



## Reflections on the Discussion of Investment Facilitation

By Kinda Mohamadieh

Senior Researcher, Global Governance for Development Programme (GGDP)

### KEY POINTS

◇ The concept 'investment facilitation' is broad and could cover a variety of approaches and suggestions made by countries and multilateral institutions. Conceptually, it covers a broad set of regulatory actions, institutional roles and administrative procedures that are usually closely interlinked with policies and regulations that shape national developmental processes.

◇ As proposed in different fora (reviewed by this brief), the 'investment facilitation' concept covers principles of 'predictability and consistency', 'transparency' of processes and engagement with stakeholders, including establishing a mechanism to provide 'interested parties' with an opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation.

◇ Emphasizing 'predictability' in the regulatory environment without recognizing the need for differentiated approaches in the regulatory processes among countries and the dynamism that may be required in the regulatory process in order to attend to changes at the national, regional and global levels, could result in making such regulatory processes unable to respond to the regulatory needs posed by a highly globalized and dynamically changing economic context.

◇ Embedding a deep transparency model, which includes an obligation of prior consultation with 'interested parties', under the umbrella of investment facilitation could amplify existing problematic aspects of investment treaties, especially those pertaining to the ability of private investors to influence domestic policy and regulatory processes, leading to a situation of 'regulatory chill' in some cases.

◇ While the narrative on 'investment facilitation' draws links with mobilizing and channeling investment towards sustainable development, an 'investment facilitation' model that adversely affects regulatory and policy space would run counter to national efforts directed towards building linkages between FDI and sustainable development processes.

◇ The dominant experiences pertaining to 'investment facilitation' thus far rest in developing voluntary principles and guidance that leave their adoption and application to the discretion of national authorities. Cases where investment facilitation is imbedded in treaties focus on a 'best endeavor' approach and dynamically cater to the objectives of each State Party to the treaty.

◇ In the way forward in the discussion of 'investment facilitation', it is important to focus on the implications of the means by which action on investment facilitation is to be taken with respect to policy and regulatory space. Such implications are likely to significantly vary depending on the scenario to be chosen. Multilateral convergence over voluntary guidelines that would be implemented as appropriate by developing countries, taking into account their national contexts in accordance with development, regulatory, and institutional priorities, would carry significantly different implications in comparison to negotiating and having 'one-size-fits-all' multilateral hard rules that would apply to both developing and developed countries across varying sectors.

◇ Ensuring that investment facilitation efforts are appropriate to and situated within the framework of a host state's development policies and objectives are key elements to consider in pursuing more efforts in this area.

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**While the reform process of international investment protection treaties is evolving, it is still at a nascent stage. Systemic reforms that would safeguard the sovereign right to regulate and balance the rights and responsibilities of investors would require more concerted efforts on behalf of home and host states of investment in terms of reforming treaties and rethinking the system of dispute settlement.**

**Experiences of developing countries reveal that without such systemic reforms, developing countries' ability to use foreign direct investment for industrialization and development will be impaired.**

**The policy brief series is intended as a tool to assist in further dialogue on needed reforms.**

**\*\*\* The views contained in the policy brief are personal to the author and do not represent the institutional views of the South Centre or its Member States.**

### I. Introductory Points in regard to the Concept of ‘Investment Facilitation’

‘Investment facilitation’ is a concept repeated in discussions pertaining to investment policies and treaties, including those addressing the reform of investment treaties. The discussion on investment facilitation is taking place in various fora and contexts. Multilateral institutions such as UNCTAD, the OECD and the World Bank have been engaged in this discussion. Investment facilitation has been on the agenda of the G20 as well<sup>1</sup>. At the regional level, some country blocs, like the Asia-Pacific Economic Cooperation (APEC), have developed their Investment Facilitation Action Plan. Moreover, selected countries have chosen to address this issue bilaterally, such as through investment treaties. For example, Brazil adopted the “Investment Cooperation and Facilitation Model”.

