how to structure effective mechanisms to identify and resolve investment-related issues early, before they become a risk to the investment climate or lead to legal disputes.

The meeting was chaired by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF. Opening remarks were made by Priyanka Kher, Private Sector Specialist, Investment Policy and Promotion, World Bank Group. The meeting included the following panellists: Lilanie Gudeta, Legal Advisor, Ethiopian Investment Commission, Anthony L. Assassa, Board Member, European Chamber of Commerce and Industry in Lao PDR and Director of Operations, BDO Francophone West Africa, Philippe Yvergniaux, Director of International Cooperation, Business France, and Sebastian Reil, Manager, FDI Center. Concluding remarks were made by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

### Highlights

#### The importance of a grievance management mechanism

During the meeting, there was a consensus that the establishment of grievance management mechanisms would be useful for both developed and developing countries, and should be included in the WTO Investment Facilitation for Development (IFD) Agreement. An effective grievance management mechanism helps to prevent disputes by identifying and resolving investment-related issues early. Grievances that are not resolved can become a risk to the investment climate, affect investment retention, or can flare into legal disputes, which may be costly. Investor grievance management is a basic investment facilitation measure. From World Bank data, it appears that most grievances arise from a lack of coordination and cooperation among the different government agencies and from a lack of awareness and understanding by government officials of the legal and economic implications of their day-to-day actions on foreign investors. When governments do not take into consideration the effects that their actions have on investors, investments may be withdrawn. This especially affects small and medium-size enterprises (SMEs), as they do not have the financial stability to continue operations when faced with policy and regulatory challenges, unlike larger multinational enterprises (MNEs) that may continue to operate.

#### Structuring grievance management mechanisms

##### The World Bank's investment grievance management tool

The World Bank developed an investor grievance management tool that provides host country governments with a minimum institutional capacity to detect investor-related issues and to resolve them in a timely and effective manner. This is especially important to identify which issues might be high-risk and prioritise addressing those so they do not risk becoming legal disputes with commensurate financial and reputational costs or lead to divestment. Although grievance management mechanisms require country specific customisation, several common elements have been identified, as described below.

**Institutional set up:** The establishment of a lead agency that is politically empowered through official designation. There is an advantage in having the lead agency be independent from other parts of the government, since this creates separation from the office or institution that may have created the grievance. However, it was stated that often governments prefer to take corrective actions in-house, confidentially, and consequently may not establish an independent lead agency. In any event, there should be an escalation mechanism that can address issues that are not resolved or that require a political decision. An escalation mechanism is important from an enforcement perspective, as there may need to be adjudication by a higher body.

**Operating procedures for issues management:** All issues and related information should be captured, using a tracking tool. Given limited resources and capacity, there should be a filtering mechanism: complaints with a higher risk of turning into a dispute or resulting in divestment should be prioritised. In this regard, economic and legal assessments should be made regarding potential legal and economic implications if an issue is not resolved. It was noted during the discussion that, if prioritisation is assessed by economic impact or investment size, SMEs will usually not qualify; however, these are the companies that need assistance

the most, as they do not have many resources. As stated above, in the event that there is no resolution, there should be a possibility of escalating the complaint to a higher body. Follow-up on implementation should be taken by the lead agency.

**Impact management:** A tracking tool assessing the impact of resolved issues, including investment and jobs retained and the number of grievances resolved overall, can be established.

### **Ethiopia case study - investment grievance handling from a developing country's perspective**

Ethiopia has implemented a grievance management system that includes a systematic and formalised procedure to detect, track and manage grievances. The aim of the system is to improve the retention and expansion of foreign direct investment (FDI) and address grievances before they escalate into investment disputes. There is a lead entity that received the mandate, the Grievance Management Unit, which reports directly to the Commissioner within the Ethiopian Investment Commission (EIC). The unit has the mandate of detecting, analysing and proposing solutions for issues related to established investors. Investor issues that fall within the mandate of the Unit must meet the following three criteria: (a) the grievance is claimed against a federal government executive body's final administrative decision. The reason is that Ethiopia's federal structure means it cannot intervene in regional matters. This raises a challenge, as grievances may be brought about through the actions of regional governments. Although, formally, the Unit cannot address regional grievances, the EIC can informally provide assistance through facilitating resolution. As a practical matter, some of the grievances in Ethiopia were resolved in an informal manner with the Unit's help, due to informal relationships with regional officers; (b) the grievance is based on an action that could violate or affect rights and protections guaranteed to investors in domestic laws and/or in international investment treaties; and (c) resolving grievances requires a policy/regulatory/administrative intervention.

### **France case study - investment grievance handling from a developed country's perspective**

Business France puts substantial focus on aftercare and policy advocacy through the following mechanisms:

**Regional collaboration:** Maintaining a strong relationship with regional partners.

**Policy advocacy:** Business France publishes a yearly report that includes proposed improvements to investment-related regulations and operations based on issues and grievances raised by investors. Many proposals are taken into account by the government. This is a preventive approach for grievance management.

**Review of new regulations:** Before a new regulation is put into effect, a review process must be performed to analyse the implications of the regulation on the attractiveness and economic competitiveness of France. This also changes the approach of the agency towards investors. The agency needs to see investors as customers that need services and assistance in order to conduct their business.

**Aftercare:** Business France puts significant emphasis on aftercare. Increasing the amount of aftercare provided increases investor confidence in the investment regime.

### **Grievance management elements that should be included in the IFD Agreement**

**Key point of contact:** Investors need to have a contact person to whom they can turn once an issue/grievance occurs. It was mentioned that independence of the key point of contact is important.

**Alert mechanism and a clear and efficient process with time limits:** There should be an alert mechanism to catch issues/grievances early. In order to address the issue in a speedy manner, there should also be a clear and efficient process within the agency, with time limits for different stages.

**Clear process for coordination as well as information sharing:** Usually, investors deal with multiple agencies, and the grievance can be related to multiple governmental agencies. In order to deal with this issue, the secondment of investment promotion agencies officials into related ministries or vice versa can assist. Good cooperation among government agencies is also important.

**Regionalisation:** Having governmental contact persons or offices at the regional level is important as it positions the relevant investment officials closer to investors' operations. The problem with this approach is the need for higher capacity in the lead agency. In any event, there should be transparency on responsibilities and activities among the involved agencies, both at the national and regional levels.

**Digitalization:** The streamlining of processes and the creation of an online platforms where investors can track the status of their complaints should be undertaken.

## Commentary Group meeting: Increasing the effectiveness of IPAs to facilitate sustainable FDI flows: key technical assistance needs

18 May 2021

The meeting focused on increasing the effectiveness of IPAs to facilitate sustainable FDI flows and key technical assistance needs, including capacity building needs for the implementation of the commitments under a WTO IFD Agreement, and specifically measures that will promote sustainable FDI.

The meeting was moderated by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI, and included the following panelists: Axel Berger, Senior Researcher, DIE; Rifat Parvez, Additional Secretary, Board of Investment, Pakistan; Russell Curtis, Head, Invest Durban; Shahzada Dawood, Vice Chairperson, Dawood Hercules Corporation Ltd; and Sebastian Reil, Manager, FDI Center. Concluding remarks were provided by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF.

### Highlights

The discussions during the webinar focused on the following two points, which are further elaborated upon in separate sections below.

**Gaps in the implementation of investment facilitation measures:** The number of international agreements that include clauses on investment facilitation is increasing, with the IFD Agreement, which is currently being negotiated, being one of these. When reviewing the agreements, together with the actual investment facilitation measures undertaken by developed, developing and least developed countries (LDCs), it is apparent that there are many implementation gaps. In order for developing countries and LDCs to implement measures included in provisions and close the gaps there is a real need for technical assistance and capacity building. This is especially apparent with respect to the implementation of an IFD Agreement, which includes investment facilitation measures such as transparency, streamlining of administrative procedures, the establishment of a single window and dispute prevention through grievance management mechanisms, all of which were mentioned during the meeting as measures that will require technical assistance and capacity building in order for IPAs from developing countries and LDCs to be able to implement them.

**Country-specific capacity building and technical assistance needs:** During the meeting it was emphasised that the technical assistance and capacity building that is needed by IPAs is country specific, and depends on the level of development and structure of the IPA. In some IPAs, very basic investment facilitation measures, such as responding to initial investor inquiries, requires technical assistance, while in other IPAs relatively more advanced technical assistance is needed, for example training staff on how to attract sustainable investment, or how to create supplier databases and linkage programmes that will ensure the investment the country is receiving contributes to development as much as possible. It is important to make sure that the basic functions of an IPA are in place before moving to more complex investment facilitation measures that require greater institutional capacity.

Additional key investment facilitation measures that were mentioned during the meeting for which capacity building is needed include establishing public-private partnerships and industrial clusters, digitalization, policy advocacy, deal negotiations and assessing with the evaluation of investment contracts, incentive management, dispute prevention mechanisms, and aftercare service, all of which are elaborate in more detail below.

### Gaps in the implementation of investment facilitation measures

During the webinar the DIE Investment Facilitation Index was presented. The index covers 117 investment facilitation measures and maps the implementation of investment facilitation measures at a country level of 86 WTO Members. From the index it is clear that the level of implementation of investment facilitation measures is closely related to the development level of a country. Those countries that are most in need of investment facilitation measures in order to attract FDI have the lowest investment facilitation implementation scores. The index shows that the establishment of focal points received the lowest implementation score in all groups. The e-government implementation score is also low in LDCs, though higher in other groups. On

the other hand, the implementation of investment facilitation measures that relate to transparency and predictability received a high score except in high income countries, and application review processes received a high score in low-income countries.

### **Country-specific capacity building and technical assistance needs**

During the webinar many investment facilitation measures were raised as measures that require technical assistance for implementation. Investment facilitation measures build on top of each other. Technical assistance typically starts with getting the basics right and then moving towards more advanced measures. Capacity building needs depend on the level of development and structure of the host country's IPA. Therefore, it is important to start from basic IPA investment facilitation measures that are most important to investors, such as establishing initial communications and providing a contact person within the agency, or making sure that the IPA has basic equipment such as computers, before moving to the implementation of more complex investment facilitation measures. It was noted that there is a difference usually between the capacity of the national IPA and sub-national IPAs; consequently, when looking at technical assistance needs of a host country, it is important to evaluate the needs of subnational IPAs as well. <sup>3</sup> The following investment facilitation measures were mentioned as the main areas that IPAs need technical assistance and capacity building.

**Training of IPA officials:** Training courses should be provided to officials to be prepared for the range of investor inquiries. Training should also build capacity within the IPA for acquiring knowledge of investor needs in targeted industries, such as site selection considerations. It was mentioned that following a World Bank study that was conducted on this issue, a large number of IPAs did not respond to basic potential investor inquiries. Cultural training is also important when interacting with foreign investors, to align with expectations or practices prevalent in different economies and “speak the same language”. IPA officials should also have the knowledge to conduct due diligence with respect to potential investors, to ensure that there is no prior track record that would cause concerns or issues. In this regard, assistance in establishing a database of investors, including information on their focus areas and backgrounds, would be useful. A problem with capacity building in general is the large turnover in human resources, which leads to lost knowledge. IPAs need assistance with this challenge of turnover, as well, for instance with retention techniques, and how to capture and transmit institutional memory.

**Attracting sustainable investment:** In the context of sustainable foreign direct investment, capacity building is needed in order to assist IPAs in understanding how to attract sustainable investment and how to promote responsible business conduct. Currently, many government officials don't fully understand the concept of sustainable investment, and don't know how to identify and promote such investment. In this regard capacity building is required to assist in establishing marketing strategies aimed at attracting sustainable investment, as well as operational strategies to facilitate its inflow and retention. Public recognition for sustainable investors, including through an award programme, could serve as one tool to attract such investment, in addition to financial and non-financial incentives and targeted support.

**Supplier databases and linkage programs:** IPAs should facilitate linkage programmes that correspond with the interests and needs of the investors. It was indicated that investors prefer local sourcing provided there is sufficient quality, scale and competitive pricing. In this context, technical assistance is needed to assist local suppliers – and especially SMEs through growth programs – to upskill, upgrade, and further link local smaller businesses with investors, including helping ensure that SMEs can meet foreign investors' needs. To establish local supplier databases, technical assistance is needed both on the technology side and in the construction of the databases, including steps of selecting features and in establishing a registration process for local suppliers (including information on the sustainability dimensions of supplier businesses, to facilitate sustainable FDI and thus both reward and motivate sustainable operations, as Cambodia has done through launching a Supplier Database with Sustainability Dimensions). The approach in this context should be for an IPA to build a deep enough, value-added relationship with foreign investors so that early in the investment cycle IPA representatives can identify localization opportunities in an investor's value chain. Government officials should also be trained to identify and create linkage opportunities between investors and local suppliers, on a project-by-project basis. This strategic focus around SME linkage programs and supplier databases was written, for example, into the Durban Investment Promotion Strategy, co-authored by the National Treasury and the World Bank Group. However, it was emphasized that technical assistance is still required to implement the Durban IPA strategy.

**Establishing public-private partnerships and industrial clusters:** Technical assistance is needed for the negotiation and management of public-private partnerships. It is also needed for developing business plans that will take into consideration localisation, export promotion, skills development, local investment and integration of local manufacturing into the value chains of multinational enterprises. Capacity building on how to conclude investments through combining foreign and domestic equity, including both private and public sources capital, can also serve to facilitate investment.

**Policy advocacy:** IPAs are the interface between the private sector and government policy, the “front of the house” in restaurant parlance. There are issues and challenges that investors face that need to be brought to the attention of policy makers, including the need for improved coherence between difficult policies or institutional actions. IPAs should have the capacity to conduct regulatory impact assessments by means of stakeholder consultations and should be directed to provide such information to policymakers.

**Digitalization:** Capacity building and technical assistance regarding digitization of the IPA is important in many aspects especially post-Covid-19. Technical assistance is needed in this regard for website development, customer relationship management, and for building more interactive relationships with investors. For example, interactive relationships could be supported through a mobile application by which investors could receive investment facilitation support through their mobile devices. In addition, digitalization is important for streamlining of administrative procedures such as processing of applications, and for the establishment of online one-stop shops.

**Deal negotiations and assessing investment contracts:** IPAs in developing countries may not have the capacity and knowledge to evaluate contracts to ensure that stable, win-win contracts are developed. Contracts between states and international investors, especially for large-scale investment projects, are highly complex and require multidisciplinary expertise to assess and negotiate. Smoothing this process is an important investment facilitation measure. Technical assistance and capacity building are needed in order to bring multi-disciplinary expertise to IPAs in order for them to assess and negotiate investment contracts.

**Incentives management:** IPAs need technical assistance in incentive management that will ensure that the incentives that are provided address targeted markets and match articulated policy objectives, and that the policy objectives are precisely tailored so that the incentives are tied directly to the intended objective. Capacity building is also needed for evaluating the effectiveness of incentives, in order to ensure that incentives are ‘targeted’, by using incentive specific monitoring, evaluation frameworks and cost-benefit analyses.

**Dispute prevention mechanisms:** IPAs need assistance in maintaining or establishing dispute prevention mechanisms that will identify, receive, resolve and track investor grievances in a transparent, fair and timely manner. Such capacity building should include assistance in implementing dispute prevention mechanisms (also known as grievance management mechanisms) that will identify and address investors’ complaints at an early stage, to prevent the escalation of complaints to legal grievances or to investor-state disputes. Such capacity building can include assistance with the establishment of a ‘lead agency’ that has the ability to determine if an investor’s complaint constitutes a grievance or not (a grievance being actions that have broken legal commitments and for which there could therefore be legal consequences). An investment grievance management mechanism should be empowered with problem-solving methods, including a mechanism to coordinate with relevant government agencies, to obtain information from them and make recommendations or provide solutions to effectively resolve grievances.

**Aftercare services:** There is a capacity building need in developing aftercare programmes and strategies. This would include the training of a team within the IPA that is committed to the success of investors after they have started their operations within the country. Aftercare is a crucial investment facilitation measure to retain investment. There should be mechanisms of dialogue between investors and IPAs to provide ongoing value. The establishment of such mechanisms requires technical assistance.

## Commentary Group meeting: How to facilitate investment that is green, gender-equal, and contributes to generating skills (3Gs)

2 September 2021

The meeting focused on investment facilitation measures for attracting green, gender-equal, and skills-generating investments (3Gs). The meeting addressed investment facilitation measures that might prove effective in this regard and that a future WTO IFD Agreement may wish to include to facilitate these kinds of investment, given their importance and prioritization across economies.

