



Webinar report: Investment facilitation for development – assessing large-scale investment contracts

The webinar on investment facilitation for development - assessing large-scale investment contracts, co-organized by the International Trade Centre (ITC), the German Development Institute/ Deutsches Institut für Entwicklungspolitik (DIE), the World Association of Investment Promotion Agencies (WAIPA), the CONNEX Support Unit, and the World Economic Forum (WEF), took place on 6 July 2021, from 15:00 to 16:15 Geneva time. The webinar hosted approximately 100 participants. The webinar was held in the framework of the Investment Facilitation for Development [project](#), jointly implemented by the ITC and DIE. This was the 6th webinar in a series meant to assist investment promotion agencies (IPAs) and policymakers strengthen their capacity to facilitate higher FDI flows, especially investment flows that directly contribute to development.

Opening remarks were provided by Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC. The webinar was moderated by Karl P. Sauvant, Resident Senior Fellow, Columbia University, CCSI, and included the following speakers: Louis T. Wells, Herbert F. Johnson Professor of International Management, Emeritus, Harvard Business School; Boris Dolgonos, Partner, Gibson Dunn; Samantha Thompson, Head of Legal Global M&A, Anglo American; and Brigitte Klein, Head, CONNEX Support Unit. Concluding remarks were made by Bostjan Skalar, Executive Director, CEO, WAIPA.

The webinar's programme is annexed to this report.

Summary of the main issues

The discussions focused on the following main points, elaborated further below.

- Large scale investment contracts are typically very complex and require careful assessment and preparations, as they often relate to sensitive sectors such as resources and infrastructure.
- Contracts for large scale investment projects require multi-disciplinary expertise to assess and negotiate. Developing countries and especially least developed countries (LDCs) may benefit from technical assistance to assess and negotiate highly complex contracts to ensure outcomes that are win-win and sustainable. Governments that utilize technical assistance may also improve their contract assessment processes so that the processes do not become bottlenecks—the opposite of investment facilitation—for the development of investment projects.
- The importance of good contracts is critical - especially for natural resource and infrastructure projects - as they determine the distribution of benefits between governments and investors for

years to come. Good contracts reduce the risks that the relationship between the parties will be disrupted, with negative consequences for both sides.

- The discussion focused on the importance of the preparatory process for negotiating contracts, starting with defining the objectives for the government, which is difficult as different ministries may have different interests. It was emphasized that it is important to have a good and multi-disciplinary negotiating team at the negotiating table that is well prepared and has a clear objective and a strategy in mind.

I. Key considerations and bottlenecks in assessing and negotiating large-scale investment contracts

Large scale investment contracts are very complex and involve multiple stakeholders and therefore require careful assessment and preparation. Such contracts not only determine the distribution of benefits between the government and the investor for years to come, but, if poorly designed, may lead to conflicts that have negative consequences, both in terms of litigation costs and in terms of the impact on subsequent foreign investment.

From the government perspective, it was emphasized during the discussion that the most difficult negotiations are often the ones that arise internally among government agencies involved in preparing for the negotiations with the investor. Often different ministries have different priorities and, in assessing the ultimate goals of the contract, each ministry may therefore have different evaluation criteria. To facilitate such internal discussions, it is important that every ministry make its objectives clear and that such objectives are consolidated so that the government arrives at the negotiating table with unified and coherent objectives. The government should have a good negotiating team, which should not be too big. There are examples of countries that have 20-25 people on their negotiating team, which makes it impossible for each negotiator to have a voice in the negotiations. In addition, the government should understand the investor's interests, objectives, priorities, and limitations, including feasibility studies, sources of financing and limitations in providing that financing. The negotiating team should also look at the track record of the investors they are negotiating with elsewhere, and what the investors have done in the past when they faced disputes (e.g., did they try to settle the disputes or did they rush to international arbitration).

It is important to make sure that the agency that is empowered to negotiate contracts with investors has the technical and legal skills needed for such negotiation. Developing countries and LDCs often have capacity gaps when it comes to negotiating large scale contracts and ensuring that contracts have sustainable development impacts. Such gaps may include legal, financial, business, tax, and sector specific expertise. It was mentioned that, because of the lack of expertise, government officials may be hesitant when negotiating contracts. For example, officials may be afraid to conclude such agreements not only because of national consequences, but because of personal consequences, as poorly negotiated contracts may be viewed as evidence of corruption. During the webinar, some government representatives also mentioned that they have information gaps regarding the implications of investment projects and that they lack the capacity to perform risk assessments. In addition, they indicated that investors do not share relevant information with them.