The term ‘investment facilitation’, as used in different fora, remains broad and unspecific, which allows it to encompass a variety of approaches and suggestions made by countries and multilateral institutions. This fluidity in the concept could provide space for discussing different approaches and thus for nurturing dialogue in regard to the concept. However, the same conceptual fluidity could lead to lack of clarity or confusion, especially when participants are not on the same level playing field in the discussion. This would especially be the case where some proponents are actively developing the concept and related proposals while others are reacting or commenting on pre-elaborated proposals.

While the term ‘facilitation’ holds an overall positive connotation, there may be multiple potential adverse implications for developing countries of the approaches and rules that could be developed in this area. Such implications are closely interlinked with the developmental context and institutional and regulatory frameworks existing in different countries.

This note focuses on discussing the approaches to ‘investment facilitation’ being developed at the multilateral level and other fora and institutions. It specifically discusses issues pertaining to whether there would be an added value from developing hard multilateral rules in the area of ‘investment facilitation’, and the potential implications of such rules on policy and regulatory space.

### II. Overview: Delineating the Concept/Term of ‘Investment Facilitation’

The term ‘investment facilitation’ has been considered to encompass a broad set of regulatory actions, institutional roles and administrative procedures. Different institutions and fora have chosen to focus on different angles and approaches to the concept.

For example, in its ‘Policy Framework for Investment’, the OECD includes under investment promotion and facilitation<sup>2</sup> issues pertaining to the business envi-

ronment and investment promotion, the role of investment promotion agencies (IPA) and its performance and dialogue mechanisms, streamlining administrative procedures, the cost-benefit of investment incentives, issues pertaining to the promotion of investment linkages, drawing on international expertise, and information exchange networks in the area of investment.

UNCTAD’s Investment and Enterprise Division has developed a more detailed approach to investment facilitation under the Investment Facilitation Action Menu<sup>3</sup>. UNCTAD assesses that there is a systemic gap in both national and international investment policies when it comes to ‘investment facilitation’. It points out that “[a]t the international level, in the overwhelming majority of the existing 3,300-plus international investment agreements (IIAs), concrete facilitation actions are either absent or weak”<sup>4</sup>. UNCTAD defines ‘investment facilitation’ as encompassing transparent and predictable rules, efficient administrative procedures, efficient dispute prevention and resolution, effective stakeholder relations, and investor services to help deal with rules and procedures<sup>5</sup>. UNCTAD explicitly differentiates between investment promotion and facilitation. UNCTAD anchors promotion in actions of IPAs, image and marketing efforts, targeting of certain FDI projects, and providing incentives<sup>6</sup>. The UNCTAD Investment Facilitation Action Menu includes ten lines of action pertaining to transparency, regulatory process and policies, administrative procedures, relations with stakeholders, institutional framework, international cooperation and technical assistance (see detailed list of the ten lines of action in Annex 1)<sup>7</sup>.

UNCTAD does not specify a manner in which to advance the efforts pertaining to ‘investment facilitation’. It points out that the action menu, as an international policy instrument, reflects flexibility and options to pick and choose from, adapt and adopt for national and international policymaking<sup>8</sup>. At the same time, UNCTAD proposes that “the package includes actions that countries can choose to implement unilaterally and options that can guide international collaboration or that can be incorporated in IIAs”<sup>9</sup>.

The 2016 G20 ministerial meeting held in Shanghai, under China’s Presidency, had agreed a set of non-binding Guiding Principles for Global Investment Policy-making<sup>10</sup>. The Principles also refer to ‘investment facilitation’, providing that “[p]olicies for investment promotion should, to maximize economic benefit, be effective and efficient, aimed at attracting and retaining investment, and matched by facilitation efforts that promote transparency and are conducive for investors to establish, conduct and expand their businesses”<sup>11</sup>.

At a regional level, the Asia-Pacific Economic Cooperation (APEC)<sup>12</sup> had adopted an investment facilitation action plan, under which “investment facilitation refers to actions taken by governments designed to attract foreign investment and maximize the effectiveness and efficiency of its administration through all stages of the investment cycle... Transparency, simplicity and predictability are

among its most important principles”<sup>13</sup>. APEC points out that the “[investment facilitation] initiatives were undertaken in recognition of the diversity that exists among APEC member economies, and they provide members with a broad range of policy choices suitable for different economic circumstances” (See Annex 2 for a list of actions included under the APEC investment facilitation action plan).

