

Report: 10th virtual meeting of the Expert Network on a Multilateral Framework on Investment Facilitation for Development

14 April 2022, 15:00-16:15 CET

The 10th meeting of the Expert Network took place on 14 April 2022 from 15:00 to 16:15 Central European Time (CET) and focused on the scope of “investment” under the Investment Facilitation for Development (IFD) Agreement.

The meeting was moderated by Axel Berger, Deputy Director (interim) at the German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE) and included the following speakers: Catharine Titi, Research Associate Professor, CNRS–CERSA, University Paris-Panthéon-Assas; Christian Pitschas, Advisor, German Development Corporation (GIZ); and Daniela Gómez Altamirano, Private Sector Specialist, World Bank. Concluding remarks were provided by Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

This report is a summary of the discussion that took place during the meeting. A list of the participating members and the programme are attached at the end of this report.

Discussion highlights

The discussions focused on the following points, which are further elaborated upon in the sections below.

- It is important to define the term ‘investment’ under the IFD Agreement because issues of interpretation will most likely arise at later stages. The IFD Agreement seems limited to FDI, given that the Joint Ministerial Statements address foreign direct investment. However, the current draft text of the IFD Agreement does not have agreed language in this respect.
- The WTO legal framework and agreements seem to lean towards an enterprise-based definition. This approach should therefore be a point of reference for the IFD Agreement. Accordingly, if investment were to be defined under the IFD Agreement, then it probably should include a link to two criteria, namely “a business or professional establishment within the territory of a Member,” and second, “the production of and trade in goods and/or services”.
- The IFD Agreement aims not only to facilitate investment flows in general, but to facilitate investment that contributes specifically to sustainable development. Accordingly, host countries should be allowed to give special facilitation support to “sustainable” FDI that directly increases the development impact of investments in host countries. This can be done through including sustainable development as part of the definition of investment under the IFD Agreement or by strengthening the chapter on sustainable investment.

I. Defining “investment” under the IFD Agreement

The vast majority of investment treaties have detailed definitions that specify a wide range of assets, or indicate characteristics of types of investment, including details such as duration and expectation of profit and return. Typically, the definition of investment covers both FDI and portfolio investment; however, there are exceptions. In addition, some treaties may include

exclusions from the scope of the definition, such as the exclusion of claims arising out of commercial transactions, or disputes such as sovereign debt disputes.

In any legal document it is important to define key terms; specifically, it is advisable to define the term ‘investment’ under the IFD Agreement because issues of interpretation will most likely arise at later stages. When the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) was negotiated, the negotiating parties had a long discussion about whether to provide a definition of investment under Article 25 of the ICSID Convention. Eventually, they decided not to provide a definition of investment. Subsequently, arbitration panels have struggled with the issue, and eventually settled on the long-standing Salini test, which defines an investment as having four elements: (1) a contribution of money or assets (2) a certain duration (3) an element of risk and (4) a contribution to the economic development of the host state. However, the interpretation of the term “investment” has not been consistent and not all arbitration panels follow the Salini test.

In the event that the IFD text will include a definition of investment, it would be important to make sure that the definition does not conflict with other provisions in WTO Agreements, such as the Agreement on Trade in Services (GATS). It is also important to ensure that the definition does not create further fragmentation in investment law. This is particularly challenging because there are thousands of investment treaties with definitions that are not identical. However, it is important to aim for a definition that is compatible with other definitions of international investment agreements.

The IFD Agreement seems limited to FDI, considering that the Joint Ministerial Statements address foreign direct investment. However, the draft text with respect to the current scope of the IFD Agreement has not yet been agreed upon. If the future IFD Agreement text is limited to FDI, it is advisable to define FDI under the IFD Agreement. However, there is also the Organisation for Economic Co-operation and Development benchmark definition of FDI, which provides a good understanding of a commonly accepted, broad definition of FDI.

The question was raised whether there may be a benefit in facilitating both foreign and domestic investment, as local businesses may feel discriminated against if only FDI is facilitated. In addition, the benefits of facilitating FDI can easily be extended across all firms. However, it was noted that the IFD Agreement was negotiated in the WTO—an organization that focusses on international transactions—and that its context is international law, meaning a framework associated with foreigners and cross border activity. In addition, measures under the IFD Agreement will serve both types of investors. For example, transparency measures are going to help both domestic and foreign investors. It is also important to remember that foreign investors may have to go through certain procedures that domestic investors will not have to undertake and that they may have additional difficulties because they are investing in a foreign country, difficulties that do not apply to local investors.

II. Defining “investment” under the WTO legal framework – scope limitations

The Agreement Establishing the WTO (WTO Agreement) has two provisions that provide an indication regarding possible scope limitations on a definition of investment in the WTO context. Art. II:1, ‘Scope of the WTO’, refers to conducting trade relations, and Art. III.2, ‘Functions of the WTO’, addresses multilateral trade relations. The preamble mentions that the objectives of the WTO are “relations in the field of trade and economic endeavour” and “expanding the production of trade in goods and services”.

