

# Investment Facilitation for Development

A toolkit for policymakers



In collaboration with

d.i.e

Deutsches Institut für  
Entwicklungspolitik



German Development  
Institute

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A toolkit for policymakers

## About this publication

Investment facilitation is key to a post-pandemic recovery and to achieving the Sustainable Development Goals. This publication combines insight and analytical expertise relevant to negotiating and implementing investment facilitation for development. It is intended to support the WTO negotiation on this topic, as well as unilateral, bilateral and regional efforts to facilitate sustainable investment flows.

The publication includes lessons from negotiating and implementing relevant WTO agreements, an inventory of investment facilitation measures, as well as the proceedings of some 30 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.

**Publisher:** International Trade Centre (ITC)

**Title:** Investment Facilitation for Development: A toolkit for policymakers

**Publication date and place:** Geneva, April 2021

**Page count:** 182

**Language(s):** English

**ITC Document Number:** TFPB-21-81.E

**Citation:** Berger, A., and Sauvant, K., eds (2021). *Investment Facilitation for Development: A toolkit for policymakers*. International Trade Centre, Geneva, Switzerland.

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For more information on Investment Facilitation for Development, see <https://www.intracen.org/itc/Investment-Facilitation-for-Development/>

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## Foreword

The pandemic has touched all corners of modern life, including the trade and investment landscape.

The health and economic impact, coupled with extended lockdowns, have contributed to a sharp decline in flows of foreign direct investment (FDI). Global investment flows contracted by 42% in 2020 compared to 2019, according to the United Nations Conference for Trade and Development, and we expect 2021 to also be a challenging period.

This is of concern because a fundamental component of any global and resilient recovery – and, beyond that, the achievement of the Sustainable Development Goals – depends in no small measure on FDI.

The global community – at the local, regional and multilateral levels – needs to fast-track actions to create an environment that facilitates investment. This includes supporting countries to build business ecosystems for domestic and foreign investors to focus on policy infrastructure and innovation that benefits all firms, including micro, small and medium-sized enterprises.

But simply ‘just more’ investment is not enough. We need more inclusive, sustainable and responsible FDI that will help countries recover from the pandemic in a way that facilitates the economic, environmental and social transition required to achieve the Sustainable Development Goals by the end of this decade.

The Investment Facilitation for Development discussions at the World Trade Organization (WTO) aim to create a multilateral framework for a more transparent, efficient and investment-friendly business climate. The focus has been on making it easier for foreign investors to invest, conduct business and expand their existing investments, in a manner that advances sustainable development.

A successful outcome to these discussions at the WTO can inject confidence into the global economy and revitalize investment. Enhancing cooperation, transparency, streamlining procedures, improving regulations, and encouraging investment that directly contributes to development are important principles to take into account. The successful WTO Trade Facilitation Agreement, with its flexible implementation periods and capacity-building elements, can serve as an important template to consider.

Our joint project seeks to strengthen the capacity of policymakers in developing countries to engage constructively in these discussions at the WTO. It does this by bringing the ground-level experiences of investment promotion agencies, investors and investment service providers, as well as analytical expertise, to the attention of negotiators and by promoting public discussions of these issues. Particular emphasis has been placed on the sustainable development dimension of investment facilitation.

This publication is a resource for negotiators, policymakers and investment promotion agencies. It distils key policy insights from project activities and addresses legal, economic and political aspects of the WTO discussions. It also serves as a capacity-building tool to help on this issue in negotiations of regional and bilateral agreements that address investment facilitation. It is, in fact, also useful for investment promotion agencies and any institutions seeking to facilitate FDI flows.

Working with stakeholders in the FDI space, we stand ready to expand our joint collaboration through empirical studies, capacity-building needs assessments, and the design of institutional and regulatory reforms, to encourage higher flows of sustainable FDI for sustainable development.



Pamela Coke-Hamilton  
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## Acknowledgements

We are grateful to all those who have contributed to the activities of this project for the time they have dedicated and the expertise they have shared.

The project's activities benefited from the cooperation and feedback of colleagues in various organizations. These include:

African Continental Free Trade Area Secretariat

African Union Commission

Association of Southeast Asian Nations Secretariat

Bertelsmann Stiftung

Economic and Social Commission for Asia and the Pacific

Economic Commission for Africa, Economic Commission for Latin America and the Caribbean Organisation for Economic Co-operation and Development

Shridath Ramphal Centre for International Trade Law, Policy and Services of the University of the West Indies' Cave Hill Campus in Barbados

World Association of Investment Promotion Agencies

World Bank Group

World Economic Forum

World Trade Organization

This publication was compiled and edited by Axel Berger, Senior Researcher, German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE) 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, Rajesh Aggarwal, Chief, Trade Facilitation and Policy for Business (both ITC), Axel Berger and Karl P. Sauvant.

Thanks also to Natalie Domeisen and Anne Griffin (both ITC) oversaw quality and production management, Janet Hill, who edited the document, Franco Iacovino (ITC), who provided graphic support and Serge Adeagbo (ITC), who provided the printing support.

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## About the project

The investment facilitation negotiations at 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 need 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 implemented with the World Economic Forum;
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 an international agreement;
4. Delivering a series of capacity-building workshops and regional roundtables to 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, co-organized with the World Association of Investment Promotion Agencies (WAIPA) and the WEF for representatives in investment promotion agencies and government officials.
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. For further information, see <https://www.intracen.org/itc/Investment-Facilitation-for-Development/> or contact Rajesh Aggarwal, Chief, Trade Facilitation and Policy for Business, or Quan Zhao, Trade Policy Adviser, ITC.

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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
IFF4D	Investment Facilitation Framework 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

This overview synthesises what has been learned from more than 20 capacity-building workshops and consultations with stakeholders (governments, international organizations, investment promotion agencies, private sector, civil society and academia) conducted in the framework of the ITC-DIE project on Investment Facilitation for Development (parts of the project are jointly organized with the World Economic Forum).<sup>1</sup>

### Cross-cutting issues

#### Maximize the contribution of an international framework for sustainable development

- Facilitate not only more FDI, but also more sustainable FDI through the inclusion of facilitation measures aimed at increasing the development impact of FDI, to fully reflect the 'for development' purpose of the Investment Facilitation Framework for Development (IFF4D);
- Request that home countries indicate their outward FDI support measures, including measures to encourage sustainable FDI and observe corporate social responsibility (CSR) standards. Investors, too, should be encouraged to make their commitments transparent.

#### Interrelations with other agreements

- Ensure maximum complementarity and avoid inconsistencies with existing WTO agreements (GATS, TFA) and ongoing negotiations (domestic regulations), e.g. by creating mechanisms for the exchange of views of the respective chairpersons;
- Insulate the IFF4D from international investment agreements, and especially their dispute-settlement provisions, through appropriate treaty-interface clauses, to avoid the use of the IFF4D in Investor-state dispute settlement (ISDS) cases.

### New investment facilitation measures

This section lists actionable investment facilitation measures emerging from the stakeholder consultations. Some may not yet have been considered in WTO negotiations and may be useful for investment facilitation. They are grouped into general investment facilitation measures and measures to increase the development contribution of FDI. Formulations for some of them are in the inventory on the [project website](#).

#### General investment facilitation measures

- Maintain a list of support measures offered to inward investors, through online portals and notification to 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 expatriates by making available e-visas or 'green channels';
- Enable 'lite processing' for SME applications for establishment;
- Grant permits or licences automatically if no government action is taken within statutory time limits: 'silence is consent';
- Establish aftercare mechanisms to help investments take place and operate smoothly, and to deal with issues that arise;

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<sup>1</sup> This summary was developed before the Inventory was made available to the WTO Structured Discussions, September 2020; some of the measures included here have since been proposed and discussed by Delegates.

- Provide for risk-based approvals as part of authorization 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 'early warning system' and establish time frames for addressing grievances;
- Establish a mechanism for public-private dialogues to inform regulation and implementation, such as regular quarterly meetings or online portals;
- Facilitate cooperation among sub-national IPAs;
- Make publicly available lists of support measures for outward investors through online portals and notification to WTO;
- Publish information on requirements and procedures for outward investment, if any, to assist interested parties.

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

- Publish internationally recognized guidelines/standards of responsible business conduct and strongly encourage investors to observe these guidelines, e.g. by requesting in application forms to acknowledge that the 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 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 that have 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 needs assessments;
- Provide clear guidelines on CSR and responsible business conduct to outward investors; for sectors with high development/environmental sensitivities, such investor education could be made mandatory;

- Establish clear criteria linking home-country support measures to the observation of internationally recognized 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.

## Negotiation process and implementation

### Assure inclusive and transparent negotiation process

- Support the participation of delegates and experts from developing countries (especially LDCs), to allow all WTO Members to actively participate in the negotiations;
- Support exploratory needs assessments to identify priority facilitation measures and implementation challenges that will require attention;
- Make the Consolidated Text public and provide opportunities for stakeholders (e.g. investors, civil society, academia) to comment on it to help build a consensus;

### Support implementation

- Establish a sufficiently large technical assistance and capacity building programme to assist developing countries (especially LDCs) in implementing an IFF4D, following the innovative approach of TFA, which links the implementation of certain provisions to technical assistance and capacity building;
- Provide technical assistance and capacity building for needs assessments during the implementation phase to identify technical assistance and capacity building needs in light of Members' sustainable development strategies;
- Provide for the establishment of national investment facilitation committees to help coordinate the domestic actors involved and obtain stakeholder input;
- Ensure that the WTO Investment Facilitation Committee becomes a knowledge hub for sharing best practices and policy learning among IFF4D signatories to support implementation;
- Focus less on formal dispute settlement but provide procedures to identify implementation bottlenecks;
- Agree on a built-in treaty-mandated future work programme to ensure that, among others, special attention is given to facilitating sustainable FDI and CSR;
- Establish a global IPA market platform where IPAs can look for benchmarking information and contacts and list bankable projects.

## 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 negotiators, policymakers and investment promotion agencies 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 IFF4D would need to command a consensus among the WTO Membership. Moreover, by seeking to develop a generic set of investment disciplines straddling WTO's goods-services divide, the negotiations inevitably overlap with provisions under GATS, while introducing concepts used in merchandise trade under 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 international investment agreements (IIAs), an IFF4D 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 IFF4D 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 Trade Facilitation Agreement (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 IFF4D. The authors suggest that elements of what was done in the TFA can be applied in the IFF4D negotiations and notes differences between the two areas; these have implications for both ongoing negotiations and the design of potential provisions of an IFF4D.

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

This inventory of measures is a tool to help participants engage in the IFF4D negotiations. 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>2</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>3</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>2</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>3</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>4</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>5</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 framework for development (IFF4D) 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.

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<sup>4</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>5</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)

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-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>6</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>7</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>8</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>9</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>10</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.

<sup>6</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&CatalogueList=108652](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueList=108652)

<sup>7</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>8</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>9</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>10</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 (CFAI), 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 IFF4D 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 IFF4D 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 IFF4D.<sup>11</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).

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<sup>11</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

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 *tel quel* regardless of any country- or sector-specific considerations (see Box 1).

### 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).

These 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>12</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 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>13</sup>

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.

<sup>12</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 15.

<sup>13</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)

## 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.)

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>14</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 IFF4D, 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>15</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>16</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.

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<sup>14</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>15</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>16</sup> See, for example, Adlung, R and Soprana, M (2013). SMEs in services trade – A GATS perspective. *Intereconomics*, 48(1), 41-50.

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.

### Scope of existing disciplines

#### Notification and information<sup>17</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>18</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 IFF4D 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

<sup>17</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>18</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.

GATS Article VI.4 mandate,<sup>19</sup> with the stated aim of incorporating a reference paper with such disciplines into their services schedules by the 12th Ministerial Conference.

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>20</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>21</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.

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<sup>19</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)

<sup>20</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>21</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)

An IFF4D 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>22</sup> the readiness to address incentive-related issues in the current context should not be overrated.

### 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, 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>23</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>24</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>25</sup>

<sup>22</sup> For a more detailed discussion, see Sauv , 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.