‘Investment facilitation’ has also been linked to facilitating trade, specifically efforts under the WTO-led Aid for Trade Initiative and the recently adopted WTO Trade Facilitation Agreement<sup>14</sup>. Under this context, it is proposed that the Aid for Trade Initiative could be expanded to cover investment, or the Trade Facilitation Agreement could be expanded to cover investment, turning it into an Investment and Trade Facilitation Agreement<sup>15</sup>. It is also proposed that a group of countries could launch a Sustainable Investment Facilitation Understanding focused on practical ways to encourage the flow of sustainable FDI to developing countries<sup>16</sup>.

Representatives from the business community have received the discussion on ‘investment facilitation’ as a step towards refocusing the attention away from issues pertaining to investment treaty and dispute settlement reforms. A representative of the U.S. Council for International Business had pointed out that the propositions pertaining to investment facilitation “eschews broad and controversial policy issues related to international investment” and represent an “out with politicized policy debates on Investor-State Dispute Settlement (ISDS) and in with practical recommendations to help governments attract more and better foreign investments ...”<sup>17</sup>.

### Reflections from practices of selected developing countries

In the context of presenting an alternative to the traditional international investment treaty model, Brazil developed a model treaty<sup>18</sup> entitled “Investment Cooperation and Facilitation Model”. The model focuses on a ‘best endeavor’ approach to investment facilitation that is in line with domestic laws. For example, it provides for provisions on ‘Exchange of information between Parties’ “whenever possible and relevant to reciprocal investments...”<sup>19</sup>. It also anchors transparency requirements in ‘best-endeavor’ language, whereby the provisions require the administering of ‘measures that affect investment’ in a ‘reasonable, objective and impartial manner, in accordance with [Parties’] domestic law”<sup>20</sup>. It is also worth noting that the Brazilian model does not provide for a system of investor-state dispute settlement, but sets in place a system of focal points and joint committees to prevent, manage and resolve disputes, and a mechanism of arbitration between the States as a last resort if other means do not work. This model focuses primarily on bilateral institutional cooperation in the form of joint committees and focal points that engages with investors directly and seeks dynamic linkages between investors and domestic sectoral policies.

The establishment of focal points<sup>21</sup> or ‘ombudsmen’ in each Party and the creation of a Joint Committee<sup>22</sup> represent the institutional core elements of the Brazilian model treaty, as they contribute to the fulfilment of the commitments made and to the strengthening of dialogue between the Parties with regard to investments and appropriate assistance to investors. The Brazilian model also provides for the establishment of investment facilitation and cooperation agendas in areas that may improve the investment environment, which may vary depending on the possibilities and challenges of the bilateral investment relationship. According to a Brazilian official<sup>23</sup>, such agendas make of the Agreement a dynamic tool that facilitates the gradual evolution of specific commitments between the Parties.

In the South African experience, the investment framework includes sectoral programmes and investment facilitation as two core elements. This investment framework was developed after South Africa withdrew from its bilateral investment agreements and adopted a revised national investment law as an alternative<sup>24</sup>. The sectoral programmes are part of South Africa’s industrial policy, which creates an environment that will attract investors in particular sectors. According to South African officials, identifying a package of development policies around sectoral programmes can be more effective in attracting investments than protections as provided by investment treaties<sup>25</sup>. South Africa coupled sectoral programmes with actions to facilitate the entry of targeted investors in the sectoral programmes and to facilitate investments in these sectors. A committee chaired by the President oversees the work of investment agency. It coordinates with legislative bodies’ committees and sets targets for decision making.

### **III. Reflections on Investment Facilitation, Development and Policy Space Concerns**

Given that the ‘investment facilitation’ concept, as developed and used in different fora, engages issues pertaining to regulatory, institutional, and administrative processes, it is closely interlinked with issues relating to the preservation of the policy and regulatory space in developing countries that would be essential in driving the developmental process.