The meeting was moderated by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF, and included the following panelists: Laurie J. Spengler, CEO, Courageous Capital Advisors, LLC; Penny Naas, President, International Public Affairs and Sustainability, UPS; Lamberto Dai Pra', Head of Africa, Asia and Oceania, Enel Green Power; and Sophal Suon, Director, Public Relations and Promotion of Private Investment, Council for the Development of Cambodia. Closing remarks were made by H.E. Kemvichet Long, Ambassador and Permanent Representative, Permanent Mission of the Kingdom of Cambodia to the WTO and other International Organizations, and conclusions and the way forward were provided by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

### Highlights

The discussion during the webinar focused on the following points, which are further elaborated upon in separate sections below.

- Governments should provide specific investment facilitation measures to support green, gender-equal and skills-generating investment. To establish the criteria for such investment and evaluate its impact on the local economy, capacity building and technical assistance are needed, especially in LDCs. In this respect, the future IFD Agreement should include an Article that highlights the need to facilitate green, gender-equal and skills-generating FDI. Such an Article—even if general—would be very important to create the basis for any technical assistance that should be part of an IFD Agreement.
- It is important to make the business case for the 3Gs and demonstrate case studies that they are aligned with investor needs and interests.
- It was emphasised that, when addressing specifically green and gender-equal investment, governments and investors should go beyond the recognition of the importance of such investment and promote concrete measures and policies to attract such investment. Such measures could include a power-purchase approach of green energy by governments, establishing green energy industrial parks and including gender-equal requirements in procurement contracts or when evaluating investment projects.

### Strategies for unlocking green, gender-equal, and skills-generating FDI

The following elements were discussed as important to promote green, gender-equal and skills generating FDI:

**Context:** Governments should link the promotion and facilitation of FDI to climate, socioeconomic and community voice considerations. In this respect, it is important that governments can showcase investment projects. Investors do not always have sufficient information. It is also important that IPAs have a basket of case studies and empirical evidence that green, gender-equal and skills-generating FDI raises and improves operating efficiency. This requires technical assistance, especially for LDCs.

**Commitment:** Governments should integrate commitments to promote the 3Gs within their National Action Plans, including through concrete targets, as investors focus on targets. Data transparency is important to assist governments and investors meet these targets.

**Capital acceleration:** Governments should promote the 3Gsthrough measures that can include public recognition, tax exemptions and guarantees. It was emphasized that guarantees are one of the most important measures for investors, as they mitigate not only the risk but the perception of risk, especially in developing countries.

## **The business case and government policy for green, gender-equal, and skills generating FDI**

It is important to make the business case for the 3Gs and demonstrate it through case studies. It was noted that, today, because of consumers' demand, renewable energy and labour standards are requirements that come from investors and not only governments. Nevertheless, governments should also undertake policy actions to promote and facilitate green, gender-equal and skills-generating FDI. For example, procurement contracts could require the production of clean energy. The procurement process could also include gender criteria, such as the percentage of women in the supply chain or affordable access to renewable energy in households, specifically in rural areas, which are consumed by women primarily as heads of households.

### **Targeting green, gender-equal and skills-generating FDI – lessons from Cambodia**

Cambodia has developed a supplier database with sustainability dimensions (<https://sd2.cdc.gov.kh/>) that include information on green, gender-equal and skills-generating FDI, to facilitate investment that achieves these objectives. Domestic suppliers can register their companies in the database, thus promoting their businesses with potential investors. Besides general information on the company (such as its products and services), the database indicates the sustainability characteristics of selected suppliers. There are six sustainability dimensions that registered companies can highlight (and verify) in the database: quality standards and certifications; responsible supply chains; gender and inclusion; environmental sustainability; employee capacity building; and employee care. Cambodia intends to enact a new investment law that will support all six sustainability dimensions.

### **Including the 3Gs in the IFD Agreement**

It was proposed that the IFD Agreement include an Article that highlights the need to facilitate green, gender-equal and skills-generating FDI. Such an Article, even if general, would be very important for creating the basis for technical assistance. The IFD Agreement should have a strong component of capacity building to assist governments and specifically IPAs to promote such investment, as IPAs tend to ignore the potential of impact investment. In addition, the IFD Agreement should include provisions on the establishment of partnerships between investment authorities in different jurisdictions to cooperate on both knowledge sharing and two-way investment flows.



## Commentary Group meeting: Good-practices for stakeholder consultations to facilitate FDI flows

9 November 2021

The meeting sought to identify good practices for stakeholder consultations to facilitate FDI flows. Stakeholder consultations are essential to understand what investment facilitation measures may be needed and to provide feedback as to whether measures adopted are effective and achieve their intended objectives in practice.

The meeting was moderated by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF, and included the following speakers: Jan von Herff, Senior Manager, Trade and Industrial Policy, BASF Germany; Raoul Ruparel, Director of Trade and Investment, Deloitte; Elizabeth Schaefer, Director, Investment Research, Select USA; and Sharan Burrow, General Secretary, International Trade Union Confederation (ITUC). Concluding remarks were provided by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI.

### Highlights

The discussion during the webinar focused on the following points, which are further elaborated upon in separate sections below.

- Stakeholder consultations are important because they provide governments with the experience of those who are "on the ground" and directly affected by their actions. In addition, they give government decisions legitimacy, particularly when the government has obtained input from the entire range of stakeholders.
- The format of stakeholder consultations depends on the goals, issues and impact that such consultations are intended to meet or address. Hence it is important to define the objective of the consultations and the scope of the discussion and, importantly, to set up a structure. Good practices include having a lead agency to facilitate stakeholder consultations, involving all relevant stakeholders and organizing an ongoing dialogue, from the formulation of policies to implementation and monitoring. Important are also to identify the roles of participants in the consultations and ensuring information sharing among parties.

### Stakeholder consultation mechanisms

Stakeholder consultations are important because they provide governments with first-hand knowledge and "on-the-ground" experience of those who are directly affected by government actions. In addition, they give government decisions legitimacy, particularly when the government involves the entire range of stakeholders in these consultations, including the private sector, trade unions, civil society in general, experts, and consumers.

Setting up stakeholder consultation mechanisms involves certain design choices, depending on the goals, issues and the impact related to such consultations. For example, consultations can be sector specific, when trying to address constraints that apply to specific sectors. They can be held on an *ad hoc* basis when trying to address a specific problem, or they can be held on a regular and continuous basis when the aim is to monitor feedback that can improve an economy's business environment. Accordingly, when trying to identify best practices for stakeholder consultation mechanisms, it is hard to generalize regarding best practices because they are affected by the specific context and the objectives of the consultations.

It is important to set up a structure, based on the objective of the consultation and the scope of the discussion sought. These factors will help determine which stakeholders should be invited and the form of the consultations that should be undertaken. In addition, it is important that, when addressing investment facilitation issues, the development and sustainability aspects are included as part of the objectives of the consultations and are raised during the discussions.



## Good practices for stakeholder consultations to facilitate FDI

During the meeting, the following good practices for stakeholder consultations to facilitate FDI were discussed. As stated above, depending on the goals of the stakeholder consultations, different mechanisms and good practices are relevant to organize stakeholder consultations. However, it was emphasized that it was generally advisable to institutionalise stakeholder consultations through a standing mechanism and a fairly constant group of those stakeholders consulted.

**Lead agency to facilitate stakeholder consultations:** A lead agency, usually the IPA, should facilitate stakeholder consultation meetings in terms of setting up the meetings, including establishing the goals, coordinating logistics, publishing reports with meeting conclusions, tracking outcomes, and undertaking follow-up with all relevant stakeholders, including other government agencies through policy advocacy emanating from the issues and recommendations identified through the stakeholder consultations.

**Aftercare:** Governments and specifically IPAs should engage with investors through their aftercare services, using a structured approach for reaching out to existing investors. It is important to proactively reach out to stakeholders individually, asking them for ideas on how to improve the business environment for investors and the sustainable development impact they have. It was mentioned that, for governments to understand specific problems that investors face, governments should use CRM mechanisms. CRM mechanisms assist in getting the information and data that are needed and systemically managing them to improve processes, including efficiency and accuracy.

**Involve all relevant stakeholders:** In the context of investment facilitation, stakeholder consultations should include all stakeholders involved in any process that is related to FDI flows and the economy. Stakeholders should include the public sector, both at the national and sub-national levels; the private sector, including SMEs that should be given a chance to make their own input relating to their needs and experiences; civil society; and experts. In this respect, it was mentioned that governments should proactively make sure that SMEs and civil society are involved in the discussion and have a voice.

**Ongoing dialogue, from the formulation of policies to implementation and monitoring:** When addressing broad policy issues, it was mentioned that dialogue with stakeholders should involve recurring consultations, for example in the framework of an advisory council, which can have subgroups to bring in specialised expertise. An advisory council might also need a secretariat or some form of a support system. Consultations should continue throughout the implementation process so as to monitor progress and impact (discussed in more detail below). Some countries have used a competitive process of application for companies to be selected for advisory councils.

**Industry roundtables:** Holding industry roundtables on an *ad hoc* basis is important for collecting information on specific legislation and policies. It is important to make sure that all relevant stakeholders are invited and that they are able to provide practical information directly on the topic. Putting together effective roundtables requires making sure that stakeholders who can provide different perspectives are involved. It is also important to set up roundtables in such a way that participants are comfortable sharing information. Roundtables, especially those in person, are particularly valuable, as written consultations are generally regarded as 'box-ticking' exercises and only useful if very targeted to a highly technical and specific issue. It is also recommended to keep a fairly constant group of stakeholders consulted to build trust and continuity on issues over time.

**Permanent attitude and corporate culture:** It was emphasized that, in order to build trust and strong relationships among different stakeholders during discussions, the discussions should be moderated with proactive foresight, stewardship and empathetic listening; governments in their exercise of stakeholder consultations should be persistent. This attitude and corporate culture involve constant diplomacy, while extracting relevant information and tabling that information to serve the consultation goals.

**Monitoring and evaluation:** It is important to keep track of the deliverables that were identified and decided during stakeholder consultations by reaching a clear output from each consultation. These outputs need to be translated into policy recommendations and action items. It is important that there be an entity that is responsible for following up, monitoring and evaluating progress made, which can be viewed as a form of 'secretariat' to the stakeholder consultation process.

**Data collection:** It is critical for governments and IPAs to not only understand stakeholders' needs, but also to become aware of problems when they arise and to recognise possibilities for solutions. It was emphasised that, often, governments become aware of problems only after they start consultation processes. It was noted that online surveys are an efficient way to collect data, and a recommendation was made to follow up with survey respondents who had relevant information to share. Case studies can complement surveys by capturing additional detail and nuance that may not be possible to capture in a survey. Through data collection, governments can start understanding conditions in practice, as well as compare their performance with that of other jurisdictions, as well as good practices. Government can also publish their studies and request feedback from different stakeholders. Service providers can also be a very useful source of data, as they work with many firms and can thus consolidate and synthesise insights across this experience.

**Identify the roles of the participants in the consultations:** It was noted that the roles of the participants in the consultations should be clear. The private sector, civil society and others are there to bring the practicalities of what is happening in practice, including feedback on the implementation of investment facilitation measures. The public sector is there to provide a policy overview, to inform the participants about how issues can be tackled and to explain the framework through which things can be improved.

**Information and data sharing:** To make consultations more effective, it is important to ensure a flow of information among all sides. It was noted that, often, there is an expectation that only the private sector provides information, but there should be a dialogue to ensure a genuine conversation among all stakeholders, and to make sure that all stakeholders feel that they are participating in the discussions. It is also important to ensure that the parties know what is going to be discussed before a meeting because stakeholders need time and resources to prepare themselves adequately.

## Annex VI: Expert Network seminars – Reports

### Expert Network seminar: Lessons learned from investment facilitation provisions in BITs and investment chapters in preferential trade agreements

20 March 2020

#### Overview

The Expert Network is part of a joint project on Investment Facilitation for Development by the ITC and DIE.

Participants discussed the lessons learned from investment facilitation provisions in BITs and investment chapters in PTAs, generally referred to as IIAs.

The meeting was chaired by Axel Berger, Senior Researcher, DIE, with input from Michelle Ratton Sanchez Badin and Rodrigo Polanco Lazo. The first presentation explained the experience of Brazil with the country's Cooperation and Facilitation Investment Agreements (CFIAs), which include provisions on development, including CSR. The second presentation provided an overview of the investment facilitation components in IIAs. Each was followed by an exchange of questions, opinions and suggestions by Members of the Expert Network.

#### Highlights

##### **Which dedicated investment facilitation provisions are included in IIAs?**

The definition and scope of investment facilitation has changed considerably since its inception and categorizing such measures as facilitation measures is a recent development. There has been a trend of increasing explicit inclusion of investment facilitation measures in IIAs since 1996. This trend started with the beginning of the discussion on trade facilitation and increased with the conclusion of the WTO Trade Facilitation Agreement in 2013.

This trend is observable in the data provided by the analysis conducted by Rodrigo Polanco.<sup>184</sup> The paper shows that, by 2020, 56 IIAs included explicit reference to investment facilitation. Only 21 of these agreements are BITs. Many more agreements make implicit reference to investment facilitation. The most frequently referenced measures are: granting facilitating permits for the establishment of an investment; entry and sojourn of investment-related personnel; and transparency. As investment facilitation is being discussed in WTO and becoming increasingly recognized and included in recent IIAs, it is essential to establish a common understanding of its scope.

While it is established that investment facilitation includes transparency and simplification measures, investment facilitation could also cover other investment-related matters, such as investor services, including aftercare. These services provide foreign investors with solutions to challenges they face frequently, including access to utilities, construction permits, taxation and minor disputes with governmental agencies.

Having such services in place also helps to retain investment and inform policies on the needs of foreign investors. The scope of investment facilitation continues to cover more areas and gain more clarity in recent IIA practice. Hence, it could be posited that investment is moving from only protecting property rights to including process and stakeholder rights.

##### **Which countries are the main drivers of these trends?**

Between 1996 and 2014, the main drivers of investment facilitation provisions in IIAs were China, Japan and the ASEAN countries. The Brazilian CFIAs concluded after 2014 contain several original provisions that show consideration for the needs of host as well as home countries. This development can be explained by

<sup>184</sup> Polanco, R. J. (2018). Facilitation 2.0: Investment and trade in the digital age. RTA Exchange, 1-24.

the fact that Brazil has not ratified any of the traditional BITs and has moved from a recipient to an exporter of FDI in the past decade.

Another example of countries driving the dialogue on investment facilitation are the US Trade and Investment Framework Agreements. These framework agreements create a forum for high-level political dialogue between the parties. They involve annual meetings on the ministerial level to discuss measures without the burden of an agenda or a framework.

### **What can be learned from negotiation and implementation of investment facilitation provisions in IIAs?**

The analysis of traditional BITs shows that they failed to promote cooperation among signatories and incorporate more elaborate provisions on national coherence. Future BITs could strengthen international cooperation to simplify compliance of investors by aligning outward and inward investment procedures and adopting common international standards.

The creation of an investment facilitation committee as part of a multilateral framework on investment facilitation for development could contribute, to a large extent, to promoting international cooperation. For example, joint government-to-government committees were instrumental in the implementation of several Brazilian CFAs. The Brazilian approach could inform the provision for the establishment of an investment facilitation committee in a multilateral framework on investment facilitation for development.

To continue the discussion after the conclusion of a multilateral framework on investment facilitation for development, the framework could introduce a mechanism to keep international investment facilitation discussions alive. For example, the WTO Revised Agreement on Government Procurement includes a treaty-mandated work programme that continues the discussion on government procurement. A similar work programme could be mandated in the final text of a multilateral framework on investment facilitation for development.

## Expert network meeting: Lessons learned from the negotiation and implementation of the TFA

4 May 2020

### Overview

The Expert Network is part of a joint project on Investment Facilitation for Development by the ITC and DIE.

The meeting was chaired by Axel Berger, Senior Researcher, DIE. Bernhard Hoekman, European University Institute (EUI), and Dolores Halloran, WTO Secretariat, provided inputs, followed by a discussion among members of the Expert Network. The submission of the EU to the WTO (INF-IFD-RD46 – EU) was circulated as a background document, as was the summary of the first meeting of the Expert Network. The discussion was held under the Chatham House Rules to enable frank and open exchange.