<sup>23</sup> Sauv  & Soprana (2018), *op. cit.*

<sup>24</sup> See Sauv , P. (2002). Completing the GATS framework: Addressing Uruguay Round leftovers. *Aussenwirtschaft*, 57(3), 310-341.

<sup>25</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

## 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 licences.<sup>26</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>27</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>28</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.

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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.

<sup>26</sup> Seventy-three notifications were received between January 1995 and December 2019, of which 14 from Switzerland and 10 from Australia.

<sup>27</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>28</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.'

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 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>29</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>30</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>31</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.

<sup>29</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>30</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&CatalogueIdList=3671,34022,23146,20088,5079,22853,14218,24805&CurrentCatalogueIdIndex=7&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=3671,34022,23146,20088,5079,22853,14218,24805&CurrentCatalogueIdIndex=7&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)

<sup>31</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.

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 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 Sauvants, the SDGs have become the lodestar of international economic policy.<sup>32</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 IFF4D 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

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<sup>32</sup> Sauvants, K. P. (2019). Promoting sustainable FDI through international investment agreements. *Columbia FDI Perspectives*, No. 251.

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 IFF4D 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>33</sup> current 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>34</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 IFF4D, would deviate from the respective GATS definition and those of many BITs and PTAs;<sup>35</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 IFF4D 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

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<sup>33</sup> See, e.g. Hufbauer, G. and Stephenson, S. (2014). The case for a framework agreement on investment. *Columbia FDI Perspectives*, No. 116; Sauvé, 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.

<sup>34</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>35</sup> As noted by Diebold (*supra* n 11, 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.

products/processes under either GATT or GATS (e.g. 3D printing, contract manufacturing).<sup>36</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.

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>37</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>36</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.

<sup>37</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 framework for development (IFF4D) has been on the rise among the members of WTO.<sup>38</sup> Although there is no uniform definition of ‘investment facilitation’ at the global level,<sup>39</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>40</sup>

Discussions on investment facilitation in WTO have been ongoing since the 11th Ministerial Conference in 2017. Since September 2020, formal negotiations on a multilateral agreement on an IFF4D have commenced and participating WTO Members hope to achieve a concrete outcome by the 12th Ministerial Conference, scheduled for next year.<sup>41</sup>

A number of proposals for an IFF4D have been submitted to WTO.<sup>42</sup> While the form and contents of an IFF4D are yet to be negotiated, parties to the negotiations hope to make it a multilateral agreement under the WTO umbrella<sup>43</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>44</sup>

Most WTO Members maintain a number of international investment agreements (IIAs), including BITs and investment chapters of FTAs.<sup>45</sup> Naturally, they will be bound by both an IFF4D 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 IFF4D interrelate with IIAs?

Bearing this question in mind, this chapter aims to analyse how to construct a proper IFF4D-IIA relationship, with the goal of insulating potential IFF4D 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 IFF4D remain to be negotiated, there is a consensus that an IFF4D should consider measures that aim to improve regulatory transparency and predictability, streamline and speed up

<sup>38</sup> WTO (2017). *Joint Ministerial Statement on Investment Facilitation for Development*. WTO document WT/MIN (17)/59.

<sup>39</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>40</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>41</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>42</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=Script&DataSource=Cat&Query=%40Symbol%3dINF%2fIFD%2f\\*%26DisplayContext=popup&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%2fIFD%2f*%26DisplayContext=popup&languageUIChanged=true)

<sup>43</sup> It has also been proposed that an IFF4D 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>44</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>45</sup> UNCTAD (2020). *International Investment Agreement Navigator*. UNCTAD website. Last accessed on 10 March 2021 from <https://investmentpolicy.unctad.org/international-investment-agreements>

administrative procedures, and enhance international cooperation; and, on the other hand, it should exclude issues related to market access, investment protection and ISDS from its ambit.<sup>46</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>47</sup>

The above list of investment facilitation measures, although not exhaustive, provides a helpful basis for not only the negotiation of an IFF4D, but also an assessment of states' existing investment facilitation commitments. In fact, many investment facilitation measures listed and envisaged for an IFF4D 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>48</sup>

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<sup>46</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>47</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>48</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*

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 IFF4D.

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>49</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 IFF4D. For instance, in light of the frequent appearance of transparency provisions in IIAs and the growing convergence of the contents of these provisions,<sup>50</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 IFF4D 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 IFF4D.

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>51</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 IFF4D. In fact, Brazil has put forward a concrete IFF4D proposal at WTO.<sup>52</sup>

An IFF4D 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 IFF4D could be classified into one of the following scenarios:

- a. An IFF4D is 'IIA-identical' if the obligations in the IFF4D and those in the IIA are identical or substantively similar;
- b. An IFF4D is 'IIA-plus' if the obligations in the IFF4D are greater or at a higher level than those in the IIA;
- c. An IFF4D is 'IIA-minus' if the obligations in the IFF4D are fewer or at a lower level than those in the IIA;
- d. An IFF4D is 'IIA-conflicting' if the obligations in the IFF4D conflict with those in the IIA.

In scenario A, although states are subject to both an IFF4D and an IIA, they are actually subject to the same or similar investment facilitation obligations. In this scenario, the two instruments are unlikely to be interrelated. In scenarios B, C and D, as states are subject to different obligations under an IFF4D and an IIA on a same subject matter, constructing a proper IFF4D-IIA relationship seems necessary. Furthermore,

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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/>

<sup>49</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>50</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>51</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>52</sup> WTO (2018). Structured discussions on investment facilitation. *Communication from Brazil*. WTO document JOB/GC/169.

for the purpose of an IFF4D, 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 IFF4D 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 IFF4D-IIA relationship when developing an IFF4D. Since IIAs are highly decentralized at the global level, the IFF4D-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 IFF4D.

## Importation of obligations between an IFF4D and IIAs

The construction of a proper IFF4D-IIA relationship relies heavily on how potential subject-matter overlaps between an IFF4D and IIAs are dealt with, especially how IIA-inconsistent obligations in an IFF4D (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 IFF4D 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>53</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>54</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 IFF4D 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>55</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 IFF4D was a treatment, was no less favourable, and was applied in like circumstance.<sup>56</sup> Some MFN clauses include exceptions, such as economic integration, government procurement and taxation exceptions.<sup>57</sup> These

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<sup>53</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>54</sup> See, e.g. United States Model BIT (Bilateral Investment Treaty) 2012 Annex B art. 4.b.

<sup>55</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>56</sup> See UNCTAD, *supra* note 16, at 23.

<sup>57</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).

exceptions could help prevent certain IFF4D obligations that fall into the exceptions from being imported to an IIA system through the MFN clause.

Importation of IFF4D 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>58</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>59</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>60</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 IFF4D 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 IFF4D 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 IFF4D or an IIA. Thus, a major aspect of a proper IFF4D-IIA relationship is to regulate the mutual importation of obligations between an IFF4D 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 IFF4D 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 IFF4D obligations to the IIA system, especially through ISA.

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

An IFF4D and IIAs are enforced through different dispute settlement regimes. As an IFF4D is likely to be a multilateral or plurilateral agreement under WTO, disputes under an IFF4D 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>61</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>62</sup>

<sup>58</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>59</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>60</sup> See, e.g. Article 7.2, Germany-Lebanon BIT (1997); Article 8.2, German-Nigeria BIT (2000).

<sup>61</sup> Article 23, WTO DSU.

<sup>62</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>63</sup>

The fact that IIAs and an IFF4D share subject-matter overlaps implies that a state regulatory measure related to investment facilitation could fall within the ambit of both an IFF4D 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>64</sup> At this juncture, several scenarios could arise.

### Three dispute scenarios

Scenario A: A dispute is submitted to WTO as both an IFF4D 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>65</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 IFF4D 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>66</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>67</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>68</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>69</sup>

<sup>63</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%2082020-1%20Edition%29%20ENG.pdf>, at 7.

<sup>64</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>65</sup> Article 1, WTO DSU.

<sup>66</sup> Article 3.1, the Act. Last accessed on 10 March 2021 from <https://www.legislation.gov.au/Details/C2011A00148>

<sup>67</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>68</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>69</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>70</sup> but it did not expressly address the issue of dispute moving 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>71</sup>

Scenario C: A dispute is submitted to both ISA as an IIA claim by an investor, and to WTO as an IFF4D 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 IFF4D 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>72</sup>

Similarly, an indirect expropriation (IE) clause requires that states not take regulatory measures that could amount to expropriation of foreign investments.<sup>73</sup> Depending on their wording, both FET and IE clauses could serve as a linkage between an IFF4D and an IIA, since the same regulatory measure of a state could be pursued as an IFF4D 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>74</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>75</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>76</sup>

Further, several WTO Members initiated disputes in WTO against Australia, claiming violations of several WTO agreements.<sup>77</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.

<sup>70</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>71</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>72</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/unctadaddiaeia2011d5\\_en.pdf](https://unctad.org/en/Docs/unctadaddiaeia2011d5_en.pdf)

<sup>73</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>74</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>75</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>76</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>77</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)

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 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>78</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>79</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 IFF4D with IIAs. While MFN and umbrella clauses could create obligation importation from an IFF4D 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 IFF4D-IIA relationship should aim at disallowing obligation importation and insulating IFF4D claims from ISA. Ideally, these issues could and should be addressed by both IIAs and an IFF4D concurrently. Yet, as a systematic revision of IIAs seems impossible due to their decentralization, it seems only feasible for an IFF4D to address these issues.

It is necessary for WTO Members to consider incorporating proper treaty interface clauses in an IFF4D for disallowing obligation importation and insulating IFF4D claims from ISA.<sup>80</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 IFF4D 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 IFF4D, which could reaffirm the subject-matter coverage of the IFF4D and separate the IFF4D 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>78</sup> Article 8.10, Comprehensive Economic and Trade Agreement (CETA).

<sup>79</sup> See, e.g. Article 4 (b), Annex B, 2012 US Model BIT.

<sup>80</sup> See Bermann, G., Calamita, N. J., Chi, M. and Sauvant, 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 IFF4D, which could limit the function of an MFN clause from importing an IIA obligation to the IFF4D 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>81</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>82</sup> If a similar MFN restriction clause is incorporated in an IFF4D, such a clause could help prevent IIA obligations from being imported to the IFF4D system.

Such an MFN restriction clause has limits. As investment facilitation obligations in an IFF4D are likely to be IIA-plus, it does not make good sense to import IFF4D-minus obligations in an IIA to the IFF4D system. Rather, importation of IIA-plus obligations in the IFF4D 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 IFF4D, 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 IFF4D obligations from being imported to an IIA system.

Alternative C: States should also consider inserting an ‘insulation clause’ in an IFF4D, which reaffirms that IFF4D 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:

<sup>81</sup> Article 2.4.5, EU-Vietnam IPA.

<sup>82</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 IFF4D, 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 IFF4D to be insulated from IIAs, despite their subject-matter overlaps. It could especially help prevent IIA-plus obligations in the IFF4D from being imported to an IIA system through the MFN and umbrella clauses in the IIA, because importation of IFF4D 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 IFF4D, e.g. to prevent alleged IIA violations from being treated as IFF4D 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>83</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 IFF4D, it could insulate IIA claims from being treated as IFF4D claims, thus preventing potential dispute roving from ISA to the WTO. Such a clause, however, could not insulate IFF4D 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 IFF4D claims to be treated as IIA claims, thus potentially preventing dispute roving from WTO to ISA. Similarly, as this is an IFF4D clause, it is not necessarily binding on ISA tribunals.

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<sup>83</sup> Article 9.6.3, Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation Act (CPTPP).

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 help prevent IFF4D 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>84</sup> In fact, in both ISA and WTO dispute settlement practices, adjudicators often refer to 'other treaties' for treaty interpretation purposes.

Using an IFF4D clause to interpret an IIA clause *per se* does not import an IFF4D obligation into the IIA system, but because it allows IFF4D clauses to be considered in ascertaining and enforcing a state's IIA obligation, it potentially connects the IFF4D 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 IFF4D 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 IFF4D from IIAs, through limiting importation of IFF4D 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 IFF4D is likely to contain IIA-plus obligations. However, because these proposed treaty interface clauses are IFF4D clauses, they are only binding on WTO Members in the strict sense. This situation could limit the effectiveness of these clauses.