#### Commentary on selected elements encompassed under ‘Investment Facilitation’ propositions

The propositions pertaining to the ‘investment facilitation’ concept encompass principles of ‘predictability and consistency’, ‘transparency’ of processes and engagement with stakeholders, including establishing a mechanism to provide interested parties with an opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation<sup>26</sup>. Stakeholders are considered to include the business community and investment stakeholders. Moreover, the ‘investment facilitation’ narrative has sought to situate the concept within processes linked to sustainable development and encouragement of FDI (See more details under

section II). Each of these elements could be seen differently from the perspective of an investor or a State. Consequently, each of these elements could carry a different interface with policy and regulatory space. Accordingly, maintaining these principles as general guidelines that would be implemented nationally in accordance with domestic contexts would carry significantly different implications in comparison to imbedding these principles in hard rules that are implemented in a one-size-fits-all approach.

Predictability and consistency are emphasized in the narrative on investment facilitation. These two principles could be evaluated in multiple ways. For example, predictability and consistency could be required from the time of instituting a certain measure, whereby a consecutive change induced by new evidence, such as environmental or health assessments or exogenous crisis such as a financial crisis, would be considered a retreat from maintaining 'predictability and consistency'. Another approach could be evaluating the predictability of one country's measures based on the practices by other countries, irrespective of the domestic developmental context, including institutional framework, within a country. Understanding 'predictability' as the expectation that a certain country will follow the regulatory practice of other countries or follow international standards would impose a 'one-size-fits-all' approach that carries tensions with developmental considerations. Indeed, there is concern about the potential burden on developing countries when rules that require converging to a practice considered 'best practice' at the international level are imposed.

In developing countries, where regulatory frameworks and institutions are still in the process of evolving, and as the government's capacity to regulate and the economy and society change, such requirements would put strong constraints on the right of the State to regulate. Overall, this approach would contradict the nature of regulations, which are supposed to evolve with the changing local, national, and global contexts. On the other hand, limiting the requirement of consistency to the application of investment regulations across relevant institutions, which is the approach adopted under the UNCTAD Action Menu, could be less intrusive on policy space if it does not require consistency over an unlimited timeframe. Such requirement of consistency would focus on consistency in the application of certain measures among institutions of a similar and relevant mandate. Thus, emphasizing 'predictability' in the regulatory environment without recognizing the differentiated approaches in the regulatory process among countries and the dynamic changes required in the regulatory process in order to attend to changes at the national, regional and global levels, such as an unexpected financial crisis or arising climate action, would be detached from the regulatory needs posed by a highly globalized and dynamically changing global economic context.

Moreover, the investment facilitation narrative includes broad approaches to transparency and stakeholder involvement. This encompasses publishing laws, regulations, judicial decisions and administrative rulings; setting a centralized registry of laws and regulations and single window or special enquiry points; allowing investors to choose their form of establishment within legislative and legal frameworks; providing investors with clear and up-to-date information and timely and relevant advice on changes in procedures, applicable standards, technical regulations and conformance requirements; providing advance notice of proposed changes to laws and regulations; and making available screening guidelines and clear definitions of criteria for assessing investment proposals<sup>27</sup>. Besides, it includes proposals for setting a requirement that 'interested parties', including the business community and investment stakeholders, be provided with an opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation.

The category of 'interested parties' is an undefined open-ended category, which could include private entities beyond the investors directly concerned with a specific investment in a specific country. Given the significant capacities of private entities, including multinational corporations, to organize lobbying strategies, such obligations of prior consultations could have an undue influence on national regulatory and legislative processes. It could skew the pressure on the regulatory and legislative processes towards interests defined primarily by private profit and away from the concerned public interest. It is worth noting that similar requirement was negotiated under the Trade Facilitation Agreement (TFA)<sup>28</sup>. This was a contested issue; many developing countries were not supportive of inserting such obligations under the TFA. The negotiations ended with a 'best endeavor' provision<sup>29</sup>. It is also important to underline that the category of "laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit" is more limited than the category of laws and regulations related to investment. Thus, such transparency requirement would potentially be more burdensome on the institutional capacities and regulatory processes of developing countries (See Box 1 for highlights from WTO negotiations and jurisprudence).