Two multilateral trade agreements under the WTO provide an indication of possible scope limitation on a definition of investment under the WTO system, namely the Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services

(GATS). TRIMs covers, as per its Art. 1, investment measures related to trade in goods. The Annex to TRIMs consists of an illustrative list of trade-related investment measures that are inconsistent with the national treatment obligation of the General Agreement on Tariffs and Trade (GATT) Art. III:4 and the prohibition of quantitative restrictions of GATT XI:1. The list refers to GATT-inconsistent trade-related investment measures that create a link between the purchase, importation or exportation of products by an “enterprise ” and its “local production”.

According to Art. I of the GATS, the GATS covers the “supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member” (so-called mode 3). The GATS defines the term “commercial presence” as “any type of business or professional establishment within the territory of a Member for the purpose of supplying services”, which includes the production of a service.

The Government Procurement Agreement (GPA), as amended, is an important reference, despite its plurilateral character, because it covers both goods and services. The GPA prohibits the discrimination of locally “established” suppliers on the basis of the degree of foreign affiliation or ownership. A supplier is defined by the amended GPA as a person or group of persons that provides or could provide goods or services.

On the basis of the WTO Agreement, the TRIMs, the GATS and the amended GPA it could be argued that, if investment were to be defined by the IFD Agreement, then it probably should include a link to two criteria, namely “a business or professional establishment within the territory of a Member,” and second, “the production of and trade in goods and/or services”.

III. Including development criteria as part of the definition of “investment” under the IFD Agreement

The question of balancing the rights and responsibilities of foreign investors in investment agreements has been at the centre of recent debates on the legitimacy of the international investment regime. Countries are seeking to move from quantity to quality FDI that would help them meet national development goals, while protecting themselves from investor-state dispute proceedings. Accordingly, one of the main proposals in this context is to include development impact in the definition of investment as a requirement for an investor to have access to international arbitration, i.e., the forth Salini criterion. This approach raises many questions because of the difficulty of determining the development impact of individual investment projects.

From the universe of 3,600 bilateral investment treaties (BITs), 2,015 BITs include references to “economic development” or “sustainable development” in the agreements’ preambles. Only 16 BITs incorporate a reference to the contribution to development of the host state specifically in the definition of “investment” in their agreements. It is worth noting that most of these BITs are between developing countries.

The Cooperation and Facilitation Investment Agreements concluded by Brazil (which are very similar at least in its spirit to the IFD Agreement as they do not include investment protection guarantees and focuses on investment facilitation) do not include the development criterion in the definition of investment.

As mentioned, different language has been used in relation to the development criterion, such as “economic development” and “sustainable development”, and some BITs go further and attempt to qualify the contribution by including language such as “effective contribution”, “sufficient contribution”, “significant contribution”, “any kind of contribution”, or a “positive impact”. These different definitions create more uncertainty.

The Moroccan BIT that was signed with Congo (2018) includes a contribution to sustainable development as one of the characteristics for an investment under the agreement. The BIT also

lists aspects of investments that can indicate that an investment provides a contribution to sustainable development. The list includes production capacity, economic growth, quality of jobs created, duration of the investment, knowledge transfer, and poverty reduction.

The draft African Continental Free Trade Area (AfCFTA) Agreement mentions in its definition of investment that a mandatory requirement for investment should be that it has a significant contribution to a host state's sustainable development.

The IFD Agreement aims not only to facilitate investment flows in general, but to facilitate investment that contributes specifically to sustainable development. The Ministerial Statement explicitly speaks about "investment facilitation for development", and the objective of the IFD Agreement states that the purpose of the Agreement is to adopt investment facilitation measures with the aim of fostering sustainable development. Accordingly, host countries should be allowed to give special facilitation support to "sustainable" FDI that directly increases the development impact of investments in host countries.

The Salini test refers generally to "the contribution to the economic development of the host state". It was suggested that, in the 21st century, the focus needs to be on sustainable development, which goes beyond economic development. FDI that contributes to sustainable development should take into account development, the environment, labor rights, and social rights. Such elements should be included in the definition of investment under the IFD Agreement, in line with the Moroccan Model BIT and the AfCFTA Agreement. However, due to political sensitivities and because there are different opinions among WTO Members on how to describe sustainable development, it was indicated that it may be preferable to strengthen the section on "sustainable investment" in the IFD Agreement.

Annex 1: Invitation



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Deutsches Institut für
Entwicklungspolitik



German Development
Institute

Invitation: 10th virtual meeting of the Expert Network on a Multilateral Framework on Investment Facilitation for Development

14 April 2022, 15:00-16:15 CET

Dear Expert Network members,

We would like to invite you to participate in the 10th meeting of the Expert Network on a Multilateral Framework on Investment Facilitation for Development, established in the framework of a project carried out by the International Trade Centre (ITC) and the German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE).