As these IFF4D 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 IFF4D. In such a case, it is uncertain whether these clauses could still play a helpful role in insulating an IFF4D from IIAs.

In light of this, it seems reasonable to say that, while the proposed clauses could be helpful in insulating an IFF4D 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 IFF4D and its relationship with IIAs

An IFF4D 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 IFF4D, and that such commitments may be inconsistent, construction of a proper IFF4D-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 IFF4D obligations from IIAs and ISA. Enhanced legal predictability and certainty could enhance the contribution of foreign investment to sustainable development.

To achieve this goal, incorporating sustainable-development-related provisions in an IFF4D could be helpful. Several investment facilitation elements in IIAs are related to sustainable development. For instance, it is

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<sup>84</sup> Article 31.3 (a) and (c), Vienna Convention on the Law of Treaties (VCLT).

generally agreed that transparency and international cooperation provisions in both an IFF4D 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>85</sup> It is advisable that states consider these suggested measures and elements in making an IFF4D.

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>86</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>87</sup> Likewise, WTO jurisprudence on GATT Article XX (General Exceptions) seems to imply that WTO favours free trade over public interest.<sup>88</sup>

In light of this, to make a pro-sustainable-development IFF4D, it is necessary to ensure that the IFF4D will not unduly limit states' regulatory power. This requires that an IFF4D be insulated from IIAs and ISA, so that IFF4D claims will not be treated as FET and IE claims in ISA. In this regard, construction of a proper IFF4D-IIA relationship is crucial for states.

## Recommendations

Considering that an IFF4D and IIAs may share substantial subject-matter overlaps, and that a number of IIA clauses can be used to bridge an IFF4D with IIAs, such as MFN, umbrella, FET and IE clauses, constructing a proper IFF4D-IIA relationship is important and necessary. Because an IFF4D is expected by states to exclude investment protection, market access and ISDS, the key to a proper IFF4D-IIA relationship lies in insulating the IFF4D from IIAs and ISA.

To achieve this, proper treaty interface clauses should be designed and included in an IFF4D 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 IFF4D.

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 IFF4D 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 IFF4D negotiations and assess the potential disputes related to investment facilitation obligations.

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<sup>85</sup> See Sauvank, 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>86</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>87</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>88</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.

2. As treaty interface clauses in an IFF4D 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 IFF4D 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 IFF4D-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 IFF4D 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 IFF4D.

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 IFF4D discussions: market access, investment protection and ISDS. The latter two dimensions of investment policy are covered in more than 3,200 extant IIAs,<sup>89</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>90</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 idea of a recognized sustainable investor builds on the concept of an authorized economic operator in the context of customs clearance.<sup>91</sup>

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<sup>89</sup> UNCTAD (2020). *World Investment Report*. UNCTAD website. Last accessed on 10 March 2021 from <https://unctad.org/webflyer/world-investment-report-2020>

<sup>90</sup> For a discussion of the links between investment facilitation for services and GATS, see Echandi, R. and Sauv . P. (2019). Investment Facilitation and Mode 3 Trade in Services: Are Current Discussions Addressing the Key Issues?. *World Bank Policy Research Paper*, 9229.

<sup>91</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 Sauv nt, K. and Gabor, E. (2019).

This chapter does not discuss the substance of the IFF4D discussions or the draft text, as the latter is incomplete and certain to change substantially as the negotiations proceed.<sup>92</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>93</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>94</sup> The exception to this presumption arises for landlocked countries, where trade facilitation, in part, will depend on what 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 IFF4D should be easier to define than was the case for TFA.

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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>92</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>93</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 Sauvé, P. (2006). Multilateral rules on investment: is forward movement possible?. *Journal of International Economic Law*, 9(2), 325-355.

<sup>94</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).

## 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>95</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>96</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 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

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<sup>95</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>96</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.

across different types of firms – small vs large; domestic vs foreign<sup>97</sup> – and the salience of trade facilitation for diversification goals.<sup>98</sup>

Initial studies estimated the effects of trade costs created by administrative processes at borders using World Bank-type indicators.<sup>99</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>100</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>101</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 control functions to customs authorities.<sup>102</sup> This type of monitoring exercise is important to track progress and identify areas on which to focus.

<sup>97</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>98</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>99</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>100</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/10.1787/5kq6nk654hmr-en>

<sup>101</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.

<sup>102</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>

## 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>103</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 IFF4D 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 German Development Institute/Deutsches Institut für Entwicklungspolitik (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>104</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.

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.

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<sup>103</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>104</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>.

## TFA features salient to an investment facilitation initiative

In several respects, the TFA is an innovative agreement for WTO.<sup>105</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>106</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 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,

<sup>105</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>106</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*, WTL/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)

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>107</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.

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.

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<sup>107</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)

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>108</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>109</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>110</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>108</sup> See above footnote 94, Hoekman, B. (2016).

<sup>109</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>110</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. SALLA 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 IFF4D. Some of the suggestions that follow are listed in the Sustainable Investment Facilitation Inventory,<sup>111</sup> which includes a compilation of proposals and ideas that have been put forward by governments and analysts on what an IFF4D might cover. Mostly they fall into the category of suggestions that have not (yet) been taken up in the IFF4D 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>112</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>111</sup> See above footnote 104, Sauvart P. et al. (2020).

<sup>112</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>113</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 IFF4D and with the financial support of high-income country members.<sup>114</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>115</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 IFF4D,<sup>116</sup> in part due to a lack of clarity on what an IFF4D should encompass. Identifying relevant measures by mapping domestic

<sup>113</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>114</sup> Any such effort requires leadership by IFF4D proponent countries in terms of providing the resources needed and ensuring there is broad support for giving the relevant organizations such a mandate.

<sup>115</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>116</sup> See above footnote 92, Berger (2019).

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 IFF4D and to what extent they will need assistance.

It is likely that the IFF4D 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>117</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 IFF4D 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 IFF4D, 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>118</sup> Members are asked what new themes they would like next for the informal meetings on implementation of the Agreement.

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<sup>117</sup> See footnote 99, WTO. (2015).

<sup>118</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>.

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 representatives from LDCs appearing as speakers in Trade Facilitation Committee meetings more frequently than in any other WTO body.<sup>119</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 IFF4D, 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>120</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>121</sup> How to address this matter and how an IFF4D 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>122</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 IFF4D; there has been some advocacy for their inclusion, along with CSR

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<sup>119</sup> Ibid.

<sup>120</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>121</sup> See above, Sanchiz and Omic (2020).

<sup>122</sup> Ibid.

principles.<sup>123</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 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>124</sup>

Public-private policy dialogue or knowledge platforms and stakeholder initiatives are commonly used to pursue environmental or social sustainability and CSR objectives.<sup>125</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>126</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>127</sup>

A first step could be for IFF4D 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 IFF4D. 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 IFF4D 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.

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<sup>123</sup> Sauvart, 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>

<sup>124</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>125</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>126</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>127</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>

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

If – as seems likely – the investment facilitation talks result in an IFF4D 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.

Committing to a code of conduct that is an integral part of the IFF4D and lays out such principles will ensure that any plurilateral agreement is not detrimental to its signatories.<sup>128</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 IFF4D 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 IFF4D should be incorporated into the agreement.

Insofar as the IFF4D 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 IFF4D 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.

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<sup>128</sup> Hoekman, B. and Sabel, C. (2019). Open Plurilateral Agreements, International Regulatory Cooperation and the WTO, *Global Policy*, 10(3), 297-312.

## 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.
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 IFF4D 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 IFF4D 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 IFF4D 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 IFF4D. 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 IFF4D an open plurilateral agreement.

## Chapter 4 An Inventory of Measures to Facilitate the Flow of Sustainable FDI

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The WTO negotiations on investment facilitation for development are generating a wealth of insight and information. They have 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 non-governmental organizations, and academic papers.

This inventory<sup>129</sup> of measures is a capacity-building tool to help participants engage in the negotiations. The inventory may also be of interest to negotiators of regional and bilateral investment agreements, as well as investment promotion agencies seeking to facilitate FDI.

It 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.

It does not include measures for 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 categorized by some as investment promotion measures.

For ease of reading, measures that have apparently not yet been discussed in the negotiations are **highlighted in blue**.<sup>130</sup> A number of them have been listed following this introduction.

This list of measures starts from the recognition that FDI can contribute to development and that this is the reason 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 contribute to development; or it can take the form of facilitation measures that can help increase the flow of FDI and, at the same time, directly aim to advance the development of host countries (e.g. deepening linkages between foreign affiliates and domestic firms or furthering CSR standards).

Given that the WTO 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 context and need. 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 flow of FDI, including sustainable

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<sup>129</sup> Based on an initial draft by Khalil Hamdani, this inventory was developed by a team comprising Karl P. Sauvant, Matthew Stephenson, Khalil Hamdani and Yardenne Kagan. The inventory has been significantly expanded based on additional research and comments by participants in events organized in the framework of this project (see <https://www.intracen.org/itc/Investment-Facilitation-for-Development/>). Feedback was also received from various international organizations. It also benefited from reactions by members of the ITC/DIE/World Economic Forum Commentary Group on an Investment Facilitation Framework for Development, comprising representatives of investment promotion agencies, FDI service providers and international investors, among others. The World Bank Group provided helpful text input, as did Makane Moïse Mbengue; and the Cámara Argentina de Comercio y Servicios coordinated views from Argentina. Helpful comments are due to Alexandre de Crombrugghe, Maximilian Philip Eltgen, Jaime Granados, Andreas Hora, Mia Mikic, Ivan Nimac, Ana Novik, Ahmed Omic, Sebastián Reil, Bostjan Skalar, Ana Arias Urones and Douglas van den Berghe.

<sup>130</sup> This list was developed before the Inventory was made available to the WTO Structured Discussions, September 2020; some of the measures included here have since been proposed and discussed by delegates.

FDI for sustainable development. IPAs/departments within ministries with FDI functions are the institutions often leading the implementation of investment facilitation measures.

The inventory is culled from contributions made over the past two years of Structured Discussions and negotiations; publications; in-country sustainable investment facilitation projects and private sector discussions organized by the World Economic Forum; and virtual meetings of the Commentary and Expert Groups on a Multilateral Framework on Investment Facilitation for Development, public webinars and workshops organized for WTO delegates.<sup>131</sup> These events were organized by ITC/DIE and, in the case of the Commentary Group and a number of workshops, together with the World Economic Forum.

Moreover, feedback was received from international organizations with substantial FDI programmes. These include the World Bank Group, Economic and Social Commission for Asia and the Pacific, Inter-American Development Bank, Organisation for Economic Co-operation and Development, World Economic Forum and World Association of Investment Promotion Agencies.

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

## Selected new FDI facilitation measures

### General measures

This section lists actionable investment facilitation measures that may not yet have been considered in the WTO negotiations and may be particularly useful for investment facilitation; additional measures are identified in the main text below (highlighted in blue).<sup>132</sup> 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 licences automatically if no government action is taken within statutory time limits: ‘silence is consent’;
- Establish aftercare mechanisms to facilitate that investments take place, operate smoothly and deal with any issues that may arise;
- Provide for risk-based approvals as part of authorization 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);

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<sup>131</sup> The Commentary Group met in 2020 on 26 February, 7 April, 7 May, 3 July and 27 October, and the Expert Group met in 2020 on 20 March, 4 May, 25 June and 6 October. Webinars were held in 2020 on 11 February, 19 March, 30 April, 28 May, 5 October, and on 19 January 2021. Capacity building workshops took place on 12 December 2019 and in 2020 on 11 March, 12 May, 23 September and 11 December. The reports on these events are contained in the annex of this publication.

<sup>132</sup> This list was developed before the Inventory was made available to the WTO Structured Discussions, September 2020; some of the measures included here have since been proposed and discussed by delegates.