Setting an obligation on countries to guarantee the participation of interested parties could potentially serve as another space for foreign investors to influence domestic policy making, besides their ability to challenge policy and regulatory steps through investor-State dispute settlement (ISDS) mechanisms<sup>30</sup>. Investors already use the ISDS mechanism to bring cases or threaten by bringing costly cases in an attempt to prevent new legislation and other measures from being adopted or applied, thus effectuating a 'chilling effect' on the regulatory process<sup>31</sup>. Embedding an intrusive transparency model that includes an obligation of prior consultation with 'interested parties' under the umbrella of investment facilitation would enhance existing problematic aspects of investment treaties

**Box 1. Highlights from WTO negotiations and jurisprudence**

A discussion on transparency-focused rules has been undertaken as part of the negotiations on domestic regulations under Article VI.4 of the WTO General Agreement on Trade in Services (GATS) (See the draft transparency elements that were included under the 2011 draft domestic regulation text in Annex 3). These elements required publishing promptly, through printed or electronic means, all measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards; maintaining or establishing appropriate mechanisms for responding to enquiries from any service suppliers regarding any measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards; and publishing in advance any measures of general application in relation to matters falling within the scope of these disciplines, and providing reasonable opportunities for service suppliers and other interested parties to comment, and to address in writing substantive issues raised in the comments. While some elements were agreed *ad referendum* after extensive negotiations others have not been agreed (See Annex 3). Overall, the negotiations on domestic regulations have not advanced since 2011.

Concerns raised by developing countries and experts<sup>32</sup> studying these proposed rules pertained to the extensive potential implications of the publishing requirements, especially because the obligations cover the range of existing regulations and not just proposed ones. In addition, concerns were raised about the ability of the regulatory systems existing in developing countries to comply with the proposed transparency disciplines, especially when applying to various levels of government. Moreover, concerns included the ‘chilling effect’ that could potentially result from mandatory comment opportunities open for service suppliers, especially if the authorities are exposed to campaigns by the organized lobbies of big services industries. For example, emergency economic laws enabling the executive to issue economic decrees in case of emergency or economic crisis, or government takeover of pension systems in case of a crisis without enabling input and giving responses to input from foreign pension providers, could fall in conflict with the ‘prior comment’ requirement. Such measures were taken by governments in response to economic crisis they faced.

Furthermore, it is worth noting that issues pertaining to publishing laws and regulations and related transparency elements have been addressed by WTO panels and appellate body, which have found Members in violation of their obligations under ‘transparency’ rules in several cases. In these cases, the WTO dispute settlement bodies dealt with the meaning of the term ‘promptly’ publish, the manner in which a government have published information so as to enable governments and traders to become acquainted, and whether an act of administration could be considered reasonable (See Annex 4 for examples of WTO jurisprudence tackling Article X GATT on ‘Publication and Administration of Trade Regulations’).

in regard to investor-State relations and investor’s conduct.

Overall, the narrative on ‘investment facilitation’ seeks to link the concept to efforts in support of mobilizing and channeling investment towards sustainable development, including building of productive capacities and critical infrastructure<sup>33</sup>. Building such linkages between foreign direct investment (FDI) and sustainable development processes is not a ‘laissez faire’ endeavor, but requires active policy interventions by governments. Akyüz points out that a hands-off approach to FDI, as to any other form of capital, can lead to more harm than good<sup>34</sup>. FDI policy should be embedded in a country’s overall industrial strategy in order to ensure that it contributes positively to economic dynamism of host countries<sup>35</sup>. Moreover, Akyuz notes that the experience with investment treaties strongly suggests that policy interventions that would be necessary to contain adverse effects of FDI on stability, balance of payments, capital accumulation and industrial development and to activate its potential benefits, have been increasingly circumscribed through rules imbedded in international investment treaties<sup>36</sup>. For example, action in support of infant-industry and domestic firms with the aim of enabling them to compete with foreign affiliates or successfully link up to global chains is restricted under the ‘national treatment’ clause of investment treaties, which

requires that host countries treat foreign investors no less favorably than domestic investors<sup>37</sup>. This is among a range of other prohibitions on governmental action needed to achieve a positive spill-over from FDI and limit negative impacts, including prohibitions on performance requirements, capital controls, among other restrictions on regulatory action<sup>38</sup>.