The meeting will take place on 14 April 2022 from 9:00am to 10:15am Eastern Daylight-Saving Time (EDT), 15:00 to 16:15 Central European Time (CET), 21:00 to 22:15 China Standard Time (CST).

The 10th virtual meeting of the Expert Network on a Multilateral Framework on Investment Facilitation for Development will focus on **the scope of “investment” under the Investment Facilitation for Development (IFD) Agreement.**

The scope of the IFD draft text is stated in Article 2.1 which reads as follows: “2.1. With the aim of facilitating investments, this Agreement applies to measures adopted or maintained by a Member [affecting/relating to] investment activities from investors of another Member”. The key term of this provision is “investments”. However, this term is undefined in the current IFD draft text. Generally, foreign investment involves the transfer of tangible or intangible assets from one country to another under total or partial control of the owner of the assets.¹ Foreign investments can take place in the form of greenfield investments, mergers and acquisitions, and portfolio investments among others. The scope of the IFD Agreement could potentially include each of these forms of investment, if left undefined, although investment facilitation is mainly relevant for FDI and is usually discussed only in this context.

Among the various types of investments, foreign portfolio investment is sometimes excluded from investment treaties. The International Monetary Fund defines portfolio investment as “cross-border transactions and positions involving debt or equity securities, other than those included in direct investment or reserve assets”.² The distinguishing elements between foreign portfolio investment and foreign direct investment are their short-term objective; and the separation between, on the one hand, management and control of the underlying entity and, on the other, the share of ownership in it. India’s Model BIT 2016 for example has explicitly excluded foreign portfolio investment³ and the current IFD draft also includes a proposal to

¹ M. Sornarajah, *The International Law on Foreign Investment* 8-9 (2010).

² International Monetary Fund, *Balance of Payments and International Investment Position Manual (BPM6)*.

³ India’s Model Bilateral Investment Treaty, Art 1.4 (i).

exclude portfolio investment. Another way to exclude portfolio investment in IIAs is a so-called enterprise-based definition of “investment”.

When the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) was negotiated, the negotiating Parties had a long discussion about whether to provide a definition of "investment" under Article 25 of the ICSID Convention. Eventually, they decided not to provide a definition of "investment". Subsequently, arbitration panels have struggled with the issue, and eventually settled on the long-standing Salini test, which defines an investment as having four elements: (1) a contribution of money or assets (2) a certain duration (3) an element of risk and (4) a contribution to the economic development of the host state. In the context of the IFD Agreement, the absence of a clear understanding of the term “investment” could create ambiguities in operation of the Agreement and could allow the Agreement to be potentially applied on various forms of investment such as portfolio investment.

Another relevant aspect that should be addressed is the development dimension of the Agreement and its implications on the scope of “investment” covered by the IFD. The IFD Agreement aims not only to facilitate investment flows in general, but to facilitate specifically investment that contributes to sustainable development. The Ministerial Statement explicitly speaks about “investment facilitation for development” and the objective of the IFD Agreement states that the purpose of the Agreement is to adopt investment facilitation measures with the aim of fostering sustainable development. Accordingly, host countries should be allowed to give special facilitation support to “sustainable” investments that directly increase the development impact of investments in host countries.

In this regard, the question is whether the agreement should include under its definition of “investment” development criteria and whether if the development dimension is not included explicitly in the definition, it can still be included by way of interpretation. This raises the fundamental question of how economic and sustainable development investments should be interpreted and what benchmarks should be used to assess the nature of such a contribution, absent explicit language defining investments under the IFD Agreement.

The Expert Network meeting will explore the implications of including different forms of investment under the definition of “investment”, address the pros and cons of including a definition, or other formulations to clarify the scope of "investment" in the future Agreement including addressing specific questions such as the implications of not defining the term; whether there are limitations when defining investments under the IFD Agreement that arise given the scope of the WTO legal system; and the possibilities of carving out explicitly or by way of interpretation investments that do not contribute to development.

Moderator: Axel Berger, Deputy Director (interim), German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE).

Opening speakers:

Catharine Titi, Research Associate Professor, CNRS–CERSA, University Paris-Panthéon-Assas – *“The definition of “investment” under the IFD Agreement- considerations and potential implications”*

Christian Pitschas, Advisor, German Development Corporation (GIZ)– *“Defining “investment” under the WTO legal framework – scope limitations”*

Daniela Gómez Altamirano, Private Sector Specialist, World Bank – *“Including development criteria as part of the definition of “investment” under the IFD Agreement”*

Concluding remarks: **Karl P. Sauvant**, Resident Senior Fellow, Columbia University/CCSI.