- Track complaints through an investment grievance mechanism or an ‘early warning system’ and establish time frames for addressing grievances;
- Establish a mechanism for public-private dialogues to inform regulation and implementation, such as regular quarterly meetings or online portals;
- Facilitate cooperation among sub-national IPAs;
- Make publicly available lists of support measures for outward investors, through online portals and notification to 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; additional measures are identified in the main text below (highlighted in blue). Formulations for some of them are provided in the sample texts to this chapter.

- Publish internationally recognized guidelines/standards of responsible business conduct and strongly encourage investors to observe these guidelines through, e.g. requesting on application forms to acknowledge that these guidelines have been read and understood;
- Create a special category of ‘recognized sustainable investor’ (RSI) to incentivize sustainable investment. RSIs receive additional benefits if they meet certain publicly available conditions;
- Designate a 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;
- Encourage partnerships between foreign affiliates and local suppliers to help upgrade the latter, through regular workshops hosted by the 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/environmental sensitivities, such investor education could be made mandatory;
- Establish clear criteria linking home-country support measures to the observation of internationally recognized standards of responsible business conduct, acceptance and observance of corporate CSR policies and (in the case of projects with substantial impact) *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 and 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	MSMEs make innovative investments but lack the ‘deep pockets’ of large corporations.  Effective facilitation is very important when investors need to secure permits, licences 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.
Implementation	Administrative procedures and requirements should be SME-friendly.  Provide access to finance.
I.3 Measures and procedures of 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 often 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>Example: The State Council of the People's Republic of China put forward 20 opinions, which 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.</p> <hr/> <p><b>Make available all investment-related regulations in clear and simple language, preferably in languages commonly used by businesses.</b></p> <p>Example: Viet Nam clarified the definition of foreign affiliates.</p> <hr/> <p><b>Establish and strengthen the IPA as the main focal point for investors and ensure it provides and manages official information on investment measures and provides for a single window for investors. Make the existence of IPAs widely known. (For international good practice principles for an IPA, see sample text 1.)</b></p> <hr/> <p>An IPA typically maintains an investment website, which serves as a focal point for investors. A website is one of the most effective techniques to market a location according to investors and IPAs.</p> <p>Example: Uzbekistan developed an online portal, available in several languages, to provide information on visas, residence permits, registrations and tax mechanisms.</p> <p>Example: The Netherlands Foreign Investment Agency developed a 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 infographics; use of high-impact investor case studies; and access to resources and tools for investors.</p> <hr/> <p><b>Publish digitally 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; and, ideally, available in multiple languages at no cost.</b> 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>

Example: The downloadable 2020 guide on the Scottish Development International (Scotland's trade and investment promotion agency) website 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.

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.

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Other information sources include:

- Handbooks of basic laws: Used by professionals. Published by the private sector, including in English. For sale;
- Directories of official records: Gazettes are used to reference legal archives in national language. Sometimes available online but rarely on a single portal. Free;
- 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 the private sector. For a fee;
- Lists of certified and accredited consultants and attorneys.

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Maintain a list of support measures offered to inward investors, published online for transparency and efficiency, through online portals and notification to 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.)

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.

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Maintain a list of support measures provided to outward investors, published online for transparency and efficiency. It can outline both financial and non-financial support, such as through a 'support inventory'.

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Maintain a list of special economic zones, industrial and technological parks and clusters. Include a map to geolocalize the zones and, through virtual intelligence, visualize the lot/zone and provide access to the cost, facilities and contact person. Such a database shall also list relevant domestic suppliers in specific sectors, especially those supporting the developmental goals of a Member.

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Publish and regularly update lists of national priority sectors.

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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>Example: IDA Ireland’s Annual Business Survey of Economic Impact gathers detailed information on net jobs created, payroll, investment, exports, research and development (R&amp;D) activity and other metrics, including by region.</p> <hr/> <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> <hr/> <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 the fewest steps needed to achieve the objective and at lowest possible cost.</p> <p>Publicize outcomes of periodic reviews of the investment regime.</p>
<b>II.2 Publication of information on authorization requirements and procedures</b>	
<b>Rationale</b>	<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, licences, permits, applications for exemptions, or incentives. There may also be a need for approval by regional and local authorities.</p> <p>Investment in sensitive sectors may require prior authorization.</p> <p>Information is helpful for compliance and to improve the business climate.</p>
<b>Implementation</b>	<p>Establish, disseminate widely and maintain up-to-date, easily accessible information on authorization requirements and procedures, including clear definitions on criteria for the assessment of investment proposals.</p> <p>Example: KenInvest, Kenya’s IPA, has an e-regulations portal on laws, regulations, visas and permits, sectoral licences and property certificates. Procedures are explained step-by-step from an 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 portal was set up in partnership with UNCTAD.</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> <hr/> <p>Publish investor evaluation criteria – these may include environmental and/or social impact and potential positive impact on the economy – before deciding to provide some services (or recommend/grant approvals). Any FDI screening mechanism should transparently communicate processes and requirements.</p>

	<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 help applicants to complete applications.</p> <p>Publish lists or catalogues indicating which sectors are allowed, restricted or prohibited for foreign investment.</p> <hr/> <p>Publish a list of international agreements pertaining to FDI.</p> <hr/> <p>Publish judicial decisions on investment matters.</p> <hr/> <p>Publish penalty provisions for breaches of investment procedures and regulation.</p> <hr/> <p>Ensure that the right to non-disclosure of confidential information is reserved.</p>
<p>II.3 Update on new rules and procedures</p>	
<p>Rationale</p>	<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 to simplify may complicate and delay.</p>
<p>Implementation</p>	<p>Maintain a mechanism to provide timely and relevant advice on changes in procedures, applicable standards, technical regulations and conformance requirements.</p> <hr/> <p>Ensure predictability: provide reasonable advance notice of proposed changes to laws and regulations and provide opportunities for public comment.</p> <hr/> <p>Avoid uncertainty: indicate when changes take effect, to what they apply and which rules and procedures they replace.</p> <hr/> <p>Publish updates on IPA websites.</p> <hr/> <p>Update investment guides.</p> <hr/> <p>Updates can feature as a part of regular aftercare outreach to existing investors.</p> <hr/> <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>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.</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.</p> <hr/> <p>Carry out frequent surveys and focus groups with current investors located in the host country and overseas, as well as with investment service providers.</p> <hr/> <p><b>Boards, with private-sector representation, can advise IPAs on new measures and other reforms.</b></p> <hr/> <p>Hold closed consultations and conduct public hearings open to media.</p> <p>Example: The Ethiopian Investment Commission revises investment measures on an ongoing basis, in consultation with relevant stakeholders.</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 MSMEs, especially woman-led MSMEs, 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 to address investment queries in a timely, relevant and prompt manner. It can be an IPA. The focal point provides guidance concerning legislation, institutions, processes and responsible agencies.</p> <p><b>The IPA should be funded adequately and in a stable manner (ideally from a central budget and not fees for service) to allow operational independence and quick reaction to changing conditions and opportunities.</b></p> <p>Example: Benin's Agency for the Promotion of Investments and Exports replaced three structures as the focal contact point for investment queries.</p>

Example: The Jamaica Promotions Corporation (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 adviser to the government in matters pertaining to the improvement of Jamaica's business environment and the development of new industries.

Example: PROESA is the Export 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.

IPAs should take on the role of consultant advisers 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.

Encourage online enquiries and online information on all FDI issues. Routine enquiries are commonly addressed with frequently asked questions (FAQ), commonly named as chatbots. These provide online responses in simple language – preferably in English – with links to relevant forms and documents.

Example: The Estonian Investment Agency website greets users with a FAQ pop-up interface: 'Hi, I'm Suve! I am a robot and I'm here to help you find information.'

In the absence of a chatbot, add the online searchable library with downloadable documents per key topic.

All FAQs should ask if the information is useful, thus providing feedback.

All queries should be promptly acknowledged even if the requisite information is not immediately at hand.

There should be alignment of focal points' operating hours to commercial needs.

Provide an investor inquiry protocol, with time frames, which explains how to deal with inquiries and lists the mechanisms that should be in place.

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 on questionable administrative measures.

The focal point should forward complaints, supporting the implementation of solutions for such complaints.

	<p>The focal point should provide parties with alternative forms of dispute resolution.</p> <hr/> <p>IPAs typically handle enquiries as part of bespoke ‘hand-holding’ and ‘red carpet’ services.</p> <hr/> <p>IPAs can publish an interactive roadmap for navigating procedures and making investment applications, and create call centres for questions and answers.</p> <hr/> <p>IPAs should consider developing a skill and training programme, and raise the importance of policy advocacy to facilitate more strategic engagement with key existing investors and government policymakers to improve the country’s business environment and location competitiveness.</p> <hr/> <p>IPAs might have a role in assisting investors to divest more easily and finding new investors to step in. IPAs could conduct an exit interview to understand investors’ divestment decisions and ensure that the exit process is as user-friendly as possible. This makes it more likely that these investors will return, and builds a good reputation for the investment climate to attract other investors.</p> <hr/> <p>The contact information of the focal point should be provided to the WTO Investment Facilitation Committee.</p> <hr/> <p>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.</p>
<b>II.6 Clarity of regulations</b>	
Rationale	<p>Issues that could lead to potential disputes should be clarified to help avoid disputes, increase compliance and provide predictability to investors.</p> <p>Clarity on the roles of investors, suppliers and government agencies in implementing safety and control standards would help prevent mistreatment of labour and enhance the safety of working conditions.</p>

Implementation	<p>Economies should have in place a clear regulatory framework, including for 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>Example: Ecuador introduced new regulations to clarify the Productive Development Law and to simplify environmental rules.</p> <p>Example: China passed a new Foreign Investment Law that replaced three previous laws and aimed to provide clarity on FDI policies and investment protection.</p> <p>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.</p>
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### III. Simplification of administrative procedures and requirements

III.1 Consistent administration	
Rationale	Standardized administrative procedures ensure uniformity, while reducing ad hoc decisions and miscommunication.
Implementation	<p>Standard operating procedures, investor roadmaps and investment entry/registration/establishment flowcharts are common in civil service and industry. They avoid discriminatory use of bureaucratic discretion in the application of laws and regulations.</p> <p>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.</p> <hr/> <p>Standard operating procedures should include stepwise guidelines for each task or activity. The guidelines should be clear and easy to follow.</p> <hr/> <p>IPAs and departments should 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>Example: In January 2020, Uzbekistan created a one-stop shop mechanism to facilitate investment.</p> <hr/> <p><a href="#">A robust one-stop shop exercises a coordination function in which investment agencies interact with 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.</a></p> <p>Example: Kazakhstan introduced a one-stop shop that enables investors to apply for more than 360 types of permits and licences without the need to visit multiple ministries or government agencies.</p> <p>Example: Egypt’s Investor Service Centres gather representatives from 47 ministries and government agencies authorized to provide all necessary licences and approvals required for the establishment of a business.</p> <hr/> <p><a href="#">The single-window website should provide telephone or online contacts for complaints, for each mandatory registration.</a></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 the procedures and requirements, 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 guards against predispositions (e.g. favouring larger over smaller firms, manufacturing over services, developed- over developing-country investors; all of which are potentially beneficial).
Implementation	<p>Establish clear criteria for administrative decisions on investment appraisal and approval.</p> <hr/> <p>Provide explanations for administrative decisions.</p> <hr/> <p>Note: Pursuit of attractive investments should not neglect other potential investments.</p>
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 can facilitate corruption.</p>
Implementation	<p><a href="#">Publish investment incentives and criteria to qualify. (For the elements of an 'incentives inventory', see sample text 2.)</a></p> <hr/> <p><a href="#">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).</a></p> <p>Example: Nigeria, in granting a Pioneer Status incentive, published a list of industries eligible to enjoy the incentive.</p> <p>Example: Italy reduced its tax rate for profits reinvested to acquire assets or increase employment.</p> <p>Example: Cameroon has several tax incentives for the rehabilitation of an economic disaster area.</p> <p>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.</p> <p>Example: Colombia established a preferential corporate tax regime for investment projects that aims to grow taxable income and create jobs.</p> <p>Example: The United States clarified its tax incentive programme in Opportunity Zones that are created by the Tax Cuts and Jobs Act.</p> <hr/> <p><a href="#">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.)</a></p>

	<p>Example: North Macedonia adopted a new law in January 2020 to create more favourable conditions for strategic investments.</p> <p>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.</p> <p>Example: Under the Law on Investment Promotion of the Lao People's Democratic Republic, special economic zones are established with an administrative mechanism to create favourable conditions for investment that uses innovation in the production of agricultural products to save natural resources and energy.</p> <hr/> <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>	
<b>Rationale</b>	<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 units within departments. Redundancies can be eliminated without loss of appraisal or effectiveness.</p>
<b>Implementation</b>	<p>Reduction of procedures is 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>Example: Argentina published a decree with 170 measures to eliminate rules and regulations that reduced the country's competitiveness.</p> <p>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.</p> <hr/> <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>Example: The Visa Tech Chile 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 15 working days.</p> <p>Example: Thailand introduced a new visa system (Smart Visa) to attract highly skilled foreign talent.</p>

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.