Thus, an ‘investment facilitation’ model that is intrusive on regulatory and policy space would run counter to efforts directed towards building linkages between FDI and sustainable development processes. Moreover, investment facilitation interventions that are not associated with reform to the content of the existing investment protection treaties and investor-state dispute settlement mechanism would be futile in terms of spilling positively onto the sustainable development front.

Practical ways to encourage the flow of FDI require efforts aiming at achieving sustained growth in domestic markets and productivity capacities, and enhancing linkages with regional markets. Indeed, a study published by the World Bank points out that “business opportunities – as represented by the size and growth potential of markets – are by far the most powerful determinants of FDI”<sup>39</sup>. It specifies that “for developing and transition economies, perhaps more important than market size is market potential growth”. This requires policies specific

to nurture domestic private sector and avoid its crowding out. Moreover, attaining FDI that services development and industrialization requires dynamic and selective policies by governments, providing incentives where spillovers into the domestic markets are possible. Such spillovers require active interventions by governments to encourage employment of local people, training, local procurement, domestic content and links with local firms<sup>40</sup>.

### Reflections from country practices

It is evident from the approaches of various institutions and countries, as demonstrated under Section II, that the majority of the national approaches to investment facilitation underline the importance of recognizing the diversity in implementing investment facilitation measures and the need for a broad range of policy choices suitable for different economic circumstances. While UNCTAD points to a systemic gap (see more details on this assessed gap under section II) evidenced by the absence or weakness of facilitation provisions in investment agreements, one could propose that this absence is possibly a reflection of States' choice not to anchor investment facilitation action in hard rules under international treaties, and to take a more nuanced approach attentive to the differences across institutional and regulatory frameworks among various countries.

The dominant experiences pertaining to 'investment facilitation' thus far rest in developing voluntary principles and guiding action menus that leave the choice of adoption and implementation of such principles and guidelines to national authorities. Moreover, country experiences like that of Brazil and South Africa show that investment facilitation efforts are rooted in sector specific actions. Thus, a general cross-cutting approach to organizing investment facilitation processes at a multilateral level could fall in tension with the dynamic selected approaches required for an effective investment facilitation intervention.

Moreover, cases where investment facilitation is imbedded in agreements, such as the Brazilian "Investment Cooperation and Facilitation Model", focus on a 'best endeavor' approach that leaves discretion to the parties (See also Annex 5 for examples of investment facilitation elements included in existing investment agreements). Moreover, the Brazilian model treaty recognizes that the bilateral agreement will dynamically cater to the objectives of each party and will gradually evolve specific commitments between the Parties. Such dynamic context that attends to the specifics of each Party is not possible under an agreement of multilateral hard rules.

Taking these policy space and regulatory issues into consideration, in one international forum for developing countries' investment negotiators, participants noted that provisions on investment promotion and facilitation should be non-binding in nature and be drafted using "best-endeavor" language when possible in order

to reserve governments' policy space to regulate<sup>41</sup>. The investment promotion and facilitation model under consideration in this discussion included elements of cooperation between investment promotion agencies, transparency and exchange of information, facilitation of administrative processes, compliance provisions linked to treaty benefits, and dispute-prevention mechanisms, including contact points<sup>42</sup>.