### Highlights

#### **TFA represents a distinct model of WTO agreements**

To set the stage for comparing the WTO TFA with a potential multilateral framework on investment facilitation for development, it is essential to review what distinguishes the WTO TFA from its WTO siblings. The TFA stands out from other WTO agreements because it does not address issues of market access but instead focuses on the simplification and harmonization of border procedures; it has an innovative model of SDT that involves technical assistance and capacity building to address implementation gaps; and minimizes recourse to formal dispute settlement.

#### **TFA provides an innovative model of SDT**

Instead of the standard WTO approach of transition periods and reduced commitments, TFA is divided into measures that economies can notify individually under categories A, B or C. The categories have the following implications: measures notified under A are to be implemented upon ratification of the agreement; measures notified under B should be implemented within an extended implementation period; and measures notified under C should be implemented within an extended implementation period and after technical assistance and capacity building have been provided fully to the implementing country.

#### **TFA focuses on facilitation of trade policy**

One of the characteristics that sets TFA apart from other WTO agreements is that it addresses the transparency, streamlining and simplification of processes. In other words, the agreement is concerned with facilitating existing trade policies that economies have without having implications for market access or the liberalization of market regulations. Similarly, investment facilitation aims at simplifying and speeding up the procedures for FDI without affecting the substance of domestic policies or access of foreign investors to markets.

#### **The minimal role of dispute settlement in TFA could be considered for investment facilitation**

There is much less emphasis on formal dispute settlement in TFA than in other WTO agreements. For example, under TFA, if a WTO Member has not implemented a measure within the predetermined time frame, this Member is requested to report any problems that are causing the lack of implementation and disseminate this information to other economies. Such problems may include insufficient resources or implementation times.

In such cases, a group of experts would be assigned to evaluate the claim and ascertain whether the Member has not designated sufficient time or received sufficient technical assistance and capacity building to implement the measure. Adopting a similar approach for a multilateral framework on investment facilitation for development could increase the likelihood of reaching consensus and soothe apprehensions by developing and least developed countries.

### **The subject and objective of TFA had to be specified early**

There was some resistance among developing countries about having further WTO commitments. This created a strong demand to limit the scope of TFA to the subject of alleviating procedural and administrative burdens for traders, particularly SMEs, to expedite the movement of goods.

To reach consensus, proponents had to increase interest by narrowing the focus of the agreement until they reached the final scope, which addresses friction associated with trading across borders. Another issue that had to be identified clearly was the role of WTO in trade facilitation, especially in comparison to the roles played by other international organizations, such as the World Customs Organization.

### **Negotiators had to be realistic about the legal nature of TFA**

Negotiators had to be realistic about eventually having a mix of binding and non-binding provisions. Developed countries were proponents of a rules-based agreement, whereas developing countries preferred a recommendations-based agreement. This was partly because negotiators from developing countries were concerned about the measurement of compliance against which they would be monitored, and whether this would result in dispute settlement proceedings, especially when it comes to more costly and complex measures.

There were discussions on the nature of modalities. Developed countries were interested in open-ended modalities that could be detailed later, whereas developing countries were interested in detailed modalities from the beginning, particularly about concerns of levels of commitment as well as technical assistance and capacity building. This acceptance of a mix of binding and the non-binding provisions allowed negotiators to bridge the different interests of developed and developing countries and facilitate the negotiations of TFA.

### **Facilitation of trade had consensus from the beginning**

As opposed to other WTO negotiations on issues like tariffs and subsidies that are often controversial, in trade facilitation, governments were in favour of the reforms presented by TFA. However, the key barrier was the lack of resources and capacity to implement trade facilitation measures. This is reaffirmed by a phenomenon that is only observed in TFA, in which governments will often do TFA+ reforms, i.e. implement beyond the minimum obligations of the agreement because they view the implementation to be in their own interest. A similar dynamic may be possible in a multilateral framework on investment facilitation for development, if developed countries would be prepared to provide additional support through technical assistance and capacity building.

### **TFA applies to all WTO Members, while a framework on investment facilitation for development could be a plurilateral agreement**

TFA was negotiated in a different political environment, where the notion of a plurilateral agreement was not as prevalent. Therefore, it is conceivable that a framework on investment facilitation for development could be supported by a sub-group of WTO Members only, and would be concluded as a plurilateral agreement. The framework should also consider the governance model of a plurilateral agreement and how it could be incorporated into the WTO framework. Such a model should address, for example, issues relating to the management of the relationship with non-Members of the plurilateral agreement.

### **TFA and the potential multilateral framework would have different scopes**

As part of the Annex 1A Multilateral Agreements on Trade in Goods of the Marrakesh Agreement, TFA deals exclusively with goods. If a multilateral framework on investment facilitation for development were concluded as a stand-alone agreement, the framework would not be sector-specific.

Care would have to be taken that the framework does not conflict with GATS, as certain forms of investment are covered in the third mode of supply of GATS, which relates to commercial presence. A multilateral framework would also potentially be relevant to the fourth mode of supply of GATS, i.e. the movement of natural persons, which (as far as key personnel are concerned) is important for FDI operations.

### **National trade facilitation committees played a key coordination role at the country level**

Insofar as the multilateral framework on investment facilitation for development would follow the approach of TFA, there is an important role for a WTO Investment Facilitation Committee. However, TFA also requires national trade facilitation committees that deal with coordination at the country level. This model could be adopted in a multilateral framework on investment facilitation for development, to build a connection between implementation at the country level and the WTO Investment Facilitation Committee on the agreement level.

Such national committees are particularly needed, as investment facilitation addresses many behind-the-border issues that often fall under the responsibility of sub-national actors. A national committee could also help identify implementation problems and establish efficient coordination with donors.

### **The TFA experience in the measure of the authorized economic operator**

The authorized economic operator provision is a national arrangement implemented by national customs authorities. While the implementation of this provision has not been analysed comprehensively, it seems that it works well on a country-by-country basis but its success is conditional on the country-level circumstances.

There have been no implications of the authorized economic operator for the most-favoured-nation component of GATT. This is probably because providing traders with the status of an authorized economic operator is contingent on domestic regulations; thus, the provision on authorized economic operators would not constitute discrimination if applied consistently.

### **Unlike TFA, the ongoing negotiations on a multilateral agreement on investment facilitation for development include an explicit development dimension**

This is a new issue in the negotiations on a framework on investment facilitation for development, in comparison with TFA. For example, the proposals submitted to WTO include provisions directly addressing development, be it through technical assistance to support implementation or CSR. TFA also addresses development in its SDT model by addressing the needs of SMEs and landlocked countries in some of its provisions. Yet, TFA does not include explicit mention of CSR.

TFA was successful in securing development assistance largely because it is linked to a broader Aid-for-Trade initiative, which was set in place to help developing countries benefit from trade agreements. This is not the case for a future multilateral framework on investment facilitation for development, which means that securing development assistance for technical assistance and capacity building may require a hard link between implementation and technical assistance funding. One possibility to support the implementation of a future multilateral framework on investment facilitation for development is to expand the Aid-for-Trade initiative to investment.

### **The match between supply and demand of technical assistance and capacity building**

The negotiations of TFA were also connected to the willingness of countries to fund technical assistance and capacity building. Since TFA is a binding multilateral agreement, developing and developed countries were careful about the commitments they were willing to undertake. In contrast, an agreement on investment facilitation for development that is concluded on a plurilateral basis would, so far, imply voluntary membership. Hence, the willingness to fund technical assistance and capacity building may not have as much of an influence on the dynamics of the negotiations.

It is worth noting that there was a real match between demand and supply for technical assistance and capacity building in TFA. This raises the question of whether there is a similar match for investment facilitation for development, especially when taking into consideration the current international environment.

## Expert Network seminar: The relationship between a multilateral IFD Agreement and international investment agreements

26 June 2020

### Overview

The Expert Network is part of a joint project on Investment Facilitation for Development by the ITC and DIE.

The meeting explored the issues related to the integration of an IFD Agreement into the WTO rulebook. It was chaired by Axel Berger, Senior Researcher, DIE, with input from Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI; Manjiao Chi, University of International Business and Economics, Beijing, China; and Jansen Calamita, National University of Singapore. The discussion was held under the Chatham House Rule to enable frank and open exchange.

### Highlights

#### **The relationship between IFD Agreement, domestic regulations and commitments from IIAs**

IIAs are targeted at the promotion and protection of investment but many have investment facilitation components. IIAs often include provisions on facilitating permits for the establishment of investments, entry and sojourn of investment-related personnel and transparency. A few IIAs include investment facilitation measures related to investment insurance and investment financing. Among these, some measures are clear-cut, while others are not as easy to categorize as investment facilitation. The issue of the relationship between WTO rules and IIAs is not entirely new. The WTO Agreement on Trade-Related Investment Measures and the General Agreement on Trade in Services both deal with issues of investment, including performance requirements, services trade through commercial presence and domestic regulation. The intricacies of this relationship need to be fully examined. In this context, it would be useful to review the treaty interface provisions between multilateral and bilateral agreements. Such a review would explore the efficacy of interface provisions in reconciling the potential overlaps and generate ideas for incorporation of similar provisions in an IFD Agreement.

#### **Addressing potential overlaps related to IIAs**

Special attention should be paid to potentially overlapping provisions in an IFD Agreement and IIAs. Commitments with high levels of similarity could potentially be cross-referenced in conformity assessments. The Vienna Convention on the Law of Treaties provides guidance on addressing conflicts between treaties. Additionally, treaty conflicts could be dealt with by introducing provisions that shield the framework from unwarranted interpretations. Treaty parties could also review their IIAs and BITs to identify implications for an IIF4D.

#### **Fair and equitable treatment (FET)**

IIAs usually include provisions relating to FET. As an IFD Agreement may contain an MFN clause, negotiators should examine the similarity of the treatment between IFD Agreement and FET clauses in existing IIAs.

#### **An IFD Agreement would help economies implement IIAs**

There is a virtuous cycle between IIAs and an IFD Agreement because multilateral rules on investment facilitation can help the implementation of IIA obligations and make disputes less likely. Investment facilitation disciplines, such as transparency, ombudsperson-type mechanisms and streamlined procedures contribute to the prevention of disputes under IIAs.

#### **An IFD Agreement should not inadvertently create new obligations under IIAs**

The negotiations on an IFD Agreement should ensure that it does not inadvertently create new risks or liabilities for economies, especially developing ones, with regards to their IIA obligations. IFD Agreement



obligations could potentially be referenced in investment arbitration proceedings initiated under IIAs. Nonetheless, as an IFD Agreement would not address market access, investment protections and investment disputes, such reference is unlikely to have significant impact on investor-state dispute settlement cases that often relate to investment protection provisions such as FET and indirect expropriation.

While tribunals could potentially look into the provisions of an IFD Agreement as a way of informing the requirements of FET and legitimate expectations in IIAs, this could be prevented by provisions invalidating the importation of IFD Agreement provisions.

### **Building a firewall between an IFD Agreement and IIAs**

To prevent using IFD Agreement provisions in disputes based on IIAs, an IFD Agreement could incorporate provisions that ensure that a determination that there has been a breach of an IFD Agreement obligation does not establish a breach of obligations under another international agreement. This approach has been used in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership in article 9.3, which could be considered for inclusion in an IFD Agreement.

Furthermore, an IFD Agreement could include a provision that states that it should not be treated as either a subsequent agreement or subsequent practice regarding the interpretation of any rules on investment protection or investor-state dispute settlement.

Finally, the language of the framework could prevent its obligations from being considered as ‘treatment’ by stating that the obligations do not in themselves constitute treatment. For greater certainty, the framework could state that its obligations do not constitute treatment under any other treaty, unless the measures adopted by an economy were implemented pursuant to an IFD Agreement.

## Expert Network seminar: Integrating an IFD Agreement into the WTO

6 October 2020

### Overview

The Expert Network is part of a joint project on Investment Facilitation for Development by the ITC and DIE.

The meeting was chaired by Axel Berger, Senior Researcher, DIE, with input from Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI; Rudolf Adlung, independent trade policy analyst, former Counsellor, Trade in Services Division, WTO; and Robert Basedow, Assistant Professor International Political Economy, European Institute, London School of Economics. The discussion was held under Chatham House Rules to enable frank and open exchange.

### Highlights

Legal possibilities for integrating an IFD Agreement into the WTO include:

#### The creation of separate IF regimes for services and non-service sectors

- **Services:** The GATS provides a framework that includes IF-related measures such as publication and notification requirements, creation of enquiry points, and creation of contact points by economically advanced Members to provide developing-country suppliers with commercially relevant information. Such measures could be complemented by tailored additional commitments (Art. XVIII), which may include qualifications standards, and licensing matters. Additional commitments could be used to pursue development and sustainability-related objectives (e.g. creation of an information and advisory centre for SMEs, free provision of professional education and training, compliance with certain SDG-related principles, prevention of collusion among major suppliers). Relevant initiatives might be taken at any time, either on an individual basis or in coordination by a critical mass of interested Members. Note that any measure affecting trade in services is subject to the MFN requirement of GATS.
- **Non-service sectors:** Investment facilitation measures need to be defined in the absence of an existing framework for non-service sectors. They could be implemented either in the form of open plurilateral agreements, supported by a consensus of Members, by which relevant obligations would be assumed by participants on an MFN basis; or informal understandings among interested Members independent of the WTO system. Such informal understandings would not be enforceable through the WTO dispute settlement system. However, depending on the envisaged measures, there is no need for an enforceable, binding agreement. The WTO draft negotiations text on an IF framework includes many 'best effort' clauses.

**Common regime:** A common regime framework could be implemented that would be equivalent to recent PTAs. These combine provisions on cross-border trade in services, defined to embrace modes 1 and 2, with separate cross-cutting chapters on investment and the movement of people. However, it is unrealistic to expect Members to embark on such a project in current circumstances. A more practical alternative would be a cross-sectoral framework that applies to the scheduling of IF measures that focus on administrative, procedural and regulatory issues. The creation of such a framework, possibly in the form of an Annex to the WTO Agreement, however, would need to be consensus-driven.

**Open plurilateral agreement:** An open plurilateral agreement, without the need to distinguish between services and non-services sectors, was raised as a legal possibility for an IFD Agreement. In order to arrive at an open plurilateral agreement under WTO law that can be serviced by the Secretariat, the first stage will require consensus, which could be vetoed by any Member. Members can agree on a critical mass that would trigger the application of the agreement. Reaching a consensus in the current political climate may be very difficult. The only way around this requirement might be a soft law model.

**Soft law model for an IFD Agreement:** Developing countries that are struggling to attract investment, and which are not part of the deep RTAs because they do not have the capacity to commit to these agreements,

may be interested in an IFD Agreement that is not binding but instead functions as an information sharing platform. Such a platform would be based on soft law, best practices and learning rather than legally binding commitments.

This approach is similar to many trade facilitation measures that are implemented through soft law, or the model of the OECD. However, as WTO is a rule making organization, a soft law approach would be a fundamental reorientation of the Organization. In addition, if the IFD Agreement is only based on soft law, any commitment to provide capacity building and technical assistance would be voluntary. The soft law approach does not require an IFD Agreement under WTO; UNCTAD provides soft law guidelines and other international organizations are dealing with providing IF technical assistance (while struggling to receive funding).

**Hybrid model for an IFD Agreement:** TFA is considered a success because it addresses known barriers with respect to country borders, and public officials have experience with such problems, which makes it easier to address these problems in a practical manner. In addition, the agreement focuses on technical issues, leaving political debates aside. WTO and other international organizations have provided technical assistance to help countries implement the agreement.

Another reason for TFA's success is that it did not create many new commitments but specified GATT commitments and created recommendations and soft law for trade facilitation issues. An IFD Agreement could take the same approach of combining hard law and best-effort provisions. Such best-effort provisions will always be hard to enforce because of interpretation issues. The problem may be that many developing countries will not sign an IFD Agreement if it includes hard law commitments.

#### **Learning from existing WTO agreements to avoid contradictions**

The current draft of the IFD Agreement contains GATS-inconsistent definitions, definition modifications and uncertainties, and non-existing flexibilities. A conflict-of-rules provision could ensure the continued prevalence of relevant treaty obligations. However, it would not protect governments from misinterpreting their scope for action. Countries can distinguish obligations that are already hard obligations under GATS by excluding them from the IFD Agreement.