Example: Uzbekistan increased its quota for the issuance of work permits for highly qualified foreign specialists.

Example: Spain (INCEX-Invest in Spain) supports added-value investors with immigration services.

Example: The Philippines relaxed the mandatory local employment requirement for foreign investors.

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Clear criteria are needed for decisions to carry out audits, as well as for potential penalties.

Where warranted, reduce the frequency and content of audits.

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Simplify and expedite, where possible, the issuing of approvals, licences and registration requirements (e.g. patent, trademark, and copyright registration), as well as documentation of investment inflows with the central bank.

Example: Indonesia replaced the licence requirement for establishing a business with a registration procedure.

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.

Example: Myanmar amended its investment law, simplifying investment approval and authorization procedures for foreign and domestic investors.

Example: Mauritius adopted the Business Facilitation Act of 2017 to eliminate regulatory and administrative bottlenecks to investment.

Emphasis on core documentation requirements lessens the burden on applicants and administrators.

Example: Saudi Arabia expedited the licensing procedures for foreign investors by reducing the number of required documents and shortening the review period.

Example: On 23 October 2019, 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.

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Streamlined forms are easier to fill and to process.

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 nine forms within 30 days.

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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>Example: In El Salvador, the process to register a company has been reduced from 16 to three 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.</p> <hr/> <p>Maintain a periodic review of documentation requirements with a view to ensuring that they are still relevant and simplify/remove those that are not.</p> <hr/> <p>Simplify the process for connecting to essential infrastructure, 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, and approvals required to connect to the necessary utilities within a specified and short time frame so that investing companies can commence operations smoothly and quickly.</p> <p>Example: India is promoting a ‘plug-and-play’ scheme to fast-track large investment proposals.</p>
<b>III.6 Processing of applications</b>	
<b>Rationale</b>	Different categories of investment may call for particular types of assessment.
<b>Implementation</b>	<p>Processing of applications should be carried out in a timely and consistent manner.</p> <p>Example: Indonesia’s fast-licensing process allows certain categories of prospective investors to have their preliminary permits within three hours.</p> <p>Example: Colombia streamlined its foreign investment registration scheme, in particular by eliminating registration deadlines.</p> <hr/> <p>Mining and infrastructure investments often involve negotiations, which could be minimized by clear rules and procedures.</p> <hr/> <p>Export-oriented investments are processed by export processing zone authorities when in those zones, which should work closely with investment agencies.</p> <hr/> <p>Special economic zones operate incentive schemes that should have monitoring mechanisms to ensure the implementation of requirements.</p> <hr/> <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> <hr/> <p>Conditional approval: Consider authorizing MSMEs to start operations without the requirement of approvals from the government for an initial period of time.</p> <p>Example: Many state governments in India authorize MSMEs to start operations without the requirement of approvals from the government for the first 36 months of operation.</p>

	<p>Note: Processing procedures should safeguard confidential information.</p> <hr/> <p>Note: Public policy goals should be clear, and the decision process should be transparent.</p>
III.7 Time limits	
Rationale	Reasonable time limits can set a steady pace to advance the process, making for more productive and efficient administration while also increasing predictability for investors.
Implementation	<p>Adopt diagnostic tools and indicators on the efficiency of administrative procedures and benchmark performance relative to international best practice.</p> <hr/> <p>Publish the timeline for processing approvals.</p> <p>Enact time limits for the processing of applications for investment screening, admission and licensing.</p> <p>Example: In Malaysia, there is a commitment that a licence will be approved within four weeks from the date of complete information received.</p> <p>Example: In Jamaica, agencies are mandated to give a 10-day review of applications, thus significantly shortening the approval timeline.</p> <hr/> <p><a href="#">Publish the time limits for visa processes.</a></p> <hr/> <p>Clearly state time limits for deciding judicial appeals.</p> <hr/> <p><a href="#">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.</a></p> <p>Example: In the country of Georgia, 'silence is consent' – a permit or licence is automatically granted if no government action is taken within statutory time limits.</p> <p>Example: Telangana Government's industrial policy establishes a right to clearance for industrial projects. The right to clearance recognizes that businesses have the right to know why project proposals are being delayed and to demand redress for 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.</p> <hr/> <p><a href="#">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.)</a></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 style="color: #00AEEF;">Applicants should be encouraged to stay in contact with a designated case officer on the application status.</p> <hr/> <p>Communication does not end with approval but shifts to the next steps for implementation.</p> <hr/> <p>The creation of national IPAs centralizes and consolidates efforts of identifying and communicating with investors.</p> <p>Example: Qatar created an investment promotion agency to attract FDI.</p> <p>Example: The United Arab Emirates established the Abu Dhabi Investment Office to increase FDI in the Emirate.</p> <hr/> <p style="color: #00AEEF;">Creating sub-national (region/city level) IPAs and enhancing their capacity can facilitate investment into other regions in an economy. There must be clear roles and responsibilities and good coordination between national and sub-national IPAs.</p> <p>Example: Germany Trade &amp; Invest, 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.</p> <hr/> <p style="color: #00AEEF;">Platforms can be created to share information among different levels of IPAs and the overseas network of trade commissioners.</p> <p>Example: ICEX-Invest in Spain uses a platform (Interactua) to share projects, documents and information.</p>
III.9 Acceptance of applications	
Rationale	It is important to sustain the interest of investors and encourage follow-through.
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>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.</p> <hr/> <p>Authorizations may be time-bound to discourage undue delay in implementation.</p>

	<p>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.</p> <p>Note: Many approvals are not implemented, i.e. investments do not take place.</p>
<b>III.10 Rejection of applications</b>	
<b>Rationale</b>	Rejection should be based on clear criteria and transparent procedures.
<b>Implementation</b>	<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.</p> <p><a href="#">Appeal mechanisms, where appropriate, may include impartial fast-track review procedures.</a></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>
<b>III.11 Fees and charges</b>	
<b>Rationale</b>	<p>Fees to cover the cost of processing applications are standard practice.</p> <p><a href="#">Applicants may be prepared to pay higher fees for urgent processing (e.g. courier mail service).</a></p>
<b>Implementation</b>	<p>Reduce the number and complexity of fees and charges, which should not be set at a level as to deter applications.</p> <p>Example: Australia has an online fee estimator.</p> <p><a href="#">Payment in foreign currency is encouraged by use of official accounts of a country's</a></p>

	<p>consular offices worldwide.</p> <hr/> <p>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.</p> <p>Example: Ukraine simplified and lowered the costs of the registration procedure for representative offices of foreign business entities.</p>
<b>III.12 Aftercare</b>	
<b>Rationale</b>	<p>Aftercare refers to the post-investment services provided to investors to encourage them to expand and deepen their operations in the host country.</p> <p>Post-establishment services make it more likely that investments will be successful and that investors will therefore remain and expand investment.</p> <p>A significant amount of investment is reinvestment by existing investors.</p> <p>Satisfied investors are a confirmation of a country's investment climate and the best publicity for a country.<sup>133</sup></p> <p>Aftercare processes allow regular contact with investors to address the ongoing needs of stakeholders.</p>
<b>Implementation</b>	<p>IPA aftercare should be information and assistance services starting from investment decision/announcement, during entry, establishment, retention, expansion and possibly beyond. Well-connected IPAs help investors have clarity on what needs to be done, by when and 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>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>)</p> <p>Example: Kenya's KenInvest provides post-implementation services, such as following up with investors at regular intervals to assist in smooth project implementation and address any concerns established investors may have.</p> <p>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 organized 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</p>

<sup>133</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>  |

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

platform with pandemic-related information for foreign investors, in English. It includes an online questionnaire on how the agency and federal government can assist foreign investors in investment facilitation and mitigation of pandemic impact.

IPAs should adopt tools for managing the relationship with existing investors.

IPAs should have in place three internal systems to manage relationships with existing investors: standard operating procedures; investor information system; and an investor relationship management system built on customer relationship management software. These tools are also relevant for managing the relationship with potential investors.

An IPA can assist investors in acquiring land, buildings, utilities, work permits and import licences. 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.

More broadly, IPAs can facilitate investor relations within communities, stakeholder associations and civil society, nurturing corporate social responsibility.

Even when operations are well underway, an IPA can fast-track approvals of sequential investment, the renegotiation of investment licences, the certification of incentive privileges and help ensure disbursement.

Build and maintain a comprehensive database of existing investors with key contacts in every company.

Develop with other agencies a database of bankable projects for possible sequential investments.

IPA can guide the project sponsors/owners (ministries, private sector, communities, municipalities) in building project profiles/books that are bankable.

Example: Invest India created an 'Investment GRID', which provides information to investors on the investment opportunities prepared by states/communities.

Help investors by seeking to build complete supply chains, often with a focus on creating an appropriate local ecosystem.

Example: Morocco has a programme for constructing local ecosystems for investors, to help investors more easily obtain the resources needed to operate.

Organize initiatives and events that provide recognition and networking opportunities in the local ecosystem (for 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.

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.)

Train local talent that can be hired by foreign affiliates.

Example: Uruguay XXI has developed (with the help of 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

	<p>of their training-on-demand plans, in both soft and technical skills. It is directed to companies with operations in Uruguay that export services in a number of sectors.</p> <hr/> <p>Establish supply-chain development aftercare programmes.</p>
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## IV. Digitalization

IV.1 E-government	
Rationale	E-services are user-friendly, fast, accessible worldwide and increase transparency.
Implementation	<p>Implement a global IPA 'FDI market' platform, where investors can come and look for benchmarking information, IPA contacts, sectors promoted, etc. IPAs can promote themselves on such a platform.</p> <hr/> <p>Applications for business visa, work permits, and security and customs clearance should be provided by e-services.</p> <hr/> <p>Establish a chatbot guiding users.</p> <hr/> <p>Provide explanatory videos.</p> <hr/> <p>Enable digital identity, interoperability and digital signature options.</p> <hr/> <p>E-services are particularly suited for SMEs (local and foreign investors).</p> <hr/> <p>Establish electronic payment system for investors to pay all fees, charges and taxes associated with the admission, establishment, maintenance, acquisition and expansion of investments.</p> <hr/> <p>Enable online tax registration and declaration to non-resident foreign investors.</p> <hr/> <p>E-services aid in scoping sites for plant locations and sourcing local contractors.</p> <hr/> <p>E-services should help in jumpstarting preparatory activities following approvals and before full physical presence has been set up.</p> <p>Example: Tanzania established an online registration system that simplifies investment registration processes, significantly reducing time and costs.</p> <p>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).</p> <p>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>.</p>

