

Report on the 3rd virtual meeting of the Expert Network on a Multilateral Framework on Investment Facilitation for Development

26 June 2020

The 3rd virtual meeting of the Expert Network on a Multilateral Framework on Investment Facilitation for Development took place on 26 July 2020. The meeting had 17 participants, including the project support team and speakers. The meeting was chaired by Mr. Axel Berger (Senior Researcher at the German Development Institute / Deutsches Institut für Entwicklungspolitik, DIE) and concluded by Karl P. Sauvant (Resident Senior Fellow, Columbia University/CCSI). Mr. Chi Manjiao, University of International Business and Economics, Beijing, and Mr. Jansen Calamita, National University of Singapore, provided inputs addressing the aforementioned questions. The invitation and list of participants are attached.

The meeting explored the issues related to the integration of an international framework on investment facilitation for development (IFF4D) into the WTO rule-book. Specifically, the meeting was structured around the following guiding questions:

- What are the experiences gained from investment facilitation provisions in International Investment Agreements (IIAs)?
- What are the provisions that are referenced most frequently in IIAs, especially in IIAs with high membership, and would be the best candidates to be included in a multilateral framework?
- What is the relationship between a multilateral framework on investment facilitation for development and IIAs, in particular with regard to market access clauses and most-favoured-nation provisions?
- How can the provisions of a multilateral framework on investment facilitation for development be shielded from investor-state dispute settlement provisions in IIAs?

The discussion was held under the Chatham House Rule to enable frank and open exchange.

Discussion highlights

1. 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 as well. IIAs often include provisions on facilitating permits for the establishment of investments, entry and sojourn of investment-related personnel and transparency. A few IIAs also include investment facilitation measures relating 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's Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS) both deal with issues concerning 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, for example, 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.

2. 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 specific provisions that shield the framework from unwarranted interpretations. Treaty parties could also review their IIAs and BITs to identify implications for an IFF4D.

3. Fair and equitable treatments (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.

4. 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 IIAs obligations and make disputes less likely. Investment facilitation disciplines, such as transparency, ombuds-type mechanisms and streamlined procedures, contribute to the prevention of disputes under IIAs.

5. 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 IIAs 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.

6. 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 already been used in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in article 9.3, which could be considered for inclusion in an IFF4D.

Furthermore, an IFF4D could include a provision that states that an IFF4D 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. Such an article could also state that the framework is not to be treated as relevant rules of international law applicable in the relations between the parties in the interpretation of 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 also 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.

Invitation 3rd virtual meeting of Expert Network on a multilateral framework on investment facilitation for development, 25 June 2020, 14:00-15:30 CET

Dear Expert Network members,

Thank you very much again for your willingness to participate in the Expert Network 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 3rd virtual meeting of the Expert Network will take place on **25 June May 2020** from 8:00am to 9:30am Eastern US Daylight Saving Time (EDT), 14:00 to 15:30 Central European Time (CET), 20:00 to 21:30 China Standard Time (CST). We would appreciate if you are able to participate. **Please register [here](#).**

The 3rd meeting will focus on the **relationship between a multilateral framework on investment facilitation for development and international investment agreements**. More specifically, we would like to discuss the following questions with you:

- What are the experiences gained from investment facilitation provisions in IIAs?
- What are the provisions that are referenced most frequently in IIAs, especially in IIAs with high membership and would be the best candidates to be included in a multilateral framework?
- What is the relationship between a multilateral framework on investment facilitation for development and IIAs, in particular with regard to market access clauses and most-favoured-nation provisions?
- How can the provisions of a multilateral framework on investment facilitation for development be shielded from investor-state dispute settlement provisions in IIAs?

The discussion will be held under Chatham House Rule to enable frank and open exchange. The main results of the discussion will be summarized in a short report which will be fed into the WTO process on investment facilitation.

Moderator: Axel Berger, Senior Researcher at the German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE).

Opening speakers:

Mr. Chi Manjiao, University of International Business and Economics

Mr. Jansen Calamita, National University of Singapore.

Concluding remarks:

Karl P. Sauvart, Resident Senior Fellow, Columbia University/CCSI.

To enhance the dialogue in the session and ensure that we address as many questions as practicable, we would like to hear from you – prior to the meeting – by submitting your questions through this [link](#). To join the meeting, kindly, click on the link below shortly before 14:00pm CET on 25 July 2020 and follow the instructions. If you are not able to connect online, you could connect using the dial-up options provided at the end of this email.

Join Zoom Meeting

If you would like to request the floor to speak or send written questions or comments during the meeting, please feel free to type your question or request in the chat window by pressing on the chat icon in the middle-bottom pane of the Zoom window.

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

With best regards,

Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC
Axel Berger, Senior Researcher, DIE
Karl P. Sauvant, Resident Senior Fellow, Columbia University, CCSI

Bios

Axel Berger is a Senior Researcher 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.

N Jansen Calamita is Head of Investment Law & Policy, Centre for International Law, and Research Associate Professor (CIL), Faculty of Law, National University of Singapore. Prior to entering academia, Professor Calamita served in the Office of the Legal Adviser in the US Department of State and as a member of the UNCITRAL Secretariat. He began his career in private practice in New York. He is co-editor (with L Malintoppi) of *International Litigation in Practice* (Brill) and a member of the editorial board of the Yearbook of International Law and Policy (Oxford University Press).

Chi Manjiao is professor, Law School of University of International Business and Economic (UIBE), China, and founding director of the School's Center for International Economic Law and Policy (CIELP). He is also founding editor-in-chief of the Asian Yearbook of International Economic Law. His recent research focus includes international economic law, dispute settlement and sustainable development. He frequently advises international organizations, government bodies as well as private firms on legal and policy issues of his research fields.

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>), participated in various events relating to it and currently assists 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), stepping down as its Executive Director in 2012, to focus his work, as a CCSI Resident Senior Fellow, on teaching, research and writing.

Annex: Attendance

First name	Last name	Affiliation
Rudolf	Adlung	Independent Trade Policy Analyst, former Counsellor, WTO Trade in Services Division
Axel	Berger	German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)
Ayelet	Berman	National University of Singapore (NUS)
Benjamin	Czapnik	Pacific Islands Forum Secretariat
Pablo Agustín	Escobar-Ullauri	Permanent Mission of Ecuador to the WTO
Mohamad	Fakhreddin	International Trade Centre (ITC)
Ahmad	Ghourri	University of Sussex
Khalil	Hamdani	Graduate Institute of Development Studies at the Lahore School of Economics
Yardenne	Kagan	Project Officer, ITC/DIE Project on Investment Facilitation for Development, International Trade Centre (ITC)
Simon	Lacey	University of Adelaide
Rodrigo	Polanco	World Trade Institute (WTI)
Michelle	Ratton Sanchez Badin	Getulio Vargas Foundation
Karl P.	Sauvant	Columbia Center on Sustainable Investment (CCSI)
Stephan	Schill	University of Amsterdam
Quan	Zhao	International Trade Centre (ITC)
Speakers		
Jansen	Calamita	National University of Singapore
Manjiao	Chi	University of International Business and Economics (UIBE)