#### **Committee on investment facilitation**

The functions and agenda for a committee on investment facilitation might include:

- Undertaking ongoing investment-facilitating initiatives, possibly based on WTO Secretariat reports;
- Exchanging views on implementation of the IFD Agreement, sharing experiences and providing a communication platform for best practices;
- Providing a platform for peer pressure: countries should notify Members with respect to their implementation stage of the IFD Agreement, and such progress should be tracked routinely;
- Establishing initiatives to promote sustainability-related investment objectives;
- Addressing distortions in investment disciplines to overcome financial crises;
- Providing an outreach platform for other international organizations, NGOs and states to cooperate and improve the investment climate among developing and developed countries; there is no experience in WTO for institutionalizing stakeholder contributions, and there may be a risk in such close collaboration;
- Bringing together the trade and investment communities.

#### **Relevance of WTO dispute settlement understanding (DSU)**

The WTO DSU is fully applicable to 'measures by Members affecting trade in services' (GATS Art. I:1). Any Member is free at any time to invoke the DSU, challenging other Members' non-compliance with the Agreement. TFA opens the door for complaints under the DSU. However, its implementation programme for

developing countries and LDCs provides specific phase-in periods, which are reflected in a parallel exemption from DSU challenges. Similar provisions might be included in an IFD Agreement. However, because market access and investment protection are exempt from the IFD Agreement, the likelihood of legal challenges may remain remote.

In practice, governments are hesitant to use the DSU for services-related matters. Since 1995, there have been about 40 consultations over services-related disputes in the GATS context. This reflects that the commitments under GATS are rather shallow and difficult to interpret. It is easier to seek remedies under BITs than to motivate governments to use the DSU.

With respect to the IFD Agreement, countries may be hesitant to enter into commitments that subject them to WTO dispute settlement mechanisms (DSMs). For years, DSMs have been criticized for not being constructive with respect to sustainable development, so this approach would be hard to align as the IFD Agreement is supposed to contribute to sustainable development. As such, the role of a DSM in contributing to the sustainable development goal seems limited. An IFD Agreement will likely not be subjected to a DSM because the IFD Agreement is much more intrusive into the domestic system.

### **WTO system supporting the implementation of an IFD Agreement**

As stated above, there are difficulties in establishing an IFD Agreement under the WTO system, the main one being the consensus requirement in dealing with issues not covered by existing multilateral frameworks due to the political climate. However, this may be mitigated by the desire of a number of countries to have a binding agreement combined with the needs of developing countries and LDCs for technical assistance and capacity building, which would be provided under the agreements as hard commitments.

The added value of an IFD Agreement coming under WTO would be that the Framework would mirror TFA commitments and bring developing countries to a technical assistance programme that would help them achieve implementation capacity. This is what makes TFA attractive; and this would be true for a WTO agreement for IF, even when taking a hybrid approach, as the added value would lay in the support for developing countries to achieve implementation capacity. In addition, the added value of WTO is that it is a platform that can bring together the trade and investment communities and other stakeholders.

## Expert Network seminar: The potential value added of an IFD Agreement

16 February 2021

### Overview

The Expert Network is part of a joint project on Investment Facilitation for Development by the ITC and DIE.

The meeting was chaired by Axel Berger, Senior Researcher, DIE. The meeting included the following opening speakers: Manjiao Chi, Professor and Founding Director, Center for International Economic Law and Policy, Law School, University of International Business and Economics, China, Makane Moïse Mbengue, Professor and Director, Department of Public International Law and International Organization, Faculty of Law, University of Geneva, and Lauge Poulsen, Associate Professor and Director, Graduate Studies, School of Public Policy, University College London. The meeting was concluded by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI. The discussion was held under Chatham House Rules to enable frank and open exchange.

### Highlights

The discussion focused on two main issues. First, the potential benefits of an IFD Agreement; and second, the main elements that should be put in place to realise such benefits, as the potential value added depends on the content of the IFD Agreement. It was emphasised that the agreement will establish a floor and a reference point for any agreements and investment chapters that will be negotiated in the future.

#### **An IFD Agreement can help developing countries implement and lock-in domestic reforms**

Looking at past experience, WTO agreements have assisted countries, such as is China, in implementing domestic reforms. In order to ensure that an IFD Agreement can indeed assist developing countries in implementing domestic reforms the following factors should be considered.

**Clear obligations:** Creating clear obligations for Members that are enforceable is key to ensuring the implementation of domestic reforms. For example, under the China-EU Comprehensive Agreement on Investment (CAI), most of the investment facilitation obligations were aligned with unilateral reforms that China had already implemented. This means that the treaty imposed on China the obligation not to change policies, but to maintain its reforms. In addition, if home states establish corporate social responsibility obligations, these obligations will encourage host states to adopt similar obligations.

**Review mechanisms:** It is important to establish a strong review mechanism, both at the WTO and national levels, as an obligation under the IFD Agreement. A strong review mechanism at the national level should have the authority to review the existing laws of the state and analyse whether they are compliant with investment facilitation rules under the agreement.

**Capacity building:** Developing countries are in need of strong supportive technical assistance commitments to ensure that their commitments under the IFD Agreement will be implemented.

#### **The IFD Agreement can establish benchmarks of good investment facilitation practices**

The IFD Agreement can reduce the fragmentation that currently characterizes investment facilitation frameworks and can establish benchmarks for good investment facilitation practices.

There are two levels of fragmentation: conceptual fragmentation and regulatory fragmentation. For example, African economies have a different understanding of the concept of investment facilitation. These differences may slow down negotiations and discussions regarding the future AfCFTA Investment Protocol in the area of investment facilitation. Having a universal investment facilitation framework can help establish a consensus on what investment facilitation includes and thus facilitate negotiations in the African region. This conceptual challenge was also mentioned with respect to different international initiatives.

In addition, it will be a challenge to negotiate the AfCFTA Investment Protocol as there are so many different regulatory frameworks and approaches to investment facilitation in the African region, in national investment laws and in bilateral investment treaties. A universal IFD Agreement will provide clear benchmarks on appropriate investment facilitation provisions. Then, countries can adopt investment facilitation provisions in their specific region while building on a coherent approach and an approach that was validated at the universal level, which will give regional agreements additional legitimacy.

### **The establishment of firm capacity building commitments under the IFD Agreement**

One of the value-added of an IFD Agreement will be the commitment by donors to provide funding for capacity building to ensure implementation in developing countries in need of support. This is particularly important for LDCs. The current text does not include such a firm commitment. Without such a commitment, countries seeking to reform their investment facilitation frameworks will clearly have more difficulties to implement their obligations.

### **Welfare gains of an IFD Agreement for developing countries**

Almost all countries spend resources to promote FDI, as they believe it helps to advance development. Results from a DIE draft study on the potential welfare gains from different investment facilitation framework scenarios were mentioned during the meeting. It was stated that, while economies have an incentive to unilaterally implement investment facilitation measures, many have not done so, especially developing countries at the lowest levels of development and with the greatest need for investment; an IFD Agreement containing strong technical assistance commitments would therefore be particularly useful for these countries.

## Expert Network seminar: Options to integrate an IFD Agreement into the WTO rulebook

20 May 2021

### Overview

The Expert Network is part of a joint project on Investment Facilitation for Development by the ITC and DIE.

The meeting focused on options to integrate an Investment Facilitation for Development Agreement into the WTO rulebook. The meeting covered legal as well as political challenges that need to be taken into account by the negotiating parties. The meeting was moderated by Axel Berger, Senior Researcher, DIE. Opening speakers included Petros Mavroidis, Edwin B. Parker Professor of Foreign and Comparative Law, Columbia Law School, and Hamid Mamdouh, Senior Council at King and Spalding LLP (Geneva office) and Visiting Professor, Queen Mary University of London, Centre for Commercial Law Studies (CCLS). Concluding remarks were provided by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI. This report is a summary of the discussion at the workshop.

### Highlights

The following possibilities for integrating an IFD Agreement into the WTO rulebook were presented during the meeting.

- The multilateral route includes three options. Establishing a new multilateral agreement (Article III.2 of the WTO agreement), which will require a consensus by all WTO Members, interpretation of existing agreements (Article IX.2 of the WTO agreement), or an amendment of an existing agreement (Article X of the WTO agreement).
- The plurilateral route refers to an agreement by a sub-set of WTO Members and includes three main options. The first involves adding (coordinated) schedules to the GATT and the GATS, which do not fall under the consensus requirement of article X of the WTO agreement. However, this option would limit the obligations under the IFD Agreement to the scope of the two agreements. The other option would be an amendment of the WTO agreement under Article X.9, which requires a consensus by all WTO Members to add a new plurilateral agreement under Annex 4. The last option involves establishing a new mechanism (Annex 5) for agreements that would not require the participation of all Members but extend all benefits to WTO Members on an MFN basis.

### The multilateral route

The multilateral route was addressed only briefly, because establishing a new multilateral agreement (III.2 WTO agreement) would require a consensus by all WTO Members, which is currently not likely. The option of interpretation of existing agreements is also problematic: Article IX:2 of the WTO agreement establishes that a decision to adopt a multilateral interpretation can only be taken by the Ministerial Conference or the General Council, and that such decisions must be approved by a three-fourths majority of Members. In addition, this option encounters substantive issues, as interpretation is still limited to the text itself and may not be sufficient to cover all aspects under negotiation in the IFD Agreement negotiations. The last option of amending the existing agreement (Article X of the WTO agreement) may be more achievable. Under the amendment clause, amendments to some provisions of the WTO agreement or the GATT that are of a nature that would alter the rights and obligations of the WTO Members, would take effect upon acceptance by two thirds of the Members on those consenting Members and thereafter for each Member upon its acceptance of the amendment. Amendments to provisions of the WTO agreement or of the GATT of a nature that would not alter the rights and obligations of the Members, will take effect for all Members upon acceptance by two thirds of the WTO Members. The rules for amendments under the GATS are different. Depending on the specific provisions of the agreement that are being amended the requirement for the acceptance of two thirds of the Members may apply only to the accepting Members or to all Members.

## The plurilateral route

### Coordinated scheduling

During the meeting the option of integrating the IFD Agreement into the GATT and/or the GATS by coordinated scheduling undertaken by the interested WTO Members was introduced. The challenge of scheduling under both agreements is that the scheduling is limited to the scope of the agreements. Consequently, where the substantive matter of the IFD Agreement goes beyond these agreements, it cannot be added to individual Members' schedules, as is elaborated below.

**Coordinated scheduling under the GATT:** Under the GATT, Members can schedule obligations related to FDI in connection with producing goods, under the non-tariff measures section. It was indicated that this option is not optimal for the incorporation of the IFD Agreement as the GATT refers to the treatment of goods, not the treatment that is given to investors or manufacturers in a Member's territory.

**Coordinated scheduling under the GATS:** This was proposed as the better option for scheduling, as the scope of the GATS captures more of the content of the IFD Agreement. However, the provisions of the GATS are limited to the treatment of services and service suppliers of other Members. Under the service supplier definition, the GATS only covers services FDI involving at least 50% foreign ownership or control. Applying these provisions to FDI will mean that the obligations under the IFD Agreement provisions will be applicable only regarding service suppliers of other Members and will not cover all types of other investors under the IFD Agreement. It was noted that the scope of the IFD Agreement is not yet defined and that there are ongoing discussions regarding different definitions, such as "investors" and "investment" that will also affect the implications of incorporating the IFD Agreement under the GATS scheduling provisions.

It was indicated that most of the provisions under the IFD Agreement that relate to transparency and streamlining of administrative procedures can be scheduled and are within the scope of the GATS under Article 18 as long as it refers to services FDI, which includes provisions that enable the development of a sound regulatory environment. However, currently the IFD Agreement negotiations go beyond transparency and administrative procedures and include the establishment of focal points, dispute prevention mechanisms, provisions of responsible conduct of investors, anti-corruption, and special and differential treatment issues that may not be within the scope of the GATS. It was also noted that such provisions will need the assistance of a designated committee where Members can discuss issues related to sustainable investment and development under the IFD Agreement provisions, and that the scheduling route does not provide such a forum.

It was emphasized that, even if a WTO Member willingly takes upon itself obligations that go beyond the scope of the GATS, the obligations will probably not be enforceable by any future dispute settlement panel. Furthermore, adding obligations beyond the scope of the GATS under the scheduling provisions could be considered outside the WTO practice and could face resistance by other Members. Members may claim that it is not possible to change the scope of the GATS through scheduling provisions even if a Member is only adding obligations to its own schedules, and such resistance can lead to objections to the certification process.<sup>185</sup> While completing a certification procedure requires the absence of objection by other WTO Members, this should not be equated with "consensus" within the meaning of Article IX (Decision-Making) of the WTO agreement. While the latter provides the rules for joint action that binds the entire membership through consensus-based decisions (and voting if necessary), a schedule certification procedure has the sole object and purpose of the verification of the content of the modifying Member's schedule regarding its effect on existing rights of other Members under the WTO agreement. Hence, the expectation is that an objecting Member would identify the specific elements giving rise to an objection. The mere fact that footnote to Article IX refers to the absence of objections does not create equivalence between the certification of a schedule and the adoption of a consensus decision by all Members.

An additional challenge that was mentioned regarding the coordinated scheduling option was the question of including special and deferential treatment provisions. Under the IFD Agreement, one of the main issues

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<sup>185</sup> Certification is the process of attesting changes to the authentic text of schedules to reflect modifications resulting from renegotiations under the GATT and the GATS as sources of enforceable legal obligations of WTO Members.



that is being discussed involves adopting the TFA approach to special and differential treatment. Consequently, there would be different categories of Members' commitments under the IFD Agreement, including transitional periods for implementing individual commitments under the agreement and an option for Members to request technical assistance and capacity building. A majority of developing countries insists on applying the TFA approach to special and differential treatment. In this regard, it was mentioned that the flexible nature of the GATT and GATS with respect to scheduling commitments would allow Members to schedule their commitments under the IFD Agreement while taking into account flexibilities such as transition periods and technical assistance, as long as the commitments are within the scope of the agreements. Accordingly, under the scheduling route, developing countries may associate the implementation of an obligation with acquiring technical assistance.

Overall, many experts felt that because of the scope limitations of the GATT and the GATS, the scheduling route may not be the best option for the integration of the IFD Agreement into the WTO rulebook.

#### **Annex 4 of the WTO agreement**

Currently, Annex 4 of the WTO agreement consists of two plurilateral agreements, the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement. Unlike the agreements in the first three annexes of the WTO agreement, which are binding on all WTO Members, the plurilateral agreements are binding only on those WTO Members that have accepted them and are typically applied on a non-MFN basis. However, in order for the IFD Agreement to be added as an Annex 4 agreement there is a need for consensus by all WTO Members. It was noted that there is one more plurilateral agreement in the WTO, the Information Technology Agreement (ITA), which was concluded by 29 participants at the Singapore Ministerial Conference in December 1996, and which is not included under Annex 4. However, the ITA is an agreement on tariff reduction not on rules like the IFD Agreement, so it is an imperfect example of such an integration option.

#### **Adding the IFD Agreement as an Annex 5 to the WTO agreement**

Currently under the WTO agreement, agreements are included under Annex 1 and Annex 4. Annex 1 includes the multinational agreements, which are binding on all Members, and Annex 4 includes the agreements that are binding only on parties to the agreement and benefits are also usually limited to the parties to the agreement. The establishment of Annex 5 as a new category of agreements that are binding on some Members but benefit all Members on an MFN basis would be an option for an IFD Agreement. Adding Annex 5 will still require a consensus by all WTO Members. The difference between Annex 4 and 5 for the IFD Agreement outcome is whether it creates "rights" for non-signatories. Even if there is consensus to add the IFD Agreement to Annex 4 and signatories promise to apply it on MFN basis, it still would not create rights for non-signatories unless other amendments are introduced to change the nature of Annex 4 to accommodate agreements that are binding on some but create rights for all. Consequently, Annex 5 is likely to receive more support by all WTO Members as it creates enforceable rights for non-signatories.

#### **Political challenges for the integration of the IFD Agreement in the WTO rulebook**

The legal route that will be taken to integrate a future IFD Agreement into the WTO rulebook will imply differently on the political costs faced by its supporting Members. Consequently, the first political challenge will be how to mobilize the support of non-participating Members to the agreement in the WTO. To unlock the consensus requirement under the WTO agreement, there needs to be an incentive to non-participant Members to support the agreement. The first type of incentive is of a public good type, which refers to the institutional well-being of the WTO itself. The IFD Agreement negotiations envisage a new type of stand-alone agreement that although it is not supported by the full membership includes commitments that benefit signatories and non-signatories at the same time. The nature of the commitments, which refer to regulatory reforms of its signatories that are adopted on a non-discriminatory basis, the focus on development and the strong support by developing countries make the IFD Agreement negotiations a best case for such a new type of WTO agreement. If there, however, is no consensus for the IFD Agreement within the WTO, the negotiating Members can decide to sign an agreement independently which may have serious consequences for the WTO going forward.