IV.2 Online single window	
Rationale	Facilitates interchange with investors and manages coordination within government.
Implementation	<p><a href="#">Develop an online single window, compatible with the Global Trade Single Window that some countries operate. The digitalized portal should include online information for investors and enable the whole entry and establishment process for investors.</a></p> <p>Example: Malaysia has a single window for trade (DNeX).</p> <p>Example: Pakistan is set to implement by 2022 a single window system for trade to streamline the cross-border movement of goods and alleviate regulatory bottlenecks. The system includes the establishment of an ICT-based platform involving simplification, harmonization and automation of regulatory processes related to cross-border trade.</p> <hr/> <p><a href="#">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.</a></p> <p>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.</p> <p>Example: Wesgro's business support provides a virtual team of sectoral 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 the private sector.</p> <hr/> <p><a href="#">Create an online business registration system.</a></p> <p>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.</p> <hr/> <p>The web address of a digital single window system should be provided to the WTO Investment Facilitation Committee.</p>
IV.3 Improving organizational efficiency through the application of digital technologies	
Rationale	<p><a href="#">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.</a></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 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> <hr/> <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>Example: Azerbaijan established a single online portal for the issuance of business licences and permits.</p> <p>Example: The Mauritius Economic Development Board requires that applications for Occupation Permit or Residence Permit be submitted online through the National E-licensing System.</p> <p>Example: The Philippines launched a digital platform, the Philippine Business Data Bank, shortening the time needed for applying and renewing permits.</p> <hr/> <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> <hr/> <p>Laws or regulations should allow for electronic signatures with the equivalent legal validity with handwritten signatures.</p> <hr/> <p>Digital certificates and signatures should be available, as should IT systems capable of accepting and exchanging data electronically.</p> <hr/> <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> <hr/> <p>IPAs can use data analytics to find potential investors.</p> <p>Example: InvestChile and Costa Rican CINDE use website analytics for measurement, collection, analysis and reporting of web data for purposes of understanding and optimizing web usage. Such information is used to assess and improve the effectiveness of their websites.</p> <hr/>
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	<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> <hr/> <p>Promote the adoption of new technology by IPAs, including through the training of officials at all levels of government.</p>
IV.4 Digitalization of investor onboarding and aftercare	
Rationale	Digitalization offers new opportunities for IPA operations and outward-facing activities.
Implementation	<p>Establish a national investment website with up-to-date applicable information for investors, including legislation and regulations. Such a platform should be user-friendly and enable investors to quickly and easily locate the information needed.</p> <p>Example: India established its national investment promotion platform, Invest India, with a ‘three-clicks’ rule, i.e. within three clicks, the investor gets to the information sought. The platform enables online Q&amp;A services with a response within 72 hours. The platform includes COVID-19 updates and relevant resources for business aid.</p> <p>Example: Germany Trade &amp; Invest developed a 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.</p> <hr/> <p>Create a LinkedIn profile (for IPA or other entities) and use this platform for identifying investors, gathering investor intelligence, setting up meetings and advertising/sharing investment opportunities with investors.</p> <hr/> <p>Host online investor conferences, on-on-one meetings, webinars, online recruitment, aftercare and information sessions, especially during the COVID-19 pandemic.</p> <p>Example: Germany Trade &amp; Invest has launched a series of webinars on topics such as pandemic-related regulatory changes, how companies have managed the crisis, possible exit scenarios, and novel fast-track programmes for medical apps as demand for digital solutions in the healthcare system continues to grow.</p> <hr/> <p>IPAs could create promotional videos in the form of conversations and talk shows that discuss the investment environment.</p> <p>Example: The Korea Trade-Investment Promotion Agency is producing such content to facilitate and promote investment in the context of the COVID-19 pandemic.</p> <hr/> <p>IPAs may facilitate virtual site visits by potential investors (and others). This can be enhanced through the use of virtual reality goggles and/or geographic information systems.</p> <p>Overseas offices can be used as a platform to facilitate virtual site visits by prospective investors from that economy.</p>

	<p>Example: Estonia and Costa Rica offer virtual site visits.</p> <hr/> <p>Enable online negotiations and drone-based due diligence.</p> <p>Example: The Korea Trade-Investment Promotion Agency provides such services.</p> <hr/> <p>Enable a virtual marketplace for workers and suppliers to facilitate the matching of local suppliers and workforce availability with foreign investors.</p> <p>Example: The India Investment Grid provides an online platform that supports investment in India by showcasing investment opportunities across India and connecting 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 to the investors to do their own due diligence.</p> <hr/> <p>Maintain up-to-date social media and website platforms.</p> <p>Example: Ethiopia EIC used WhatsApp and Twitter to continue communicating with investors during the COVID-19 crisis.</p>
IV.5 Data protection issues	
Rationale	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>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 Flow of Personal Data (2013), can provide guidance.</p>

## V. Measures that directly increase the development contribution of FDI

V.1 Responsible and sustainable investment	
Rationale	<p>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, ILO and OECD have guidelines for responsible business practices: the UN Guiding Principles on Business and Human Rights, UN Global Compact, ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social policy and the OECD Guidelines for Multinational Enterprises and related OECD Due Diligence Guidance for Responsible Business Conduct. Governments and firms should ensure these guidelines are observed.</p> <p>Investment measures and procedures should welcome applications from investors that affirm corporate social responsibility 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 TFA, 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> <hr/> <p>Governments can assess the potential development impact of FDI projects using the OECD FDI qualities indicators, which fall into five clusters: productivity and innovation, employment and job quality, skills, gender equality and carbon footprint.</p> <hr/> <p>All economies can encourage high standards of corporate governance and responsible business conduct by investors, both inward and outward.</p> <p>Investors can sign and observe internationally recognized guidelines of responsible business conduct.</p> <p>Home countries can provide guidelines to their firms and support the measures of host countries to encourage responsible investment.</p> <p>Home countries can have clear criteria linking or conditioning their support measures (including information, loans, grants, guarantees, political-risk insurance) to the observation of internationally recognized standards of responsible business conduct, the acceptance and observance of corporate CSR policies and/or (in the case of big projects with substantial impact), ex ante environmental and social impact assessments to ensure a positive impact in host economies or at least the absence of a negative impact.</p> <p>Example: The World Bank Group’s Multilateral Investment Guarantee Agency (MIGA) ensures that projects supported through a guarantee are operated in a manner consistent with environmental and social performance standards.</p>

	<p>Example: The United States' Overseas Private Investment Corporation, which has since become the US International Development Finance Corporation, provides green guarantees.</p> <p>Example: 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 aims to assist SMEs and start-ups in the Netherlands with investments in 68 emerging markets by providing loans, guarantees and indirect participation up to €10 million.</p> <p>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, which InvestSA helped manage.</p> <hr/> <p><a href="#">Investors (above a certain size) could be encouraged to establish CSR committees and to dedicate a percentage of revenue to CSR activities.</a> For an example, see the Indian Foreign Contribution (Regulation) Act.</p> <hr/> <p><a href="#">The ISO 26000:2010 standard provides guidance on social responsibility.</a></p> <hr/> <p>IPAs can adopt a number of targeted investment measures in support of sustainable development goals.</p> <p>Example: Egypt has investment facilitation measures for investors that contribute to sustainable development and implement responsible business conduct standards.</p> <p>Example: A number of city IPAs have adopted 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). 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 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.</p> <hr/>
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One measure is to develop a marketing strategy with clear goals and addressed to targeting sustainable FDI.

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.

Another measure is to offer a red carpet service for investments that will have a significant positive sustainable development impact in host countries.

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. 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 one telephone number to call and a dedicated officer to troubleshoot issues as they arise. Some call these investors 'platinum investors' because they bring more benefits to the economy than others.

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.

Yet another measure is targeted incentives. About 100 developed and developing countries have tax incentives and other programmes to advance the SDGs. Clear criteria for incentives help focus the targeting strategies of investment authorities.

Example: Republic of Korea restructured tax incentives to target foreign companies engaged in high-tech businesses and extended their benefits.

Example: Côte d'Ivoire grants additional tax credits to companies in industries such as agriculture, agribusiness, healthcare and tourism that are in line with its national development strategy.

Example: Burkina Faso reduced by one-quarter the threshold for incentives to invest in strategic sectors.

Example: China expanded income tax benefits for investors, exempting them from withholding of income tax on the reinvestment of profits made in China.

Example: Poland introduced financial incentives to promote the audiovisual industry. A qualification test applies to all applications and considers specific criteria stated in the law (audiovisual work should take place on Poland's territory; Polish artists, crews and service providers participate in the production; use of Polish film infrastructure).

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.

	<p>Example: South Africa has adopted a targeted measure in support of renewable energy through a cash grant of up to \$3 million to cover 30% of the costs of a company retrofitting industrial facilities to use renewable energy through the purchase and installation of rooftop solar panels.</p> <hr/> <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>
V.2 Linkages with the host economy	
Rationale	<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>
Implementation	<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. 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. (For a possible formulation on domestic supplier databases, see sample text 10.)</p> <p>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.</p> <p>Example: Oman established an investment portal designed to enable local companies to attract foreign investors worldwide.</p> <hr/> <p>Include information on FDI projects in the database, thereby facilitating matchmaking between new and established foreign investors and domestic firms, as part of the onboarding and aftercare activities.</p> <p>Example: Invest India has compiled a pipeline of nearly 4,000 projects in nearly three-quarters of India's 686 districts. The pipeline is accessible as an online searchable database.</p> <p>Example: Haiti has a smart talent platform to connect foreign companies with certified suppliers and providers.</p> <hr/> <p>Develop with other national agencies, private-sector associations and international organizations supplier-development programmes to increase the number and capacity of qualified local enterprises that can contract with foreign affiliates. There may be potential to deepen supply chains in all sectors. (For a possible formulation on supplier development programmes, see sample text 11.)</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>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 with UNDP to train 4,000 women livestock extension workers.</p> <hr/> <p>Promote backward investment linkages between businesses, especially between foreign affiliates and local enterprises, including through the promotion of industry clusters.</p> <p>Promote collaboration among foreign investors, domestic producers and consumers to develop industry-specific solutions and enable industry development.</p> <p>Example: Huawei’s ecosystem for local start-ups in France, Germany and Spain.</p> <p>Example: R&amp;D centres create backward and forward linkages, such as in the Penang Science Park in Malaysia.</p> <hr/> <p>Governments can foster partnerships between foreign affiliates and local universities or other bodies to create centres of excellence for training or R&amp;D.</p> <p>Example: Germany Trade &amp; Invest, the country’s national trade and investment promotion agency, assists foreign investors in looking for partnerships with German enterprises or R&amp;D institutions to evaluate and test new products, which can result in further investment.</p> <p>Example: The Maharashtra Chamber of Commerce in India works with local universities to develop targeted training modules of about two to three months so that graduates have the skills that industry needs, thereby facilitating investment.</p> <hr/> <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>
<p>V.3 Build constructive stakeholder relationships</p>	
<p>Rationale</p>	<p>Constructive stakeholder relationships enable businesses to shape a productive investment environment, ensure problems can be dealt with expeditiously, strengthen public-private partnerships and enable businesses to operate in a more socially responsible manner.</p> <p>Some IPAs may not have the expertise to develop and implement a comprehensive sustainable FDI strategy.</p>
<p>Implementation</p>	<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> <hr/> <p>Establish and maintain 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.</p> <hr/>

	<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> <hr/> <p>Promote the role of policy advocacy within IPAs as a means of addressing the investment problems raised by investors, including those faced by SMEs.</p> <hr/> <p>Build partnerships with stakeholders to assist with capacity building within government agencies and with potential investors.</p> <p>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 the 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 ongoing market intelligence and support to ensure that businesses grow and remain sustainable. Together, both organizations can unlock the investment and employment potential of green technologies and services in the region.</p> <p>Example: Dubai FDI developed a global stakeholder programme, Dubai Green Economy Partnership, to engage private-sector investors and technology providers with government partners.</p>
V.4 Evaluating development impact	
Rationale	Use of international standards can facilitate technical assessments (e.g. economic, environmental and social impact).
Implementation	<p>Investor commitments to adhere to international standards could be accepted in lieu of detailed reviews of plant blueprints.</p> <p>Example: The United Nations has guidelines for national waste management strategies.</p> <hr/> <p>The International Organization for Standardization (ISO) has certifications for management.</p> <p>Example: ISO 14001:2015 specifies requirements for environmental management. ISO 20887:2020 specifies sustainability requirements for buildings and civil engineering works.</p> <hr/> <p>Public-private partnerships have developed standards.</p> <p>Example: LEED (Leadership in Energy and Environmental Design) has a certification for buildings.</p> <hr/> <p>ILO has international standards on occupational safety and health, and related guidelines.</p> <hr/> <p>Example: Uruguay's Ministry of Finance modified the rules governing free zones based on discussions between the government, users and tax authorities, while aligning the regime with international standards for the prevention of harmful tax practices, particularly the recommendations of Action 5 of the OECD/G20 BEPS project.</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 relevant government departments to reach a common position.</p> <hr/> <p>Impact assessments should be used for the ex ante evaluation of large investment projects to ensure they align with development goals.</p> <hr/> <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 12.)</p> <p>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.</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 can facilitate investments in infrastructure and sustainability projects.</p> <p>There are many measures to take into consideration for an effective implementation of public-private partnerships.</p> <p>Projects should be vetted in stakeholder consultations, involving local industry and community associations.</p> <p>Establishing a separate unit for public-private partnerships should be considered.</p> <p>Example: The Model Concession Agreement – Major Ports (India) for public-private partnership projects will be recast based on suggestions from ‘existing/prospective investors/PPP concessionaires/individuals/stakeholders’.</p> <p>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.</p> <p>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.</p>
V.7 Home-country measures	
Rationale	Home governments can play a role, in addition to host governments, to facilitate and support sustainable FDI flows.