During the webinar the CONNEX Support Unit was introduced. It has a network of experts that provide technical assistance. CONNEX has accumulated evidence-based experience over the past four years by helping 16 countries in Africa, South America, and Asia to prepare for, and assist in, negotiations of investment contracts with foreign investors, thus facilitating the negotiations process and arriving at win-win outcomes.

It was also mentioned that, for assessing specific terms in investment contracts, governments can benchmark contracts against international principles, relying for example on sustainable development goals and the OECD's Development Guiding Principles for Durable Extractive Contracts, which comprise objectives in negotiating fair contracts for both host countries and investors.

It was indicated that the contract negotiating process usually takes 9-18 months, but this is a rough estimation and the process can even take a few years, depending on the nature of the contract. It is important that the expectations for the duration of the contract negotiations be reasonable and that the timetable be transparent and known to both parties. Delays are often due to lack of preparation by government officials. Because investors are profit focused, they are usually well prepared with a financial model and have a negotiating team that has done similar types of negotiations before. The government many times comes to the negotiating table with multiple competing objectives, and resolving those competing objectives almost necessarily takes more time. Additionally, although the government should have a long-term view of what is best for the national interest, it may also be driven by short-term political considerations and can be influenced by what the media may say, which can delay the negotiation process.

II. The role of IPAs in assessing and negotiating large-scale investment contracts

It was suggested that IPAs should have a minimal role in negotiating contracts as IPAs are responsible for attracting investors; as such, they usually do not have the technical expertise that is required for negotiating a contract in a specific industry. In addition, there is a potential conflict of interest as IPAs are usually evaluated on how much investment they attract. This gives them an automatic bias in favour of concluding an agreement even if the terms are less favourable for the government.

This does not mean that IPAs should not be involved in the assessment and facilitation process. The attractiveness of the country to other investors is affected by such negotiations. If negotiations fail, IPAs should understand why they failed so that, when the agency makes new efforts to facilitate investments, it understands what the problems were and seek investors that do not raise those problems. In addition, a better understanding of large-scale investment projects can help IPAs when providing support to various government agencies involved in the investment project once established, as well as investors when facilitating the investment process.

III. Facilitating the assessment of large-scale investment contracts: a corporate perspective

Both investors and governments have an interest in negotiating beneficial contracts for both sides, in the interest of durable contracts. No party wants to end up in an arbitration or litigation process. When investors take advantage of unexperienced governments when negotiating contracts, it

breeds mistrust down the line. It can also impact the investor's reputation, not only with the government, but with other stakeholders, like communities. Consequently, it is important that both sides have the right people in the room, including the people with the subject matter expertise and the cultural expertise. Investors need to make sure that the negotiators from their side know the jurisdiction well, speak the language and understand the political environment, including the relationships among the different ministries. To the extent that the assessment and negotiation of investment projects can be facilitated, that is desirable.



Webinar invitation

Investment facilitation for development - assessing large-scale investment contracts

6 July 2021

Dear Colleagues,

On behalf of the International Trade Centre (ITC), the German Development Institute/ Deutsches Institut für Entwicklungspolitik (DIE), the World Association of Investment Promotion Agencies (WAIPA), the CONNEX Support Unit, and the World Economic Forum (WEF), we cordially invite you to a webinar on:

Investment facilitation for development - assessing large-scale investment contracts

The webinar will take place on 6 July 2021, from 15:00 to 16:15 Geneva time (Central European Time), 09:00 to 10:15 Eastern Standard Time, and 21:00 to 22:15 China Standard Time.

The webinar is being held in the framework of the Investment Facilitation for Development [project](#), jointly implemented by the ITC and DIE.

This is the 6th webinar in a series meant to assist investment promotion agencies (IPAs) and policymakers strengthen their capacity to facilitate higher FDI flows, especially investment flows that directly contribute to development; it will also provide an opportunity to exchange experiences regarding investment facilitation, including with investors.

The 6th webinar will focus on practical issues regarding **assessing large-scale investment contracts**. The discussions will be informed by “*Investment Facilitation for Development: A Toolkit for Policymakers*”, [available here](#).

Please feel free to share this invitation with officials dealing with FDI, as well as representatives of the private sector who might be interested in this subject.

The webinar will be conducted in an interactive manner and allow for questions by participants.