The second type of incentive is transactional, for example linkages with other negotiation areas of interest to non-participants in the IFD Agreement. The second type of incentive will also depend on the content of the agreement especially with respect to development-related provisions such as implementation flexibilities and the provision of technical assistance. Strengthening the development dimension of the IFD Agreement will help overcome resistance by other Members and may increase the number of participating Members in the negotiations. The more WTO Members take part in the IFD Agreement negotiations, the greater the pressure will be to integrate the IFD Agreement into the WTO rulebook.

## Expert Network seminar: Approaches to implement an IFD Agreement to support domestic investment facilitation reforms

4 October 2021

### Overview

The Expert Network is part of a joint project on Investment Facilitation for Development by the ITC and DIE.

The meeting focused on approaches to implementing a future IFD Agreement to support domestic investment facilitation reforms. While negotiations on an IFD Agreement are still ongoing and making good progress, participants reflected on the challenges that signatories will face in implementing the Agreement and the potential costs of investment facilitation reforms.

The meeting was moderated by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI. Opening speakers were Axel Berger, Senior Researcher, DIE, and Daniel Trnka, Deputy Head, Regulatory Policy Division, OECD.

### Highlights

The discussions during the webinar focused on the following points, which are further elaborated upon in the sections below.

- Estimating the costs of implementing investment facilitation measures under the IFD Agreement will assist WTO Members in prioritizing implementation. It will also help donors to understand the scope of the contributions that are needed; however, this will also require undertaking gap analyses and needs assessments. The costs of putting in place the investment facilitating measures enumerated in the IFD Agreement can be high, depending on the country context.
- WTO Members may face different challenges when trying to implement investment facilitation measures. In this respect, the model of the Organisation for Economic Co-operation and Development (OECD), which is based on a regulatory impact assessment process, can assist in the implementation of the IFD Agreement.

### Estimating the costs of implementing the IFD Agreement

During the meeting, the initial methodology and preliminary findings from an ongoing DIE research project regarding the costs that occur when implementing an IFD Agreement were presented. The research takes into consideration such costs as regulatory costs (including legislative and political costs), institutional costs (such as new staff for the establishment of focal points), human resources costs (including the recruitment of new staff and training for existing personnel), and infrastructure costs for new facilities or equipment. The research also distinguishes between upfront and operational costs.

There are many challenges in estimating the costs of implementing the IFD Agreement. They include the following: first, investment facilitation reforms involve many agencies across the government and not just customs agencies as in the case of the WTO Trade Facilitation Agreement (TFA); second, most investment facilitation measures are part of broader efficiency-enhancing reforms; third, there are often no specific budget lines; and fourth, running costs are absorbed in normal administrative operational costs.

From initial findings, the total capital expenditure for introducing investment facilitation measures in the reviewed six developing countries are high. Annual operating costs directly or indirectly related to investment facilitation are lower for most countries, though not for LDCs.

However, it is important to take into account that not only financial costs are involved. It was indicated that the next phase of the DIE research project would be to interview key stakeholders in these six countries to

get a more precise understanding of the costs of implementing investment facilitation measures under the IFD Agreement. It was emphasized that it is extremely important that the results are credible and that estimations of costs from the TFA would give at least the bottom line of costs on average, as the costs of implementation of investment facilitation measures are most likely considerably higher than the implementation of trade facilitation measures.

Moreover, it was mentioned that it may be too soon to quantify the eventual total costs of implementation, as the IFD text is still not final. In addition, because there will be different ways to implement mechanisms under the IFD Agreement, direct costs may vary, depending on the form of implementation. For example, there are different ways to operationalise dispute prevention mechanisms, which could be done in a very simple or very complex and resource consuming manner, depending on the specific mechanism. In addition, because some countries have been implementing investment facilitation measures for several years, different measures may have different costs for specific economies, depending on the level of current implementation. Accordingly, it is important that Members undertake gap analyses and needs assessments as soon as possible, to understand the costs of implementation of all measures under the Agreement.

### **Experiences from regulatory policy tools: Lessons to be learned for investment facilitation**

Regulatory policy, if implemented properly, can substantively improve conditions for FDI. In order to attract investment, it is important to improve the business environment, which often means simplifying existing regulatory requirements and removing unnecessary bureaucratic obstacles. This also includes regularly reviewing the existing regulations to check whether they still fit their purpose and whether there are ways to make them more “user friendly”. The IFD Agreement includes reforms addressing these issues, including regulatory coherence and transparency. Under the regulatory impact assessment process, regulators should clearly define each problem they are trying to deal with, quantify what the potential effects of the problem might be and then identify potential regulatory and non-regulatory solutions. Once the government has identified these options, it should measure their potential costs and benefits for the society and choose the best option.

An important part of the process of developing new laws and regulations and implementing them includes consulting the public and engaging stakeholders. The process should give all affected parties an opportunity to express their views. Related to this topic is the issue of the accessibility of laws and regulations. In this respect, it is important that all laws and regulations use simple language, including guidance for complying with regulations. In addition, all laws and regulations should be publicly available in one place, preferably electronically. The use of “one-stop shops” or “single windows” is highly recommended.

It was also emphasized that peer learning and knowledge sharing need to be part of the implementation process and that gap assessment should follow a systematic, standardized approach.

## Expert Network seminar: A possible work programme of a future WTO Committee on Investment Facilitation

19 November 2021

### Overview

The Expert Network is part of a joint project on Investment Facilitation for Development by the ITC and DIE. The meeting focused on a possible work programme of a future WTO Committee on Investment Facilitation, addressing in particular the functions of the Committee and priority issues that should be on the agenda to implement, operationalise and develop further a prospective WTO IFD Agreement.

The meeting was moderated by Axel Berger, Senior Researcher, DIE, and included the following speakers: Christiane Wolff, Counsellor, Head of SPS Section, Agriculture and Commodities Division, WTO; Heather Taylor-Strauss, Economic Affairs Officer, Investment and Enterprise Development Section, Trade Investment and Innovation Division, UNESCAP; and Bernard Hoekman, Professor and Director of Global Economics, Robert Schuman Centre for Advanced Studies, European University Institute (EUI). Concluding remarks were made by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

### Highlights

The discussions focused on the following points, which are further elaborated upon in the sections below.

- Important lessons related to establishing the WTO Committee on Investment Facilitation and setting its agenda can be learned from other WTO Committees such as the WTO Sanitary and Phytosanitary Measures (SPS) Committee. Such lessons include: involving not only investment representatives, but also technical experts from other ministries in the Committee's work; ensuring that meetings not only involve reporting on the implementation of the agreement but also information sharing on best practices in investment facilitation; and maintaining several active workstreams, to ensure that the Committee's work continues even if one workstream is not moving forward. Moreover, it is important to rely on the support of the WTO Secretariat, which has a key role in maintaining the institutional memory related to the Committee's work, as well as supporting its work process.
- The WTO Committee on Investment Facilitation should have four main functions: first, it should be tasked to develop rules of procedure, including rules for Members' submissions, notifications and responses; second, the Committee should support the implementation of the IFD Agreement through the development of guidelines related to analysing implementation gaps and assessing technical assistance needs, as well as facilitating the technical assistance process involving relevant international organisations; third, the Committee should be a source of knowledge and information sharing about investment facilitation reforms, relying among other data sources on the DIE Investment Facilitation Index; fourth, the Committee should consider fostering an "epistemic community" that would include the private sector, leading experts, policy makers across regions and additional stakeholders, including civil society, to provide inputs on investment facilitation issues and on the implementation of the IFD Agreement.

### Establishing a WTO Committee on Investment Facilitation – Learning from the SPS Committee

The SPS Committee is responsible for overseeing the implementation of the SPS Agreement. Its mandate also includes the furtherance of the Agreements' objectives, which has given the SPS Committee leeway to work on issues that Members see as important. The SPS Committee meets three times per year. In practice, the work of the SPS Committee can be grouped into three main areas: information sharing, discussions relating to specific trade concerns and "horizontal work" involving the development of new guidelines.

**Information sharing:** Members use the SPS Committee as a forum to provide information that they think will be relevant to their trading partners, such as national institutional changes or disease outbreaks. This function assists with ensuring transparency and trust building among the Members. In addition, the

Secretariat circulates documents with all the information presented in the meetings. Furthermore, the Secretariat organises side events alongside Committee meetings that include presentations of new studies.

**Specific trade concerns:** A high number of notifications are submitted with respect to new SPS regulations. The Committee gives Members the opportunity to raise concerns when there are problems with specific regulations, whether they are in the draft stage or involve concerns raised regarding measures affecting trade. Concerns are raised both with respect to actual regulations or regarding the way these regulations are being implemented. It was noted that more than half of the specific trade concerns that are raised are eventually reported as resolved or partially resolved.

**Horizontal work:** From its establishment, the SPS Committee has worked on clarifying provisions under the SPS Agreement, in particular in areas where specific trade concerns are raised. In addition, under its mandate the Committee publishes guidelines on implementing certain articles of the SPS Agreement. It was noted that the legal status of these guidelines is not completely clear. Some of them include disclaimer language that the guidelines should not affect the rights and obligations of Members under the SPS Agreement, but some of them do not include such a disclaimer. In a dispute, guidelines that are published by the SPS Committee would probably not be ignored, and they would be taken into account in interpreting a particular article.

It is important to note that the SPS Committee includes not only trade representatives but involves also SPS experts from different ministries. The involvement of other governmental agencies is important because intense coordination is required at the national level to ensure the successful implementation of measures under the SPS Agreement. The involvement of technical experts also ensures that the discussions are less political and have a more problem-solving focus. The SPS Committee also includes observer organisations that often have a lot of technical experience and assist Members in building up capacity.

The chairperson of the SPS Committee has an important role as a neutral contact person for Members. The WTO Secretariat plays a key role in maintaining the institutional memory relating to the Committee work. This is particularly important as delegates are often changing. In addition, the WTO Secretariat, as the guardian of the process, is responsible for laying out the implementation process to follow up on agreed-upon actions.

#### **Key proposals for a future work programme of the WTO Committee on Investment Facilitation**

The following key proposals were made during the meeting with respect to the future work programme of a WTO Committee on Investment Facilitation, including its functions and agenda, to implement and operationalise the IFD Agreement.

**Measuring investment facilitation:** The WTO Committee on Investment Facilitation should keep track of the progress made by Members in implementing the IFD Agreement. Accordingly, the Committee should hold regular sessions to review the progress made by Members with respect to the implementation of the Agreement. In this regard, the Committee should utilize the Investment Facilitation Index, developed by DIE, as a means to track the implementation of investment facilitation measures across WTO Members. This would potentially ease data collection efforts to update the Index. It could serve as a valuable tool not only for reviewing progress on the implementation of the IFD Agreement, but also could help identify where capacity gaps exist. It was suggested that the Index should be updated on a biannual basis. As the task of updating the Index is time consuming, the Committee could engage with regional bodies, such as the UN regional commissions, to help in gathering data to update the Index. Engaging these regional bodies could also provide a better link to information on the progress made in the implementation of investment facilitation measures and the need for capacity building support.

**Knowledge sharing and transparency:** Both informal and formal consultations with WTO Members have revealed that many Members still have a limited understanding of the IFD Agreement. For instance, key concerns that were raised repeatedly relate to investor-state dispute settlement issues which explicitly are not covered by the framework. It is important that the WTO Committee has a clear strategy on how and when to disseminate information and engage non-signatory Members on matters related to the IFD Agreement. As part of this strategy, information on experiences with implementing investment facilitation measures and examples of good practices for boosting FDI for sustainable development should be presented during Committee meetings.

**The Committee as a focal point:** The Committee should act as a focal point for national authorities, and for other stakeholders on investment facilitation issues and implementation matters under the IFD Agreement. In addition, the Committee should be a vehicle for both discussing and assessing the effectiveness of investment facilitation practices for development, cost reduction and transparency.

**Epistemic community:** To support knowledge sharing and transparency, it was proposed that the WTO Committee consider supporting a community of practitioners, including leading experts as well as policy makers across regions, civil society and the private sector. Such an epistemic community, building on the ITC-DIE project, could help not only to promote the implementation of the IFD Agreement, but also assist with data collection to track the progress made with respect to the implementation of the Agreement.

**Stakeholder consultations:** The WTO Committee should facilitate stakeholder consultations as they will be able to validate the type of data that the Committee is putting together. It was noted that the Committee should create a credible mechanism to collect information regarding the implementation process not only from delegates but also from civil society and investors. This can be done through regular surveys to identify key implementation problems from the point of view of investors and civil society groups. This can also assist in prioritising the agenda of the Committee.

**Aligning investment facilitation initiatives:** The WTO Committee should consider avenues for better engaging with, and even aligning with, regional initiatives on investment facilitation.

**A built-in agenda:** There was a discussion during the meeting on whether a built-in agenda should be included in the IFD Agreement text. On the one hand, it was suggested that Members should initially only focus on the implementation of the IFD Agreement in order not to over-burden the Committee. On the other hand, it was mentioned that a built-in agenda that includes issues that were not agreed upon in the IFD Agreement would assist in getting other Members on board. An agenda including such issues would not burden the Committee, as the issues would only be addressed at a later stage.

## Annex VII: Capacity strengthening webinars for IPAs and government officials – Reports

Capacity strengthening webinars: Strengthening investment facilitation capacity for development: an overview, based on ‘An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?’

26 February 2021

The webinar was co-organized by the ITC, the DIE, the WAIPA, and the WEF. The webinar was held in the framework of the Investment Facilitation for Development project, jointly implemented by the ITC and the DIE.

This was the first webinar in a series of webinars meant to assist IPAs and similar institutions in strengthening their capacity to facilitate higher FDI flows, especially investment flows that directly contribute to development.

The webinar was opened by Rajesh Aggarwal, Chief, Trade Facilitation and Policy for Business, ITC. It was moderated by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI, and included the following speakers: Bostjan Skalar, Executive Director, CEO, WAIPA; Quan Zhao, Trade Policy Advisor, Division for Market Development, ITC; Axel Berger, Senior Researcher at DIE; Niraj Varia, Partner, Novastar Ventures; Yofi Grant, Chief Executive Officer, Ghana Investment Promotion Centre; Augusto Pestana, Business Director, Brazilian Trade and Investment Promotion Agency (ApexBrasil); Philippe Yvergnaux, Director of International Cooperation, Business France; and Simon Galpin, Senior Advisor and former MD, Bahrain EDB. Concluding remarks were made by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF.

### Highlights

#### **The importance of increasing investment facilitation in both developed and developing countries**

FDI is a significant tool to improve productivity, increase employment, contribute to the growth of gross domestic product, and contribute to development. As a result of the COVID-19 pandemic and the related economic downturn, global flows of foreign FDI fell by 42% in 2020. In a context of uncertainty and declining FDI flows, investment facilitation may provide a practical solution for reviving the global economy. Investment facilitation measures include simplifying and streamlining administrative procedures, establishing “one-stop shops”, improving coordination between regional and sub-regional governmental levels, and improving the communication between governmental agencies and investors, while ensuring fast and efficient responses. It was noted that, especially in the post COVID-19 world, it is important to streamline communications with investors through online portals.

It was realized that facilitation efforts should correspond with the expected impact on the quantity and quality of investment flows. Investment facilitation measures can target different types of investment differently. Under the “Recognised Sustainable Investor” model, greater facilitation measures are given to investors that promote sustainability goals set by the country. Such measures may include faster licensing approvals, greater incentives and quicker aftercare support.

In considering and realizing investment facilitation measures undertaken by the government, IPAs should be involved in the process and provide their inputs, as they often are in direct communication with investors and have ground-level experience and knowledge of the practical issues investors deal with. In addition, it was noted that IPAs can assist not only in attracting FDI, but also in creating linkages between local companies and foreign investors, generating more employment and upgrading local suppliers.

In order to implement investment facilitation measures, many developing countries need technical assistance and capacity building, which should be provided under the WTO Investment Facilitation for Development (IFD) Agreement. One area of capacity building that was mentioned specifically was the assessment and



negotiation of investment contracts. The IFD Agreement can include provisions of capacity building and technical assistance that will cover assistance with investment contracts, such as contract evaluation and assistance with the negotiation process. There also are a few international institutions that provide assistance to host countries in investment contract negotiations, but they are under-resourced.