Implementation	<p>Home countries can provide guidelines to their firms and support the measures of host countries to encourage responsible investment.</p> <p>Example: South Africa has issues guidelines for its firms to invest responsibly and sustainably in other markets on the African continent.</p> <hr/> <p>Home countries should provide information on investment opportunities abroad, as well as the investment climate and home country measures.</p> <hr/> <p>Home countries should establish institutional arrangements to manage outward FDI policy and provide home country measures.</p> <hr/> <p>Home countries should use foreign offices (consulates and foreign offices that are staffed by investment professionals and embassies) to facilitate outward FDI.</p> <hr/> <p>Home countries can have clear criteria linking or making conditional their support measures (including with information, loans, grants, guarantees, political risk insurance and 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 13.)</p> <p>Example: Under the German investment guarantee scheme, an investment needs to fulfil certain conditions in order to be eligible, such as positive effects on the host country. These can be manifested by the substitution of imports, creation of jobs with high social standards or 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.</p>
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## VI. Coordination and cooperation

VI.1 Dispute prevention	
Rationale	<p>Avoiding disputes is a 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 before they escalate into disputes or 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. (For sample texts on an investment grievance mechanism and</p>

	<p>an investment alert mechanism, see sample texts 14 and 15.)</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 lengthy review of administrative decisions. Timeliness of the appeal mechanism and decision should be provided.</p> <p>Example: KOTRA (Korea Trade-Investment Promotion Agency) assigns ‘home doctors’ to give special attention to investors experiencing business difficulties and having complaints. They provide preventive care by reviewing rulings (e.g. tax, visa, labour, property) and checking the validity of regulations.</p> <p>Example: the Hungarian Investment Promotion Agency enables investors to provide feedback and mediates between government and business using such business input.</p> <hr/> <p>Training sessions specialized in civil complaints and for ombudsperson should be arranged for relevant officials and organizations.</p>
<b>VI.2 Ombudsperson</b>	
<p><b>Rationale</b></p>	<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, in terms of both financial settlements and relationships and reputation.</p>
<p><b>Implementation</b></p>	<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> <hr/> <p>The authority of the ombudsperson is based on tact, independence and collaboration in diffusing complaints before they become grievances, thus preventing disputes.</p> <p>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 findings 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.</p> <hr/> <p>The ombudsperson may recommend improvements in administrative procedures, including by tracking patterns of complaints over time to detect their source. (See V.1 Dispute prevention, including sample text 15, for a sample text on an investment alert mechanism).</p> <hr/> <p>The ombudsperson office could be equipped with an online platform to receive communication from investors.</p> <hr/> <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, but it also ensures all stakeholders contribute to the improvement of the investment ecosystem</p> <p>Example: Ethiopia established a high-level interregional 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.</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>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.</p> <p>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.</p>
VI.4 Domestic regulatory coherence	
Rationale	<p>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.</p>
Implementation	<p>Conduct periodic assessments of the investment facilitation framework's impact on actual investments, especially considering the needs of SMEs.</p> <hr/> <p>Establish an inter-agency coordination mechanism for domestic regulatory coherence in areas of overlapping jurisdiction, which will help with implementation of investment facilitation measures.</p> <p>Example: The United Arab Emirates established an FDI unit within the Ministry of Economy that is mandated to propose and implement FDI policies.</p> <hr/> <p>Establish mechanisms to enhance coherence between national and sub-national IPA activities.</p> <hr/> <p>Establish a mechanism for public-private dialogue to inform regulation and implementation, such as a standing quarterly meeting.</p> <p>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.</p> <hr/>

	<p>Conduct investor perception surveys. Survey results enable IPAs and respective governments to enhance their services to investors.</p> <hr/> <p>Bring together investors and related stakeholders to openly address practical issues of implementation and clarify areas of confusion.</p> <p>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> <p>Example: Kenya's KenInvest 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.</p> <p>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.</p> <hr/> <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 an investment facilitation framework, promote domestic coordination (including over technical assistance and capacity building) and serve as a platform for 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.</p> <p>Partnerships can either be between IPAs in two different jurisdictions or between an IPA and an outward investment agency. In some cases, the function of supporting outward FDI is given to the IPA and thus the IPA is the outward investment agency; 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 mutually beneficial 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.</p> <hr/>

	<p>Investment agencies can share experience through the World Association of Investment Promotion Agencies (WAIPA), and organize bilateral assistance for peer-to-peer learning.</p> <hr/> <p>Mutual recognition of standards among economies facilitates investment, especially export-oriented investment.</p> <hr/> <p>Align procedures and formalities with neighbouring countries, where applicable. This can include the harmonization of data requirements, documentary controls and computer systems.</p>
	<p>Host countries can create large regional markets to attract investment and trade.</p> <hr/> <p>Cooperate within relevant United Nations frameworks, particularly financing for sustainable development and the programmes of action for LDCs.</p> <hr/> <p>Cooperate and coordinate with agencies and representatives abroad, such as embassies and consulates.</p> <p>Example: Egypt's IPA relies on embassies and consular offices to connect with the home country's business community.</p> <p>Example: The Polish Investment and Trade Agency, 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.</p>

## 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 IDB, ITC, OECD, UNCTAD, UNESCAP, UNIDO and WBG, have competence, programmes and resources. For details, see:</p> <p>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></p> <p>ITC: <a href="https://www.intracen.org/itc/goals/Strengthening-trade-and-investment-support-institutions/">https://www.intracen.org/itc/goals/Strengthening-trade-and-investment-support-institutions/</a> and <a href="https://www.intracen.org/piga/">https://www.intracen.org/piga/</a></p> <p>OECD: <a href="http://www.oecd.org/investment/">http://www.oecd.org/investment/</a></p> <p>UNCTAD: <a href="https://unctad.org/en/pages/DIAE/DIAE.aspx">https://unctad.org/en/pages/DIAE/DIAE.aspx</a></p> <p>UNESCAP: <a href="https://www.unescap.org/">https://www.unescap.org/</a></p> <p>UNIDO: <a href="https://www.unido.org/our-focus/cross-cutting-services">https://www.unido.org/our-focus/cross-cutting-services</a></p>

	<p>The World Bank Group 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></p> <hr/> <p>Other international organizations, such as the World Economic Forum, have competence, programmes 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></p>
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> <ol style="list-style-type: none"> <li>1. Needs assessments during the negotiations phase are structured to raise awareness of the economy's circumstances with regards to investment facilitation and the possibility of providing support to increase its capacity through an international framework;</li> <li>2. 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> </ol>
VII.3 Sharing of experiences and mutual learning	
Rationale	<p>Achieving the SDGs 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 input from the private sector and other stakeholders and can facilitate voluntary peer review.</p> <hr/> <p>Share experiences in expert meetings of UNCTAD and other relevant United Nations and other international bodies.</p> <hr/> <p>Participate in regional forums for sharing experiences and create programmes for regional cooperation.</p> <hr/> <p>Create open-ended working groups to explore investment facilitation issues.</p>

	<p>Encourage and enhance cooperation among national focal points.</p> <p>Example: the OECD IPA Network was created to share IPA experience and discuss good practices on investment promotion and facilitation.</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>
<b>VII.4 Technical assistance and capacity building</b>	
<b>Rationale</b>	<p>Investment facilitation in developing countries, particularly the least developed, is constrained by scarce skills, imperfect institutions and weak infrastructure.</p>
<b>Implementation</b>	<p>Technical assistance for investment facilitation would complement and enhance the corresponding facility of the Trade Facilitation Agreement.</p> <p><i>Assistance for sub-national capacity building should be provided.</i></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><i>Technical assistance should be provided to support all investment facilitation measures identified as useful.</i></p> <p><i>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.</i></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>134</sup> The Incentives Inventory should include all incentives available to investors, including financial incentives (direct grants, cost-sharing

<sup>134</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>   |

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

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

#### 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>
	<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>		<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> <li>• <i>Environmental impact assessment/social impact assessment</i></li> <li>• Human rights due diligence</li> <li>• Corporate governance</li> </ul>
Environmental dimension		Governance dimension	

**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:** Sauvant 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>

<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: 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 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:

- Highlight local production capacity through company factsheets;
- Be searchable by sector or industry, name of product or service, location, certifications, etc.;
- Be linked to investor servicing and aftercare efforts;
- Be available online and in English;
- Be consistently updated;
- Track user statistics;
- Provide information on domestic suppliers that would help investors make choices aligned with sustainable investment and CSR goals, which could include, but are not limited to:
  - a. Commitments to respect supply chain standards;
  - b. Commitment to environmental management;
  - c. Commitment to gender equality in employment;
  - d. Commitment to quality employment, including training and worker safety;
  - e. Commitment to prevent corrupt practices.

**Note Source:** Research by the World Bank Group and in the framework of this project

## Sample text 11: 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 (SMEs) with potential to be long-term suppliers;
- d. Identify buyer needs and transmit these to participating firms;
- e. Provide initial certification that SMEs 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. Conduct business review of individual SME and develop an improvement plan, including management processes, technology, adoption of standards, plant layout;
- 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).

**Note Source:** Research by the World Bank Group and in the framework of this project

## Sample text 12: 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 13: 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 14: 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 15: 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: Capacity-building workshops – Reports

[Virtual capacity-building workshop: Opportunities and challenges of establishing an international framework on investment facilitation for development in WTO: Concrete measures for a framework on investment facilitation for development](#)

11 December 2019

#### Overview

Bertelsmann Stiftung, DIE, ITC 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>135</sup> and [What can Governments do to facilitate investment? A menu of the most important measures identified through surveys](#);<sup>136</sup> for session 2: [Advancing sustainable development by facilitating sustainable FDI, promoting CSR, designating recognized sustainable investors, and giving home countries a role](#);<sup>137</sup> and for session 3: [Challenges of negotiating and implementing an international investment facilitation framework](#).<sup>138</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>139</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,

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<sup>135</sup> Loewendahl, H. & Walker, J. (2019). Enhancing FDI performance: practical measures for FDI success.

<sup>136</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>137</sup> See above footnote 91, Sauvant K. and Gabor E.

<sup>138</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>139</sup> Sauvant, 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#).

project evaluation assistance could be of significant help in facilitating investment under a Framework's technical assistance provisions.<sup>140</sup>

### **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.

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<sup>140</sup> While such assistance is available in principle, the organizations providing it – especially the African Legal Support Facility (<https://www.afsf.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.

### **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>141</sup> the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy<sup>142</sup> and the OECD Guidelines for Multinational Enterprises.<sup>143</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>144</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>145</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.

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<sup>141</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>142</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>143</sup> OECD, Guidelines for Multinational Enterprises (2008). Last accessed 10 March 2021 from <http://www.oecd.org/investment/mne/1922428.pdf>.

<sup>144</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>145</sup> Sauvart K. and Gabor E., *op cit.*, pp. 7-11.

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>146</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.

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>147</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

<sup>146</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#).

