

**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.<sup>1</sup> 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”.<sup>2</sup> 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 investment<sup>3</sup> and the current IFD draft also includes a proposal to 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

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

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

<sup>3</sup> India’s Model Bilateral Investment Treaty, Art 1.4 (i).

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.