Everyone is encouraged to request the floor to speak (or send written questions or comments at any time during the meeting).

Please register for the meeting in order to receive the meeting link details (please [click here](#)).

For your reference, the reports of the last Expert Network meetings can be found [here](#).

Thank you in advance for participating in the Expert Network and sharing your expert insights.

With best regards,

Rajesh Aggarwal, Director (oic), Division for Market Development, ITC

Axel Berger, Deputy Director (interim), DIE

Karl P. Sauvant, Resident Senior Fellow, Columbia University, CCSI

Background material

ITC-DIE project on [Investment Facilitation for Development](#)

Axel Berger and Karl P. Sauvant, eds., *Investment Facilitation for Development: A Toolkit for Policymakers* (Geneva: ITC, 2021), [available here](#).

Daniela Gomez Altamirano, 'Protecting FDI contributing to host countries' development: The rise of the "forgotten" Salini criterion as part of the definition of investment,' Columbia FDI Perspectives No. 320, December 13, 2021, [available here](#).

Bios

Axel Berger

Axel Berger is Deputy Director (interim) at the German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE). He works on the design, effects and diffusion patterns of international trade and investment agreements, with a focus on emerging markets and developing countries. Other areas of current research include the effects of an international investment facilitation framework, the impact of free trade agreements on upgrading within global value chains and the role of the G20 in global governance. He teaches international political economy at the University of Bonn and regularly advises developing countries, development agencies and international organisations on trade and investment matters.

Daniela Gomez Altamirano

Daniela Gomez Altamirano is Private Sector Specialist at the World Bank focusing on investment policy legal reforms and improving the investment climate in diverse jurisdictions. Before joining the World Bank, she worked in the WTO and the European Commission. She also worked at an international legal firm advising governments in customs procedures and economic sanctions. She is a tenured Professor for International Economic Law at the National University of Mexico and guest lecturer at Fordham Law School, University of Notre Dame, and University of Leuven. She is a lawyer with post graduate degrees from Harvard University and University of Barcelona. PhD Candidate from Leiden University.

Christian Pitschas

Christian Pitschas is an Advisor at the German Development Corporation (GIZ). His work focuses on international trade and investment policy issues, in particular their relationship with development and sustainability. Previously, he worked as a trade lawyer in Geneva (2005 to 2018) and Brussels (1999 to 2005). He began his professional career as a research assistant at Free University of Berlin (1997 to 1999). He studied law in Germany, Switzerland and the US

and holds a PhD from the Free University of Berlin and an LLM from the University of Georgia (USA).

Karl P. Sauvant

Karl P. Sauvant introduced the idea of an International Support Program for Sustainable Investment Facilitation in the E15 Task Force on Investment Policy in 2015. From there, the proposal was taken forward in the WTO. He has written extensively on this subject (see <https://ssrn.com/author=2461782>). He currently assists, as Senior International Advisor, the ITC and DIE on a project on Investment Facilitation for Development. He retired in 2005 as Director of UNCTAD’s Investment Division and established, in 2006, what is now the Columbia Center on Sustainable Investment (CCSI). He stepped down as the Center’s Executive Director in 2012, to focus his work, as a CCSI Resident Senior Fellow, on teaching, research and writing.

Catharine Titi

Catharine Titi is a tenured Research Associate Professor at CNRS–CERSA, University Paris-Panthéon-Assas. She is a member of the ESIL Board and she serves as Deputy Chair of the Academic Forum on ISDS. She sits on CAfA’s panel of arbitrators and she is appointed to the roster of the USMCA’s Annex 31-B panellists. In 2016, she was awarded the Smit-Lowenfeld Prize of the International Arbitration Club of New York. Her latest monograph, [The Function of Equity in International Law](#), was published by Oxford University Press in 2021.

Annex 2: Attendance list

First name	Last name	Affiliation
Expert Group members		
Axel	Berger	German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)
Manjiao	Chi	University of International Business and Economics (UIBE)
Pablo Agustín	Escobar-Ullauri	Permanent Mission of Ecuador to the WTO
Federico	Ortino	King's College London
Christian	Pitschas	German Development Corporation (GIZ)
Karl P.	Sauvant	Columbia Center on Sustainable Investment (CCSI)
Matthew	Stephenson	World Economic Forum (WEF)
Speakers		
Axel	Berger	German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)
Daniela	Gomez Altamirano	World Bank (WB)
Christian	Pitschas	German Development Corporation (GIZ)
Karl P.	Sauvant	Columbia Center on Sustainable Investment (CCSI)
Catharine	Titi	Research Associate Professor at CNRS–CERSA, University Paris-Panthéon-Assas
Additional participants		
Yardenne	Kagan	International Trade Centre (ITC)
Quan	Zhao	International Trade Centre (ITC)