The webinar will feature the following speakers:

Opening: Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC

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

Experts and practitioners:

- **Louis T. Wells**, Herbert F. Johnson Professor of International Management, Emeritus, Harvard Business School - *“Why is it difficult to assess and negotiate large-scale investment contracts?”*
- **Boris Dolgonos**, Partner, Gibson Dunn - *“What are the key considerations in assessing large-scale investment contracts?”*
- **Samantha Thompson**, Head of Legal Global M&A, Anglo American- *“How to facilitate the assessment of large-scale investment contracts: a corporate perspective?”*
- **Brigitte Klein**, Head, CONNEX Support Unit - *“How to obtain support for contract assessments and negotiations?”*

Concluding remarks: Bostjan Skalar, Executive Director, CEO, WAIPA

To register for the event and receive the meeting-link details, please [register here](#).

The webinar will be delivered through Zoom.

We are looking forward to welcoming you at the webinar!

Best regards,

Rajesh Aggarwal, ITC; Axel Berger, DIE; Brigitte Klein, CONNEX Support Unit; Karl P. Sauvant, Columbia University/CCSI; Bostjan Skalar, WAIPA; Matthew Stephenson, WEF

Background material

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

Karl P. Sauvan and Louis T. Wells, *“Obsolescence of the obsolescing bargain: Why governments must get investor-state contracts right”* Columbia FDI Perspectives No. 298, February 22, 2021”, [available here](#).

“CONNEX: Supporting governments to realize their resource potential through better”, [available here](#).

Bios:

Rajesh Aggarwal

Rajesh Aggarwal is Chief of the Trade Facilitation & Policy for Business Section of the International Trade Centre (ITC), Geneva. He is leading a program of assisting the private sector in developing countries to be the change agent for trade policy reform and engage in business advocacy with their governments in design and implementation of trade policies and negotiating positions that reflect the business interests. Before joining the ITC, he worked for the Indian Government and participated in WTO Doha Round of trade negotiations. He has published papers in the area of trade negotiations, including a paper titled “Dynamics of Agriculture Negotiations in WTO” in the Journal of World Trade.

Boris Dolgonos

Boris Dolgonos, Partner at Gibson, Dunn & Crutcher LLP, has advised on a range of mining, investment and financing transactions, including initial public offerings, high-yield and investment-grade debt offerings, and privatizations. He has represented public and private corporations, investment banks and other financial institutions. His practice has focused on government representation and capacity development, including negotiating mining concessions, drafting model mining agreements and financing transactions. He serves on the Board of Directors of the International Senior Lawyers Project and the Advisory Committee of the CONNEX Support Unit.

Brigitte Klein

Brigitte Klein, Head of the CONNEX Support Unit, has spent over 20 years in development assistance. Former posts include the Emerging Markets Sustainability Dialogues as well as the Access to Insurance Secretariat, which GIZ continues to host. Previous positions have brought her to India, leading a Rural Finance Programme, as well as a secondment to the F.A.O in Rome. Before joining GIZ, she lectured and carried out research at Humboldt University in Berlin on agricultural market development. She earned her Ph.D. in economics and her initial degree in economics from the Free University in Berlin.

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>), 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). 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.

Bostjan Skalar

Bostjan Skalar is currently serving as Executive Director - CEO of the World Association of Investment Promotion Agencies (WAIPA). WAIPA is the umbrella organization of IPAs worldwide, established in 1995 under auspices of UNCTAD. Previously he served as the Director of the Slovenian Public Agency for Promotion of the Investment, Internationalization, Entrepreneurship and Tourism. He also served as a Consul for Economic Affairs of Slovenia in Istanbul, Turkey. He has effectively performed his international business activities and managing roles in different sectors in many countries. He has over 20 years of management experience and is one of the global leaders in the investment promotion area with a private-sector focus.

Samantha Thompson

Samantha Thompson is Head of Legal Global M&A at Anglo American, having joined in late 2018. Prior to this role she spent three years at PwC UK, latterly as co-head of Corporate Affairs. She lived in Hong Kong for 10 years where she was a corporate partner at Linklaters, with a broad corporate practice including governance, corporate advisory and M&A. She started her career at Slaughter and May in London. She is also a guest speaker on M&A at the Oxford University Said Business School.

Louis T. Wells

Louis T. Wells is the Herbert F. Johnson Professor of International Management, Emeritus, at the Harvard Business School. He has served as consultant to governments of a number of developing countries, as well as to international organizations and private firms. His principal consulting activities have been concerned with foreign investment policy, negotiations between foreign investors and host governments, and investor-state arbitrations. His associations include: Fellow - Academy of International Business, Council on Foreign Relations, and advisory committees of CONNEX and Columbia Centre for Sustainable Investment.