### **Potential welfare gains from different investment facilitation frameworks**

In order for countries to understand the potential benefits of an IFD Agreement it is crucial for them to appreciate the potential benefits and economic effects of the IFD Agreement while it is being negotiated, how these benefits are likely to be distributed across countries, and to what extent non-Members can be expected to benefit as well. Results of a DIE study on the potential welfare gains from different investment facilitation framework scenarios were introduced during the webinar. The research was based on DIE's Investment Facilitation Index, which, in its current stage, covers 86 economies. The study showed that developing countries with low levels of current investment facilitation practice would benefit the most from the implementation of IFD Agreement proposals. The study further showed that, as greater investment facilitation commitments are undertaken, gains increase in term of consumer welfare and gross domestic product impact. In addition, low and middle-income countries can expect the highest gains. There are some spillover gains that can be expected for non-participant countries on a most-favoured-nation basis; however, these gains are lower than gains from membership in an IFD Agreement.

While economies have an incentive to unilaterally implement investment facilitation measures, many have not done so, especially developing countries at the lowest levels of development and with the greatest need for investment. One of the main reasons is that implementation of investment facilitation measures requires developing countries to undertake significant reforms, and such reforms may require substantial financial and technical assistance. An IFD Agreement containing strong technical assistance commitments would be particularly useful for these countries.

### **Importance of investment facilitation measures for businesses**

It was stated that one of the most useful investment facilitation measures that should be undertaken by IPAs is the development of a clear roadmap for investors, specifying the entire regulatory process, for each step of the way, and not just for the company registration stage. Such a roadmap should include, among other things, all the documents that need to be provided by the investor and what funds and information they need to provide at each stage. Often investors only learn of one step at a time and do not have the whole roadmap for the investment process. Investors also report that prior consultations about changes in laws and regulations are important.

Another possible investment facilitation measure that was mentioned was a performance pledge or service level agreement from the government that indicates what the government commits to in terms of approval timeframes for each stage of the investment process. It is important that IPAs be clear on the service that they are offering to investors. IPAs sometimes use general terms regarding the services they provide, such as "one-stop shops" or full facilitation service; however, investors want to know exactly what services the IPA can provide and how investors can receive external service assistance if needed. It is preferable that one account manager be the contact person for each investor to follow them throughout the journey.

A clear roadmap, providing transparency regarding an investor's journey and the available investment facilitation measures, should be provided not only by the host country but also by the home country. Home countries should also provide information on supportive measures that outward investors can receive, information that is especially important for SMEs with limited resources. Consequently, full transparency requires good lines of communication between host economies and home economies.

### **The importance of investment facilitation for SMEs**

SMEs are key players in any economy, but the challenges they face are not always effectively addressed. One of the main challenges facing SMEs is access to finance, a challenge that has been aggravated by the COVID-19 pandemic. Similarly, complex administrative procedures impact SMEs more than larger companies, as SMEs have fewer resources to deal with such procedures. Large firms can maintain on-staff consultants or outsource such processes. Investment facilitation measures are especially important for

SMEs, as these measures can reduce their cost of doing business. This means that these measures can help IPAs add new potential investors from SMEs in addition to the more traditional multinational firms. Young businesses may also face similar difficulties as those faced by SMEs. It was noted that a business in Kenya needs to deal with over a dozen different governmental agencies and over 200 specific regulations, many of which are not always clear. Consequently, SMEs often may breach country laws, simply because of ignorance and lack of capacity.

SMEs and young businesses need to be able to address all regulations through a simple one-stop shop. It was emphasized that regulations need to be drafted taking into consideration the implications they will have for SMEs. Governments also need to engage with SMEs to understand the challenges they face and the impacts that new regulations may have on them. Governments can also ensure that future agreements they sign will assist foreign investors invest in local SMEs.

## Capacity strengthening webinars: Investment Facilitation: Transparency and streamlining of administrative procedures

17 March 2021

This webinar was co-organized by the ITC, the DIE, the WAIPA, and the WEF.

The webinar was opened by Quan Zhao, Trade Policy Advisor, Division for Market Development, ITC. The webinar was moderated by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF, and included the following speakers: Douglas Van Den Berghe, CEO NxtZones & FDI 4.0; Dushyant Thakor, Vice President, Invest India; Juliana Gómez, Director for Foreign Direct Investment, ProColombia; Marc Burrows, Global Head of Mobility Services, KPMG; and Markus Thill, President, Region Africa, Robert Bosch. Concluding remarks were made by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI.

### Highlights

#### **Concrete investment facilitation measures that are important for transparency and streamlining of administrative procedures**

**Transparency of the investment regime and publication of rules and regulations:** Being transparent about laws and regulations pertaining to FDI and the business climate is one of the basic means of IPAs and other governmental institutions seeking to facilitate FDI. It is a 'bread-and-butter' issue, and all IPAs provide a level of transparency, but transparency can be improved. In a survey carried out by the WEF, 90% of the investors said that transparency is a key factor in their investment decisions. Governments should publish updated information on rules and regulations applicable to investors, including administrative requirements, timeframes, contact details of governmental institutions that should be involved in the process, eligibility criteria, fees, and contact details of IPA focal points. They should also provide clear and advanced notice of proposed regulatory changes and provide investors with time to comment on such changes. It is also important, if possible, that a specific contact person or project manager be assigned to each investor, to provide assistance in navigating through all the rules and regulations of the country, especially for small and medium-sized enterprises.

**Streamlining administrative procedures:** Another IPA bread-and-butter issue, concerns streamlined administrative procedures. This is important in a highly competitive global FDI market, given that there are more than 10,000 organizations seeking to attract FDI. In addition to being clear, administrative procedures need to be streamlined as much as possible consistent with achieving policy goals. This includes streamlining steps related to the approval process and other administrative requirements. The following investment facilitation measures were mentioned in this regard.

**Silent consent:** Silent consent administrative procedures provides that authorization is granted to investors when the competent authority fails to act within a specified time period, unless investors have been notified otherwise by authorities. Economies are increasingly adopting a silent consent approach (also known as 'deemed approval', for instance in India) to strengthen the investment climate. Without a silent consent measure, the risk is that administrative processes get stuck, the very opposite of facilitation.

**Risk based approval system:** Policymakers should consider risk-based assessment, whereby low-risk investment projects are approved with more limited, if any, need for assessment, while higher risk projects receive careful assessment. A risk-based approach is in line with widely accepted regulatory good practices, and has also been included as a provision in the Trade Facilitation Agreement.

**Monitoring and tracking system:** IPAs should establish a monitoring system that tracks investors' applications and guide investors through the investment process.

**"One-stop shops":** IPAs should aim to operate "one-stop shops", to help investors interface with government departments. It was stated that many IPAs declare that they have one-stop-shop systems, but in reality, only 10%-15% of the IPAs worldwide have such programmes in operation. It was noted that, in the event that there is not an operating one-stop shop, a coordination mechanism should be enacted between governmental agencies both at the national and sub-national levels.

**"Red carpet" treatment:** Colombia has established a few mechanisms and initiatives to increase transparency and streamline administrative procedures. One of the main initiatives includes facilitating and expediting the establishment, operations and expansion of inventors' operations, where such investments

contribute to the growth and development of the country. Over 40 central government institutions are involved in such processes and are committed to provide red carpet services that include: responding to investor inquiries within a limited number of days, simplifying and expediting approval procedures, providing clear timeframes, providing assistance at the managerial level, and ensuring coordination among all the relevant governmental agencies to facilitate a smooth approval process.

**Visas and entry permits:** The entry and temporary stay of business people and investor personnel is a real challenge under restrictive practices in many countries. In this regard, the importance of clear, transparent, and also streamlined regulations with respect to the entry of people to the country is just as important as the immigration policy that is in place. It is unlikely that an investor will commit serious capital without being able to visit the investment destination, and without being able to easily visit subsequently to monitor and manage the investment. Australia's global talent programme, which targets such future-focused sectors as space, medtech and cyber security, was mentioned as an important programme in promoting a transparent and streamlined path for highly talented people to establish themselves not just temporarily but permanently in the country if an investment is successful. It was mentioned that it was difficult to receive visas for professionals, especially young professionals; however, such entry permits are important for the success of an investment abroad, as young professionals need to gain experience with a company's operations in different locations, including the culture and regulatory environment.

### **Using technology to enhance transparency and streamline administrative procedures**

Social media and IPA websites have become increasingly important, especially in the face of the Covid-19 pandemic. IPAs should make sure that all the information included on the agency's website is accurate and updated. In addition, many times investment facilitation measures are mentioned in broader publications that are put online, such as investor guides that tend to be outdated and include hundreds of pages, which makes it hard for investors to locate information relevant for them. IPAs should publish clear and targeted information on their websites, not only in the national language but also in English or other relevant languages, depending on the home country of the targeted investors. During the meeting, the importance of technology in enhancing transparency and streamlining of administrative procedures was emphasized through the following examples of technology tools that are operating in India.

**The India Investment Grid (IIG):** The IIG is an initiative of the Department for Promotion of Industry and Internal Trade, Ministry of Commerce, the Government of India and Invest India, and the National Investment Promotion and Facilitation Agency. The IIG provides an online platform that supports investment in India by showcasing investment opportunities across India. It connects potential investors to projects and key contacts. Most projects are government projects. There is a preliminary credibility check of the projects by the IPA, but afterwards investors are responsible for performing their own due diligence.

**Invest India IPA website:** India established its national investment promotion platform, Invest India, that clearly lays out FDI policies and requirements and stipulates the maximum number of days before an investor receives a response for each step of the administrative process. The website also aims to follow a "three-clicks rule", which means that in three clicks the investor gets to the information sought. In addition, the platform enables online inquiry services, with responses within 72 hours. The platform also includes COVID-19 updates and relevant resources for business aid.

**Implementing investment facilitation measures and the need for technical assistance:** IPAs can benefit from international benchmarking and by sharing best practices with respect to increasing transparency and streamlining administrative procedures. A WTO IFD Agreement could be a useful tool in providing such benchmarks and facilitating cooperation and exchange of best practices among IPAs. However, implementing multiple transparency and streamlining measures requires technical assistance. Such assistance is particularly important for least developed countries, but also for other developing countries. Hence, it would be very important for an IFD Agreement to include firm commitments to provide both financial support and technical assistance for the implementation of transparency and streamlining measures.

## Capacity strengthening webinars: Promoting linkages and supplier databases

13 April 2021

The webinar was co-organized by ITC, the DIE, the WAIPA, and the WEF, in the framework of the Investment Facilitation for Development project, jointly implemented by the ITC and DIE.

Opening remarks were provided by Jean-Sébastien Roure, Senior Officer, Business and Trade Policy, ITC. The webinar was moderated by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF, and included the following speakers: Tommy Fanning, Head of Strategic Policy, IDA Ireland; Pilar Madrigal, Director, Investment Advisory Department, CINDE; Craig Burchell, Senior Vice President, Global Trade Affairs, Public Affairs & Communications Dept., Huawei Technologies Co., Ltd.; and Suon Sophal, Director, Public Relations and Promotion of Private Investment, Council for the Development, Cambodia. Concluding remarks were made by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

### Highlights

#### **The importance of linkages between domestic firms and foreign investors**

Supplier linkages provide direct benefits to contracting firms, while also dispersing the benefits of investment widely within the domestic economy, thereby enhancing the development dimension of investment. Through such linkages, domestic suppliers benefit from the tangible and intangible assets that foreign affiliates bring into the host country. Such linkages also help local firms integrate into global value chains. Importantly, having linkage-ready firms in host countries greatly facilitates FDI by allowing foreign affiliates to source locally. Linkage-ready denotes firms that have the capacity to produce goods and services at the quality, cost and scale required by foreign affiliates. Covid-19 has accelerated the need of supporting strategic alliances between foreign investors and local suppliers given that these may be quite adapted to certain conditions. This may create new opportunities for both sides, in addition to more established and traditional forms of contracting. It was noted that a large source of investment is reinvestment. IPAs can promote reinvestment by supporting linkages between foreign affiliates and local suppliers and assisting local suppliers to become linkage-ready. The potential for linkages should be introduced to investors from the beginning, the requirements for generating linkages identified early on and proactively addressed. In addition, IPAs should document success stories and showcase them for inspiration, replication, and scaling.

There are a few ways of encouraging partnerships between foreign affiliates and local suppliers that were mentioned during the webinar. Such partnerships can be facilitated by leveraging connections between different agencies within the government, for example, sister agencies dealing with local suppliers can introduce them to investors through IPAs. Another option that was mentioned was establishing partnerships between foreign affiliates and local universities or other bodies. An additional option that was discussed in detail was the creation of supplier databases.

#### **Supplier databases**

Host countries should aim to build and maintain a database of local enterprises to help new and established investors identify potential suppliers as part of their onboarding and aftercare activities. Online supplier databases provide a way for local suppliers to advertise themselves. Once a database is online it cuts the costs for all parties involved. It was stated that, for investors that are entering the market, supplier databases are an important first step and can save investors valuable time and money, which is particularly important for SMEs having to navigate domestic and regional markets. During the webinar it was indicated that countries that have supplier databases have a competitive advantage compared with other countries and that such databases indeed help investors source more locally.

IPAs have an important role to play in creating online supplier databases, as they know the needs of the economy and are in contact with investors to understand their needs as well. IPAs should work with Chambers of Commerce to create supplier databases and make sure that all the information is updated regularly. Supplier data could be “packaged” for investors according to their needs. Sometimes it is hard to always measure the causal impact of supplier databases because of the length of time that passes between

a first interaction between a foreign affiliate and a local supplier and the time that a contract between them is formed, but anecdotal evidence confirms their importance. The following aspects in creating the supplier databases were discussed during the webinar.

**Sustainability dimensions in supplier databases:** Supplier databases can include sustainability dimensions, to boost sustainable development within the host economy. For example, the Council for the Development of Cambodia is setting up a supplier database with sustainability dimensions (known as an 'SD2') with the support of the World Economic Forum. Such characteristics include providing not only general information about local suppliers (e.g., sector, goods and services, production size, contact information, etc.), but also production standards, certifications that such suppliers are part of responsible supply chains, as well as information on whether that they promote societal goals, such as gender inclusion, training and skills development, employee health and safety, and environmental sustainability. Such information can result in a score card, including reviews of investors on suppliers to help identify not only quality production but also sustainable business practices. It was stated that the WTO IFD Agreement should encourage the creation of such databases, including databases with sustainability dimensions.

**Ensuring a fair process and the quality of local suppliers within a database:** Supplier databases should be transparent, non-discriminatory and quality-based. During the webinar, Cambodia introduced its process for selecting local suppliers that will be included in their database. To ensure a fair process of how firms should be selected, Cambodia hosted a public consultation workshop to discuss the relevant criteria with a focus on the dimension of sustainability. The workshop included representatives from the Chamber of Commerce, business/industry, impact investors, UN agencies, the World Bank, and other interested stakeholders. It was stated that in general it is hard to control the quality of a database. In Ireland, there is a template for firms to fill out, including their certification and information on other investors with whom they are working, which helps foreign investors to conduct initial assessments on the quality of the suppliers. However, it was indicated by investors that companies will need to undertake a vetting process as well, which they likely will conduct in any case.

### **Linkage development programmes**

Host country governments should establish supplier-development programmes to increase the number and capacity of qualified local enterprises that can contract with foreign affiliates. Development programmes should include training local firms to meet international standards. In this regard, it is important to understand current and future needs of foreign investors through private sector consultations, to facilitate meaningful linkages. Based on private sector consultations, IPAs should conduct a local market gap analysis that will map the capabilities of local firms and suppliers. Based on this analysis, supplier development programmes should be implemented to strengthen the capabilities and competitiveness of local companies in light of FDI local sourcing demands and standards. Such development programmes should be designed in close cooperation with domestic and foreign investors, should be demand-driven and should identify, select and audit companies with the potential for becoming long-term suppliers. Development programmes should also identify investor needs and transmit these to participating firms, and they should provide an initial certification that SMEs meet buyers' needs. Additional functions of development programmes could include supporting the development of formal relationships between suppliers and buyers, engaging in ongoing and customized advisory support to strengthen competitiveness, providing tailored consultancy support to follow-up on business review results, and actively matching opportunities for supplier/investor relationships. It was mentioned that supplier development programmes can be implemented by foreign investors themselves working with local suppliers directly, to upgrade supplier capabilities in cooperation with host and home country governments and international organizations. Linkage development programmes can start from partnerships between foreign affiliates and local universities or other bodies to create centres of excellence for training or research and development. Such partnerships could include a joint committee that includes private sector representatives and which could provide recommendations regarding university curricula that would meet international investor needs. Such a committee could also work with technological high schools to help them prepare students with skills that are in greater demand.