<sup>147</sup> Sauvart K. and Gabor E., *op cit.*, pp. 14-16.

WTO commitments through periodic Trade Policy Reviews.<sup>148</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>148</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: 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. Sauvant, Resident Senior Fellow, Columbia University/Center on Sustainable Investment (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. Sauvant, 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 a multilateral framework on investment facilitation for development; and 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 Consolidated 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/Columbia Center on Sustainable Investment; 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>149</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.

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<sup>149</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>.

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 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>150</sup> Article 18 of this proposal addresses CSR. There are two main aspects in this 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.

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<sup>150</sup> Structured Discussions on Investment Facilitation, Communication from Brazil (JOB/GC/169).

## Virtual capacity-building workshop: Implementation challenges for a multilateral framework on investment facilitation for development

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 Informal Consolidated Text of the WTO Structured Discussions on Investment Facilitation for Development. It was chaired by Karl P. Sauvant, Resident Senior Fellow, Columbia University/Columbia Center on Sustainable Investment, and included Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum; 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, International Chamber of Commerce (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 IFF4D:** The IFF4D 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.

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\* Note: For the purposes of this report, the terms economy and country are used interchangeably.

- **Importance of facilitating the entire life cycle of the investment:** The IFF4D should cover all aspects and stages of investment facilitation. The investment life cycle includes attraction; entry 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 IFF4D, 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 IFF4D 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 IFF4D**

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 IFF4D 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 IFF4D. 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 IFF4D 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 investment facilitation framework for development (IFF4D). The session provided an analysis of the status of the negotiations and addressed key issues that should be considered in further work on an IFF4D 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, World Trade Organization, 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. Sauvart, Resident Senior Fellow, Columbia University/Columbia Center on Sustainable Investment, 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 Ratton 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 IFF4D

- **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 IFF4D is crucial. A successful outcome in the IFF4D 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 IFF4D 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 IFF4D**

The aim of an IFF4D 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 IFF4D negotiations agreed that on March 2020 the group would start negotiations on an Informal Consolidated 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 Informal Consolidated Text and members proposals, as well as three additional days of intersessional conceptual discussions.

The current draft of the Informal Consolidated 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 do not include market access, investment protection or investor-state dispute settlement;
- The process needs to be open, transparent and inclusive.

### The challenges of an IFF4D

- **Reaching a concrete outcome by 12th WTO Ministerial Conference (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 IFF4D:** 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 IFF4D 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 IFF4D 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 IFF4D.
- **Implementation:** Implementing facilitation measures requires financial and technical cooperation as well as capacity building. The IFF4D 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 IFF4D.
- **Increase the number of participants:** Almost two-thirds of WTO Members are formally participating in IFF4D negotiations. Initially, the IFF4D 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 IFF4D 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 IFF4D 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 IFF4D 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 IFF4D 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 IFF4D:** 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 IFF4D 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 IFF4D. 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: Investment facilitation for development: 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 investment facilitation framework for development (IFF4D) 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. Sauvart, Resident Senior Fellow, Columbia University/CCSI; and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum. 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 IFF4D 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 IFF4D 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 IFF4D 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 IFF4D 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 IFF4D 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 IFF4D.
- **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 II: Public webinars – Reports

### Public webinar: The negotiation of an IFF4D

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. Sauvant, 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 IFF4D 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 IFF4D 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 IFF4D, 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 IFF4D implementation challenges**

One challenge of implementing an IFF4D 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 IFF4D 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 IFF4D should enhance intra-state coordination between national and sub-national governments.

There are several obstacles to reaching and implementing an IFF4D, 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 IFF4D can be used to promote knowledge-sharing of best practices on investment facilitation. Thus, an IFF4D constitutes a critical opportunity to advance SDGs.

### **Promoting sustainable FDI**

Advancing sustainable development should be an integral part of a future IFF4D. 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 IFF4D 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, CCSI; and Matthew Stephenson, Policy and Community Lead, International Trade and Investment, World Economic Forum.

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: Challenges in implementing an IFF4D and how they could be addressed in a multilateral instrument

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 Consolidated Text that incorporates the Streamlined Text and the proposals submitted by members to date. The first Consolidated Text was circulated on 20 February 2020. The purpose of the Consolidated Text is to facilitate the assessment by members and assist members in conducting consultations and outreach efforts. The Consolidated 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 Consolidated 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 IFF4D (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*

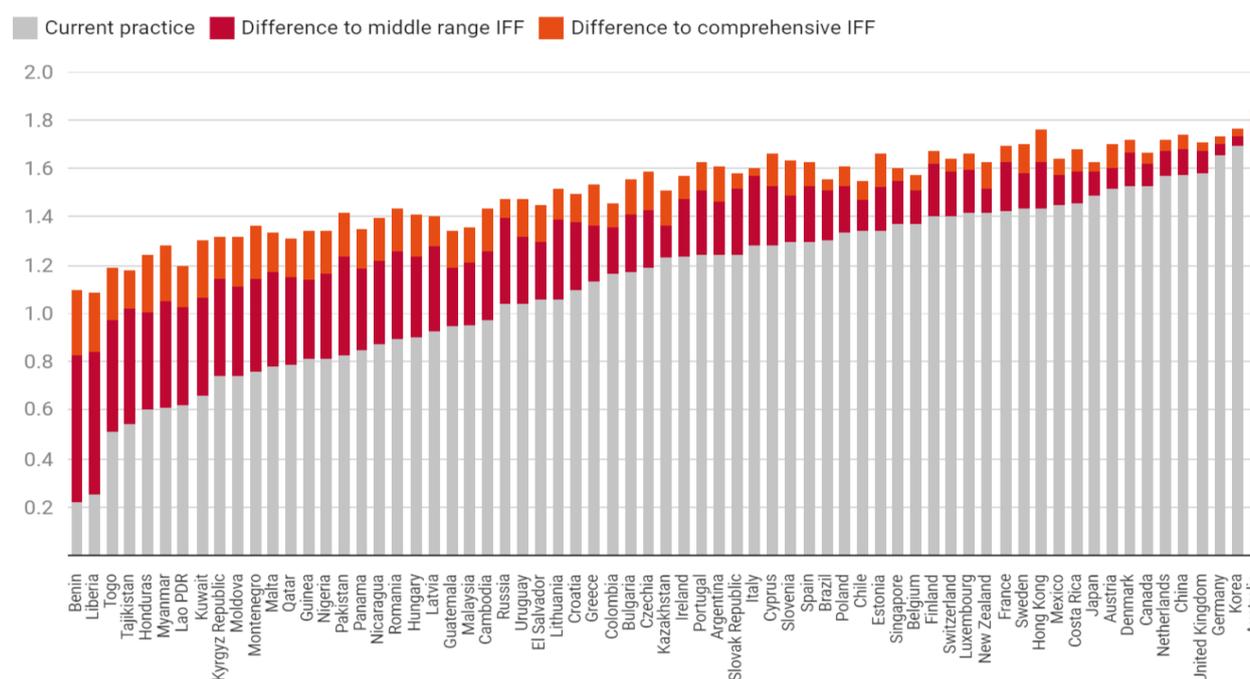


Chart: Axel Berger, German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE) • Created with Datawrapper

**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 for Development**

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 for Development is covered in chapter 7 of the Consolidated 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 assistance 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 IFF4D 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 investment facilitation framework for development (IFF4D), 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 IFF4D: 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>151</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 IFF4D 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>151</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 IFF4D 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 IFF4D, 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 IFF4D, 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. Sauvant, Resident Senior Fellow, Columbia University, CCSI

### Highlights

#### Lessons from the APEC Investment Facilitation Action Plan

The Asia-Pacific Economic Cooperation (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 IFF4D 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 IFF4D. 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 investment facilitation framework for development

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 a multilateral investment facilitation framework for development (IFF4D) 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, World Economic Forum. Concluding remarks were made by Axel Berger, Senior Researcher, DIE.

### Highlights

#### Potential welfare gains from different IFF4D scenarios

Results from a DIE draft study on the potential welfare gains from different IFF4D 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 IFF4D 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 IFF4D. 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 IFF4D containing strong technical assistance commitments would therefore be particularly useful for these countries.

#### Potential benefits of an IFF4D

- **Facilitating more sustainable FDI flows:** On the basis of the WTO Informal Consolidated 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 IFF4D 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 IFF4D 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 IFF4D 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 IFF4D 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 IFF4D can help inform and promote domestic reforms.
- **Creating home state obligations:** Transparency measures under the IFF4D 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 IFF4D by formulating obligations for both host countries and home countries.
- **Cross-border cooperation:** An IFF4D 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 IFF4D 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 IFF4D 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 IFF4D 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 IFF4D

- **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 IFF4D, but also among the parties to specific agreements.
- **Regulatory and administrative reforms:** Depending on the disciplines that are agreed under the IFF4D, developing countries may need to take significant regulatory and administrative reforms. If the scope of an IFF4D 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 IFF4D 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.

## Annex III: Commentary Group meetings – Reports

### Commentary Group meeting: Investment facilitation measures to include in an IFF4D

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 May 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>152</sup>

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<sup>152</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 IFF4D

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, World Economic Forum.

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 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: Investment facilitation measures that should be included in the WTO IFF4D

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 informal Consolidated 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 IFF4D.

#### **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 life cycle – 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, World Economic Forum.

### 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 create 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.

## Annex IV: Expert Network seminars – Reports

### Expert Network seminar: Lessons learned from investment facilitation provisions in bilateral investment treaties 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 bilateral investment treaties (BITs) and investment chapters in PTAs, generally referred to as international investment agreements (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>153</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

<sup>153</sup> Polanco, R. J. (2018). Facilitation 2.0: Investment and trade in the digital age. RTA Exchange, 1-24.

show consideration for the needs of host as well as home countries. This development can be explained by 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 Trade Facilitation Agreement

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: Integration of an IFF4D into the WTO rulebook

26 July 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 international framework on investment facilitation for development (IFF4D) 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 IFF4D, 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 IFF4D.

#### **Addressing potential overlaps related to IIAs**

Special attention should be paid to potentially overlapping provisions in an IFF4D 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 IFF4D.

#### **Fair and equitable treatment (FET)**

IIAs usually include provisions relating to FET. As an IFF4D may contain an MFN clause, negotiators should examine the similarity of the treatment between IFF4D and FET clauses in existing IIAs.

#### **An IFF4D would help economies implement IIAs**

There is a virtuous cycle between IIAs and an IFF4D 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 IFF4D should not inadvertently create new obligations under IIAs**

The negotiations on an IFF4D should ensure that it does not inadvertently create new risks or liabilities for economies, especially developing ones, with regards to their IIA obligations. IFF4D obligations could

potentially be referenced in investment arbitration proceedings initiated under IIAs. Nonetheless, as an IFF4D 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 IFF4D as a way of informing the requirements of FET and legitimate expectations in IIAs, this could be prevented by provisions invalidating the importation of IFF4D provisions.

### **Building a firewall between an IFF4D and IIAs**

To prevent using IFF4D provisions in disputes based on IIAs, an IFF4D could incorporate provisions that ensure that a determination that there has been a breach of an IFF4D 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 IFF4D.

Furthermore, an IFF4D 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 IFF4D.

## Expert Network seminar: Integrating an IFF4D 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 IFF4D 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 Consolidated 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 IFF4D. 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 IFF4D:** 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 IFF4D 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 IFF4D 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 IFF4D 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 IFF4D:** 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 IFF4D 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 IFF4D agreement if it includes hard law commitments.

#### **Learning from existing WTO agreements to avoid contradictions**

The current draft of the IFF4D 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 IFF4D.

#### **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 IFF4D, 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 IFF4D, 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 IFF4D. However, because

market access and investment protection are exempt from the IFF4D, 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 IFF4D, 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 IFF4D is supposed to contribute to sustainable development. As such, the role of a DSM in contributing to the sustainable development goal seems limited. An IFF4D will likely not be subjected to a DSM because the IFF4D is much more intrusive into the domestic system.

### **WTO system supporting the implementation of an IFF4D**

As stated above, there are difficulties in establishing an IFF4D 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 IFF4D 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.

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