## Capacity strengthening webinars: Linking outward FDI to inward FDI: The role of home-country measures

4 May 2021

The webinar was co-organized by the ITC, the DIE, the WAIPA, the ESCAP, and the WEF. The webinar was held in the framework of the Investment Facilitation for Development project, jointly implemented by the ITC and DIE.

The webinar was opened by Rajesh Aggarwal, Chief, Trade Facilitation and Policy for Business, ITC. The webinar was moderated by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI, and included the following speakers: Persephone Economou, Senior Economist, Multilateral Investment Guarantee Agency; Robert Hermann, CEO, Germany Trade and Invest; Aditya Ganesh, Senior Vice President, Marketing & Sales at Rane Madras Ltd; Jan Knoerich, Senior Lecturer, Kings College London; and Heather Lynne Taylor-Strauss, Economic Affairs Officer, Investment and Enterprise Development Section, Trade, Investment and Innovation Division, UNESCAP. Concluding remarks were made by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF.

### Highlights

The discussions during the webinar focused on the following three main points, which will be elaborated further below.

- There are many measures provided by home countries to support outward FDI. However, information regarding these measures is not centrally available to potential investors and is not easily accessible, especially for SMEs or newly established firms in general. Home countries should establish focal points that will ensure the availability of all information relevant to facilitate outward investment and can serve as a “one-stop-shop” for outward investment support.
- Host countries can take advantage of home-country measures to increase inward FDI flows by identifying and tapping into those measures to increase investment flows. Examples include identifying and taking part in investment missions and match-making organized by home countries into host economies. Other examples include educational services on doing business abroad that can be used to disseminate the most recent information on investment opportunities in the host country, or advisory services in home economies on investment climates in host economies that can be leveraged by host economies to attract such investment. IPAs should thus ensure that the information available to home countries captures the most recent developments regarding both educational and advisory services.
- The IFD Agreement should facilitate not only inward FDI but also outward FDI through transparency requirements relating to home countries. The IFD Agreement should include mechanisms that will promote partnerships between IPAs from different countries in order to support two-way flows of investments, leading to win-win outcomes. In addition, the IFD Agreement should include provisions for home countries to facilitate and encourage responsible investment. Home countries can have clear criteria linking or making conditional their support measures to a positive development impact in host economies or the absence of a negative impact.

### Home country measures – an overview

Increasingly, developed and developing countries are putting in place measures to facilitate outward investment. Home country measures (HCMs) are defined as the granting of support by a home country government in connection with an investment made by a home country firm in a foreign economy. To be considered an HCM, the measure must go beyond simply removing or changing the level of restrictions on outward FDI. HCMs may take into account the nationality of an investor, the investment sector, the size of the investor (e.g., specific assistance to small and medium-sized enterprises), and the destination of the investment.

The main types of HCM that were mentioned during the webinar include the following:

**Information:** governments can provide information about FDI policies and regulations in foreign jurisdictions. It can also include evaluations of risks/challenges or level of attractiveness of foreign investment climates. Information can further set out FDI project opportunities.

**Operational support:** governments can provide non-financial forms of operational support through certain services beyond information. These can include business missions, matchmaking, databases of investment opportunities, and project development advisory services.

**Grants:** Grants may include the funding of feasibility studies, market research and other pre-investment activities; reimbursement of costs of setting up overseas offices; costs of training staff for employment with a foreign affiliate (e.g., immersion programmes, foreign language classes); and costs of executive programmes for managers.

**Loans:** Home countries can provide concessional or non-concessional loans.

**Guarantees:** Governments can share default risks by providing financial guarantees or risk-sharing arrangements. In addition, investment insurers may provide guarantees to cover a number of risks that foreign investors encounter. Investment insurance can be provided against such noncommercial risks as expropriation, war damage, political violence, local currency conversion and transfer restrictions for remittances, and forced abandonment.

**Equity:** Governments can take direct equity participations in outward investment projects. In addition, development financing institutions may provide various types of financing.

**Tax exemptions:** These measures may include exemptions from corporate income tax on certain types of income; tax exemptions on start-up expenses of foreign operations; and tax deductions for qualifying expenditures.

**Corporate tax rate relief:** Tax relief for enterprises in particular sectors of the economy; tax deferral for qualifying income earned overseas; and tax credits for certain expenditures.

**Conditionality:** The granting of HCMs can be made conditional on meeting certain criteria, e.g., conducting environmental impact studies.

### **Transparency and access to information about home country measures**

There are many measures provided by home countries to support outward investment. However, the information regarding these measures is not centrally available to potential investors and is not easily accessible. HCMs are provided by various organizations, such as IPAs, export promotion agencies, finance agencies, and governments ministries. Consequently, accessing them is not always easy, especially for SMEs or newly established firms in general.

In addition, investors looking for support will usually approach the IPA in the host country and not know to look for assistance in their home country. IPAs in home countries, should help promote the information and knowledge on HCMs available to investors. Also, companies usually rely on other companies' experiences and case studies, to learn about the HCMs that are available or obtain such information from the chambers of commerce and industry associations within their countries. IPAs should approach industry bodies and inform them of the support measures that are available so the information can be provided to investors.

Because it is important to ensure transparency of information of such support measures, home countries should establish a focal point or a one-stop shop that will ensure the availability of all the information relevant to facilitate outward investment. Since information on HCMs is usually provided in the local language, this makes it difficult for IPAs in host countries to access such information and inform potential investors that approach them regarding HCMs.



During the webinar, an initial overview of the “Outward Foreign Direct Investment Policy Toolkit for Sustainable Development” was presented. The toolkit is being developed by King’s College London, UNESCAP and the World Economic Forum. The toolkit provides a database of what HCMs exist in various home countries, as well as evidence on home-country effects (i.e., potential benefits) from outward FDI and mediating factors that can impact the way that HCMs are used to target outward FDI. It thus seeks to inform the selection of HCMs to achieve particular home country effects through targeting or considering mediating factors. It will be updated continuously.

### **How can IPAs in host countries take advantage of home country measures?**

Host countries can take advantage of home country measures to increase inward FDI flows. HCMs facilitate inward FDI that can contribute to sustainable development. Some HCMs target specific types of FDI that correspond with host country needs. A number of countries seem to link their outward facilitation measures to the development impact that the investment has. These are the types of HCMs that not only facilitate investment but help promote the development impact in host countries. HCMs should focus on investments linked to socio-economic needs where win-win exchanges are possible with other economies, including in sectors such as agri-tech, clean energy and fin-tech. Within focus sectors, government schemes to facilitate investments such as the immigration of skilled workers, and grants and subsidies for cross border technology collaboration would help forge more partnerships. Host and home countries can also collaborate on the provision of financial measures.

In addition, IPAs in host countries should be aware of timelines of investment missions, matchmaking services provided by home countries and seminars and information and advisory services on doing business abroad that can be used to disseminate the most recent information on investment opportunities, policies and measures in the host country. IPAs should ensure that the information available to home countries captures the most recent developments.

IPAs in host countries should not assume that foreign investors are aware of assistance measures that are provided by their home governments. IPAs in host countries should actively enquire about HCMs, to pass the information to potential investors. Since there may be cultural and language barriers, IPAs should use the help of local embassies of home countries to receive information about investment facilitation measures that are offered to outward investors.

### **The importance of including home country obligations within the WTO IFD Agreement**

The IFD Agreement should facilitate not only inward FDI but also outward FDI through transparency required from home countries. This is important not only for investors—and especially SMEs—but also for intensifying cooperation on HCMs between home and host countries, by promoting matchmaking that can be done in the home country and by the provision of updated information by host countries. The IFD Agreement should include mechanisms that will promote partnerships between IPAs from different countries that would support two-way flows of investments, leading to win-win outcomes.

In addition, the IFD Agreement should include provisions for home countries to facilitate and encourage responsible investment. Investment facilitation frameworks should not ignore the role of home countries in this regard, and hence focus not only on host countries. Sustainable FDI inherently entails the responsibility and involvement of home countries. This includes measures such that their investors operate in a manner that is sustainable and aligned with host countries’ development goals. Home countries can have clear criteria linking or making conditional their support measures (including the provision of information, loans, grants, guarantees, political risk insurance, preferential trade access) to a positive development impact in host economies or the absence of a negative impact, such as through ex ante environmental and social impact assessments.

## Capacity strengthening webinars: Incentivizing sustainable FDI

1 June 2021

The webinar was co-organized by the ITC, the DIE, the WAIPA, the GIPC, and the WEF. The webinar was held in the framework of the Investment Facilitation for Development project, jointly implemented by the ITC and DIE.

Opening remarks were provided by Rajesh Aggarwal, Chief, Trade Facilitation and Policy for Business, ITC. The webinar was moderated by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI, and included the following speakers: Ana Novik, Head, Investment Division, OECD; Evan Gabor, Graduate of Columbia Law School, J.D. 2020; Yofi Grant, CEO, GIPC, and Regional Director for sub-Saharan Africa at WAIPA; and Markus Thill, President, Africa, Robert Bosch. Concluding remarks were provided by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF.

### Highlights

The discussions during the webinar focused on the following main points, which will be elaborated further below.

- The webinar focused on investment facilitation measures that incentivize sustainable FDI, i.e., measures that directly increase the development impact of FDI. Such measures were referred to as “sustainable behavioral incentives”. These incentives can be made conditional on specific criteria, such as investors contributing to specific SDGs in order to receive incentives from the host country. Incentives can include both financial and non-financial incentives. It was mentioned that a similar approach can be adopted also by home countries by making the provision of investment facilitation measures to outward investors conditional on the development impact of such investments on host economies. Another way of incentivizing the flow of sustainable FDI and increasing the development impact of FDI includes the establishment of supplier databases that are supported by local supplier development programmes.
- Setting criteria for designating a Recognized Sustainable Investor (RSI) category was elaborated on during the webinar as a way to operationalize behavioural investment incentives, making the provision of incentives conditional on meeting certain international and national standards. An RSI category could be applied on an individual country basis for promoting sustainability standards, or it can be incorporated into an international framework such as the WTO IFD Agreement.
- Sustainable investment incentives can be integrated into the IFD Agreement in two main ways: Under the transparency of investment measures section or under the sustainable investment section.

### **Key incentives to stimulate the flow of sustainable FDI and increase the development impact of FDI**

Investment facilitation measures can be grouped into two categories. General investment facilitation measures and measures that directly increase the development contribution of FDI to the economy, such as through job creation, skills development and upgrading local suppliers, especially SMEs. The webinar focused on incentivizing sustainable FDI through investment facilitation measures provided to investors that directly contribute to development, which were referred to as “sustainable behavioral incentives”. Such incentives can be made conditional on specific criteria such as investors contributing to specific SDGs, to receive incentives from the host country. Such incentives can include both financial and non-financial incentives, such as tax relief, expediting administrative procedures, “red carpet” services, fast-tracking license approvals, special visa privileges, and providing personalized aftercare services by IPAs to investors that meet specific sustainability criteria. The webinar also addressed investment facilitation measures that can be undertaken by home countries to incentivize sustainable FDI in host countries. It was mentioned that home-economy governments are increasingly adopting guidelines for their firms to undertake sustainable FDI and make home country measures (HCMs) conditional on the development impact in host economies. Examples include making HCMs conditional on environmental and social impact assessments.

Another way of incentivizing the flow of sustainable FDI and increasing the development impact of FDI that was discussed was the establishment of local supplier development programmes and supplier databases. Investors indicated that, when deciding to enter or expand their investments, finding domestic firms to supply goods and services at the right cost, quality and volume can be difficult, and the availability of local suppliers is often an important FDI determinant, as it reduces business costs and expedites operations. Accordingly, a supplier database that would help foreign firms identify and contract with domestic firms, overcoming such information asymmetry, could play an important role in incentivizing sustainable investment. Supplier-development programmes help increase the capacity of domestic suppliers to contract with foreign firms. Such programmes would be a key complementary effort by helping to increase the number of firms that are linkage ready in the database, thus increasing the potential development benefits from investment.

### **The Recognized Sustainable Investor (RSI)**

The RSI category is one way to operationalize behavioral investment incentives. Creating a special category of RSIs could help governments incentivize investors to invest in a manner that is in line with sustainable investment goals and observe CSR guidelines and international standards of responsible business conduct. An RSI category could be applied on an individual country basis for promoting sustainability standards or it can be incorporated into an international framework, such as the IFD Agreement. A suggestion was made that, if the RSI category is included in the IFD Agreement, it should cover three issues: establishment of a set of basic global criteria that all investors must meet to qualify; allowance for country-specific sustainability characteristics established by each host country; and granting of special benefits, beyond those generally available, to qualifying investors. The global set of criteria would require investors to commit to observing intergovernmental guidelines such as the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises. In addition, investors would need to meet country-specific sustainability goals, such as prioritizing climate change issues, and promoting linkages or job creation. By meeting such criteria, the RSI would qualify for certain benefits that may not be available to non-RSIs. It was stated that both civil society and competitor firms could assist in making sure investors that are recognized as RSIs are indeed meeting the required criteria.

**Pioneering the Recognized Sustainable Investor approach in Ghana:** Ghana had, prior to adopting the RSI category, a strategic investor category that provided additional incentives to large scale investors. As Ghana was interested in promoting green investment strategies and SDGs, it started a process of aligning SDGs with incentives provided to investors within the context of Ghana. The RSI model in Ghana requires investors to meet global standards and national criteria in order to receive specific incentives that are given to RSIs.

### **Integrating sustainable investment incentives into the IFD Agreement**

It was mentioned that sustainable investment incentives can be integrated into the IFD Agreement in two main ways. Under the transparency of investment measures section, Members could commit to publish support measures offered both by host and home countries, such as through an incentive inventory, which could include sustainability criteria. The aim would be to increase transparency of investment incentives and encourage smart incentives to target sustainable FDI, while simultaneously creating more predictability and less scope for rent seeking. This information is particularly important for SMEs, which may have fewer resources to find information. Sustainable incentive measures can also be included in the sustainable investment section of the IFD Agreement. In this regard, the IFD Agreement could include a clause encouraging Members to require companies to publicize their CSR statements and their conformance with those statements. Additionally, including the RSI category within the IFD Agreement could be an effective policy tool to incentivize sustainable FDI.

## Capacity strengthening webinars: Assessing large-scale investment contracts

6 July 2021

The webinar was co-organized by the ITC, the DIE, the WAIPA, the GIPC, and the WEF. The webinar was held in the framework of the Investment Facilitation for Development project, jointly implemented by the ITC and DIE.

Opening remarks were provided by Rajesh Aggarwal, Chief, Trade Facilitation and Policy for Business, ITC. The webinar was moderated by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI, and included the following speakers: Louis T. Wells, Herbert F. Johnson Professor of International Management, Emeritus, Harvard Business School; Boris Dolgonos, Partner, Gibson Dunn; Samantha Thompson, Head of Legal Global M&A, Anglo American; and Brigitte Klein, Head, CONNEX Support Unit. Concluding remarks were made by Bostjan Skalar, Executive Director, CEO, WAIPA.

### Highlights

The discussions focused on the following main points, elaborated further below.

- Large scale investment contracts are typically very complex and require careful assessment and preparations, as they often relate to sensitive sectors such as resources and infrastructure.
- Contracts for large scale investment projects require multi-disciplinary expertise to assess and negotiate. Developing countries and especially least developed countries (LDCs) may benefit from technical assistance to assess and negotiate highly complex contracts to ensure outcomes that are win-win and sustainable. Governments that utilize technical assistance may also improve their contract assessment processes so that the processes do not become bottlenecks—the opposite of investment facilitation—for the development of investment projects.
- The importance of good contracts is critical - especially for natural resource and infrastructure projects - as they determine the distribution of benefits between governments and investors for years to come. Good contracts reduce the risks that the relationship between the parties will be disrupted, with negative consequences for both sides.
- The discussion focused on the importance of the preparatory process for negotiating contracts, starting with defining the objectives for the government, which is difficult as different ministries may have different interests. It was emphasized that it is important to have a good and multi-disciplinary negotiating team at the negotiating table that is well prepared and has a clear objective and a strategy in mind.

### **Key considerations and bottlenecks in assessing and negotiating large-scale investment contracts**

Large scale investment contracts are very complex and involve multiple stakeholders and therefore require careful assessment and preparation. Such contracts not only determine the distribution of benefits between the government and the investor for years to come, but, if poorly designed, may lead to conflicts that have negative consequences, both in terms of litigation costs and in terms of the impact on subsequent foreign investment.

From the government perspective, it was emphasized during the discussion that the most difficult negotiations are often the ones that arise internally among government agencies involved in preparing for the negotiations with the investor. Often different ministries have different priorities and, in assessing the ultimate goals of the contract, each ministry may therefore have different evaluation criteria. To facilitate such internal discussions, it is important that every ministry make its objectives clear and that such objectives are consolidated so that the government arrives at the negotiating table with unified and coherent objectives. The government should have a good negotiating team, which should not be too big. There are examples of countries that have 20-25 people on their negotiating team, which makes it impossible for each negotiator to have a voice in the negotiations. In addition, the government should understand the investor's interests, objectives, priorities, and limitations, including feasibility studies, sources of financing and limitations in providing that financing. The negotiating team should also look at the track record of the investors they are

negotiating with elsewhere, and what the investors have done in the past when they faced disputes (e.g., did they try to settle the disputes or did they rush to international arbitration).

It is important to make sure that the agency that is empowered to negotiate contracts with investors has the technical and legal skills needed for such negotiation. Developing countries and LDCs often have capacity gaps when it comes to negotiating large scale contracts and ensuring that contracts have sustainable development impacts. Such gaps may include legal, financial, business, tax, and sector specific expertise. It was mentioned that, because of the lack of expertise, government officials may be hesitant when negotiating contracts. For example, officials may be afraid to conclude such agreements not only because of national consequences, but because of personal consequences, as poorly negotiated contracts may be viewed as evidence of corruption. During the webinar, some government representatives also mentioned that they have information gaps regarding the implications of investment projects and that they lack the capacity to perform risk assessments. In addition, they indicated that investors do not share relevant information with them.

During the webinar the CONNEX Support Unit was introduced. It has a network of experts that provide technical assistance. CONNEX has accumulated evidence-based experience over the past four years by helping 16 countries in Africa, South America, and Asia to prepare for, and assist in, negotiations of investment contracts with foreign investors, thus facilitating the negotiations process and arriving at win-win outcomes.

It was also mentioned that, for assessing specific terms in investment contracts, governments can benchmark contracts against international principles, relying for example on sustainable development goals and the OECD's Development Guiding Principles for Durable Extractive Contracts, which comprise objectives in negotiating fair contracts for both host countries and investors.

It was indicated that the contract negotiating process usually takes 9-18 months, but this is a rough estimation and the process can even take a few years, depending on the nature of the contract. It is important that the expectations for the duration of the contract negotiations be reasonable and that the timetable be transparent and known to both parties. Delays are often due to lack of preparation by government officials. Because investors are profit focused, they are usually well prepared with a financial model and have a negotiating team that has done similar types of negotiations before. The government many times comes to the negotiating table with multiple competing objectives, and resolving those competing objectives almost necessarily takes more time. Additionally, although the government should have a long-term view of what is best for the national interest, it may also be driven by short-term political considerations and can be influenced by what the media may say, which can delay the negotiation process.

### **The role of IPAs in assessing and negotiating large-scale investment contracts**

It was suggested that IPAs should have a minimal role in negotiating contracts as IPAs are responsible for attracting investors; as such, they usually do not have the technical expertise that is required for negotiating a contract in a specific industry. In addition, there is a potential conflict of interest as IPAs are usually evaluated on how much investment they attract. This gives them an automatic bias in favour of concluding an agreement even if the terms are less favourable for the government.

This does not mean that IPAs should not be involved in the assessment and facilitation process. The attractiveness of the country to other investors is affected by such negotiations. If negotiations fail, IPAs should understand why they failed so that, when the agency makes new efforts to facilitate investments, it understands what the problems were and seek investors that do not raise those problems. In addition, a better understanding of large-scale investment projects can help IPAs when providing support to various government agencies involved in the investment project once established, as well as investors when facilitating the investment process.

### **Facilitating the assessment of large-scale investment contracts: a corporate perspective**

Both investors and governments have an interest in negotiating beneficial contracts for both sides, in the interest of durable contracts. No party wants to end up in an arbitration or litigation process. When investors take advantage of unexperienced governments when negotiating contracts, it breeds mistrust down the line.

It can also impact the investor's reputation, not only with the government, but with other stakeholders, like communities. Consequently, it is important that both sides have the right people in the room, including the people with the subject matter expertise and the cultural expertise. Investors need to make sure that the negotiators from their side know the jurisdiction well, speak the language and understand the political environment, including the relationships among the different ministries. To the extent that the assessment and negotiation of investment projects can be facilitated, that is desirable.

## Capacity strengthening webinars: Implementing the IFD Agreement: What are the next steps?

17 September 2021

The webinar was co-organized by the ITC, the DIE, the WAIPA, the GIPC, and the WEF. The webinar was held in the framework of the Investment Facilitation for Development project, jointly implemented by the ITC and DIE.

Opening remarks were provided by Rajesh Aggarwal, Director (oic), Division for Market Development, ITC. The webinar was moderated by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF, and included the following speakers: João Luis Rossi, Deputy Special Secretary of Foreign Trade and International Affairs, Ministry of Economy, Brazil; Bostjan Skalar, CEO, WAIPA; Lisa Schroeter, Global Director, Trade and Investment Policy, Dow, USA; and Philippe Isler, Director, Global Alliance for Trade Facilitation. Concluding remarks were provided by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

### Highlights

As countries seek to restart their economy following the COVID-19 pandemic, governments at the national, regional and international levels, are creating investment facilitation frameworks to increase foreign direct investment (FDI) flows. The discussion focused on the following practical steps that should be taken in order to implement investment facilitation measures, elaborated further below.

- Institutional infrastructures and mechanisms should be put in place to implement investment facilitation measures. Such infrastructures and mechanisms should have high level support within the government and bring together all relevant stakeholders to ensure the facilitation of sustainable FDI.
- Stakeholder consultations should be established throughout the investment facilitation process, as investors and other stakeholders can provide practical inputs to ensure that the development of investment facilitation measures, and their subsequent implementation, correspond to the needs of stakeholders.
- Stakeholder consultations mechanisms should include multinational enterprises (MNEs), civil society representatives and the local community, to develop a FDI strategy that facilitates sustainable FDI.
- The implementation of investment facilitation measures requires technical assistance and capacity building for developing countries, especially LDCs. Technical assistance is also required to establish national investment committees and institutional frameworks that will be responsible for the implementation of investment facilitation measures, in addition to the measures themselves.
- The implementation of investment facilitation measures requires more technical assistance than trade facilitation measures, as investment facilitation does not only deal with obstacles at the border, but also with regulatory frameworks behind the border, the entire life cycle of an investment and all levels of government.

### The next steps for implementing investment facilitation measures

Institutional infrastructures at the national level should be put in place to implement investment facilitation measures. Such infrastructures should have high-level support within the government and bring together all relevant stakeholders to ensure the facilitation of sustainable FDI. In particular, national investment committees involving all relevant stakeholders should be established. The establishment of such committees requires – especially in developing countries and LDCs – technical assistance and capacity building.

It was noted that many IPAs do not have the capacity to establish a comprehensive FDI strategy that not only facilitates FDI flows in general but facilitates sustainable FDI in particular. Accordingly, IPAs need to establish strong relationships within the government, with the private sector, civil society and with the local communities that may be affected, to develop such a strategy. In this regard, governments should establish a whole-of-government approach, to ensure the implementation of investment facilitation provisions. IPAs

have the responsibility to connect the dots and make sure that investors talk with the right people and get the information they need from relevant governmental agencies.

During the webinar, it was emphasized that stakeholder consultations should be incorporated throughout the investment facilitation process, including during the negotiation phase of investment facilitation agreements, such as the WTO IFD Agreement, as stakeholders can provide practical inputs to ensure that the development of investment facilitation measures and their subsequent implementation reflect the interests of stakeholders. It was also emphasized that international investment agreements should provide for stakeholder consultation mechanisms that can assist in operationalizing the implementation of investment facilitation measures. Such mechanisms should bring together the public and private sectors and can take different forms, such as national investment committees or a task force for regulatory cooperation. Public-private partnerships can establish action agendas, assist in risk assessment processes and facilitate knowledge sharing of commercial opportunities and best practices for facilitating sustainable investment.

When establishing stakeholder consultations mechanisms, all the relevant stakeholders should be included. For instance, it is important that representatives from all government levels take part in the process, from the central government to the city level, including national and sub-national IPAs. In addition, it is important to involve the private sector and civil society. Such deliberations should include also efforts from all sides to facilitate and promote sustainable FDI. Mechanisms to track the progress should be established as well.

### **Operationalising facilitation through a global alliance and public-private projects: what investment facilitation can learn from trade facilitation**

The idea behind the Global Alliance for Trade Facilitation (GATF) was the realisation that there is a need not only to consult the private sector but to also bringing traders into the process of identifying and implementing the right measures, i.e., those that make a difference to facilitating trade in practice. The GATF is a public-private partnership that was established as part of the implementation process of the TFA. It provides technical assistance in the form of practical projects that assist in the implementation of the TFA. In this regard, the TFA provides the benchmark for the implementation of trade facilitation measures and enables a political buy-in from WTO Members. It was noted that it was important to bring the private sector into the GATF to support the implementation process as it brings efficiency and practical aspects to ensure that the implementation process is outcome oriented and achieves measurable, tangible results. It was mentioned that, because the implementation process under the TFA takes time, it is important that the process includes interim milestones to show stakeholders that progress is being made. Such a milestone approach should also be undertaken during the implementation process of the IFD Agreement. Additional lessons learned from the implementation of the TFA were to prioritize the implementation process and to move on from approaches that are not working.

### **The need for technical assistance and capacity building for the implementation of investment facilitation measures**

The implementation of investment facilitation measures requires technical assistance and capacity building for developing countries and especially LDCs. Technical assistance is specifically required to establish national investment committees and institutional frameworks that will be responsible for the implementation of investment facilitation measures. It was emphasized that the implementation of investment facilitation measures requires more technical assistance than the TFA, as it not only deals with obstacles at to border, but also regulatory frameworks behind the border, the entire life cycle of investments, as well as all levels of government, from the central level down to the city level.

In addition, it was noted that, from the donor perspective, it is important to establish tracking and notification mechanisms that will enable actors to demonstrate the progress made and the benefits gained from implementing investment facilitation measures. Such mechanisms will assist in getting the support and funding needed for technical assistance and capacity building.



## Capacity strengthening webinars: The role of partnerships in facilitating investment

12 October 2021

The webinar was co-organized by the ITC, the DIE, the WAIPA, the GIPC, and the WEF. The webinar was held in the framework of the Investment Facilitation for Development project, jointly implemented by the ITC and DIE.

Opening remarks were provided by Mohammad Saeed, Chief (oic), Trade Facilitation and Policy for Business, ITC. The webinar was moderated by Matthew Stephenson, Policy and Community Lead, International Trade and Investment, WEF, and included the following speakers: Jeroen Carl Maria Nijland, Director of Investor Relations & Special Advisor, Investment Promotion Agency Qatar (IPA Qatar) and former head of the IPA of the Netherlands and Chair of the OECD IPA Network; Philippe Yvergnaux, Director of International Cooperation, Business France; Hanna Tatarchenko Welgacz, Manager, Innovation Investment Division, Brazilian Trade and Investment Promotion Agency (APEX Brasil); and Esaie Ntidendereza, Head of Division, Investment Promotion, Burundi Investment Promotion Authority (API). Concluding remarks were provided by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

### Highlights

The discussions focused on the following main points, elaborated further below.

- The webinar addressed the different forms partnerships can take, such as partnerships between IPAs (or outward investment agencies) from different economies, public-private partnerships and partnerships between governments and international organizations. It was mentioned that IPA-IPA cooperation is not easy, because IPAs can at times be in competition, but they also have common interests that can be identified to facilitate cooperation.
- During the webinar, two main categories for cooperation were identified, partnerships that support knowledge/experience sharing and thus capacity building, as well as partnerships that support two-way investment flows.
- It was emphasized that partnerships should not only promote investment in general but focus on facilitating sustainable FDI.
- International investment facilitation agreements can be vehicles to develop partnerships by including provisions that promote such partnerships.

### How can partnerships work in practice?

Against the backdrop of plunging global FDI flows and the need for sustainable FDI for recovery, countries are increasingly adopting investment facilitation frameworks as well as entering into regional and international initiatives to facilitate investment, such as the potential WTO Investment Facilitation for Development (IFD) Agreement. To successfully implement such frameworks, partnerships among various groups are central.

The webinar addressed how partnerships can take different forms and how they can work in practice. Partnerships can include public-private partnerships, IPA-to-IPA partnerships, IPA-outward investment agency partnerships, organisation-to-organisation partnerships, and combinations of the above. Partnerships can be codified through memoranda of understanding and implemented through joint activities identified by the parties. In general, the areas of cooperation include two main categories: partnerships that support knowledge and experience sharing and thus capacity building, and partnerships that support two-way FDI flows. It was emphasized that the establishment of partnership mechanisms may require technical assistance.

Partnerships that support capacity building include, for instance, peer-to-peer learning on effective institutional arrangements or measures. In this regard, IPA-IPA cooperation is not easy, given that IPAs can at times be in competition. However, it was noted that IPAs from different economies also have common interests and not all IPAs are competitors. For example, cooperation can easily take place between economies that are far away from each other or have different economic structures, or between IPAs in

developed countries and developing countries. Such cooperation can involve the sharing of best practices, as well as technical assistance and capacity building. It was noted that the willingness of IPAs to cooperate with each other may also depend on the topic for cooperation. For example, there may be more willingness to discuss customer relationship management systems or other more analytical or technical issues rather than investment facilitation insights.

It was also mentioned that, due to the COVID-19 pandemic, there have been drastic changes in the way IPAs operate. Accordingly, because IPAs are seeking guidance on how to adapt their operations, partnerships can provide relevant insights and provide conceptual guidance on issues such as technology and geopolitics. In addition, there are methodological questions that IPA networks can assist with, and do not involve issues that may result in competition. For example, the Organisation for Economic Co-operation and Development (OECD) IPA network analysed econometric methods on how IPAs could demonstrate the added value of FDI to an economy, a methodological question that every IPA faces but an issue that does not engage competitive interests of IPAs for securing potential FDI flows.

Regarding partnerships that facilitate two-way investments, cooperation can include activities such as matchmaking between firms and the identification of information on investment opportunities, exchange of information on target sectors, bankable projects, joint investment projects, and alignment of host and home country measures so that these both push and pull FDI flows in a coordinated way. It was suggested that such cooperation can take place between IPAs (or other agencies) that are responsible for promoting outward FDI (known as outward investment agencies) and IPAs that are responsible for attracting inward FDI.

It was emphasized that partnerships should not only promote FDI in general, but focus on facilitating sustainable FDI. The sustainable nature of the investment could be achieved through joint efforts of investors, home country governments, host country governments, and IPAs throughout the investment cycle, to ensure that sustainability issues are given full consideration in decision making.

Another form of cooperation covered were public-private partnerships. Public-private partnerships can identify issues that need to be tackled through investment facilitation, support policy development and implementation and monitor the effectiveness of measures in practice. Governments should focus on constructive stakeholder relationships that assist in shaping a friendly investment climate, ensure that problems can be dealt with expeditiously, and that enable businesses to operate in a responsible manner. Such relationships can be facilitated by establishing and maintaining mechanisms for regular consultations and effective dialogues and collaboration with stakeholders, to identify and address issues encountered by investors and local communities.

### **International investment facilitation agreements as vehicles for facilitating partnerships**

It was noted that international investment facilitation agreements, including the IFD Agreement, should encourage cooperation and partnerships, and should include provisions that identify concrete areas for cooperation between economies through partnerships, especially to achieve the sustainable development goals. Examples of such provisions are joint committees that promote two-way flows of sustainable FDI or provisions that provide for joint policy advocacy or capacity building for designing investment facilitation frameworks.

It was mentioned that the IFD Agreement that is currently being negotiated among over 100 economies contains specific provisions on supporting cooperation between investment authorities. These provisions currently include exchange of information and sharing of experiences regarding the implementation of the IFD Agreement; exchange of information with respect to investment opportunities, the collection and compilation of data and statistics relating to FDI; the promotion of facilitation agendas with a view towards increasing investment for development; and the promotion of business partnerships and the creation of information networks.

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