### **IV. The Way Forward: Crucial Issues for Consideration**

In the way forward in discussing 'investment facilitation', it is important to delineate the potential implications of various means by which action in this regard could be taken. Indeed, the implications on policy and regulatory space would significantly vary depending on the scenario chosen for the way forward. A scenario where multilateral dialogue seeks convergence over voluntary guidelines that would be implemented in national contexts in accordance with development, regulatory, and institutional contexts would carry significantly different implications in comparison to a 'one-size-fits-all' multilaterally binding hard rules established to apply to both developing and developed countries across varying sectors. Indeed, turning non-binding principles into binding rules and commitments could become too intrusive on policy and regulatory space.

In this discussion, it is crucial to underline that regulations related to investment are a very broad category of measures that is closely intertwined with the development levels of a country as well as the sector concerned. Moreover, the difference in institutional capacities is a major determinant of the way countries design and implement regulations. Accordingly, addressing such a broad category of regulations through rules that are designed on the multilateral level to fit various countries and sectors, across the board, under a 'one-size-fits-all' approach would be intrusive on regulatory space.

Considering the diversity of the regulations related to investment, and which are imbedded in a country's development levels, focusing on prioritizing efficiency, predictability and consistency from an investor perspective and minimizing costs of the investor could imply shrinking the regulatory space that countries require in order to take into account developmental elements, including social, economic, and environmental and sustainability implications.

While 'investment facilitation' requires progress towards better linkages between investment flows and development and industrialization objectives, the answer to such objectives does not lie in hard rules that establish additional pressures on policy and regulatory space. Dialogue and exchange at the multilateral level, with the aim of clarifying the concept and enhancing exchange of experiences among countries could feed more effectively into national processes, and where appropriate regional level processes, in order to boost institutional and policy making frameworks. Consequently, it is not advisable to pro-

ceed towards a rule-making process on ‘investment facilitation’, such as at the World Trade Organization. Multilateral discussions on ‘investment facilitation’ in other fora ought to preserve a flexible approach that guards the ability of countries to adapt proposed actions in accordance with national development frameworks and needs. This is a highly crucial element in the way forward.

It is crucial that the way forward in investment-related policy making focuses on the nature of needed reforms that will help reshape investment law and policy to be more conducive to and supportive of development and industrialization prospects in developing countries. These reforms should help establish conditions where FDI could provide a stable source of support to industrialization and development, including through supplementing domestic resources, enhancing productive capacity, and supporting technological progress and industrial upgrading. Ensuring an appropriate balance between the rights and obligations of investors, safeguarding the right to regulate, and ensuring that investment promotion and facilitation efforts are appropriate to and situated within the framework of a host state’s development policies and objectives are elements that form key aspects of such needed reforms.

## ANNEXES

### Annex 1: Ten lines of action included in UNCTAD Investment Facilitation Action Menu<sup>43</sup>

1. Promoting accessibility and transparency in investment policies, regulations and procedures relevant to investors;
2. Enhancing predictability and consistency in the application of investment policies;
3. Improving the efficiency of investment administrative procedures;
4. Building relationships with stakeholders;
5. Designating a lead agency, focal point or investment facilitator;
6. Establishing monitoring and review mechanisms for investment facilitation;
7. Enhancing international cooperation on investment facilitation;
8. Strengthening investment facilitation efforts in developing-country partners, through support and technical assistance;
9. Enhancing investment policy and proactive investment attraction in developing country partners;
10. Enhancing international cooperation for investment promotion for development, including through provi-

sions in IIAs.

### Annex 2: APEC Investment Facilitation Action Plan

#### 1. Promote accessibility and transparency in the formulation and administration of investment-related policies

- Publish laws, regulations, judicial decisions and administrative rulings of general application, including revisions and up-dates
- Adopt centralised registry of laws and regulations and make this available electronically
- Establish a single window or special enquiry point for all enquiries concerning investment policies and applications to invest
- Make available all investment-related regulations in clear simple language, preferably in languages commonly used by business
- Following establishment of an Investment Promotion Agency (IPA), or similar body, and make its existence widely known
- Make available to investors all rules and other information relating to investment promotion and incentive schemes
- Allow investors to choose their form of establishment within legislative and legal frameworks
- Ensure transparency and clarity in investment-related laws
- Improve upon the APEC-wide website (e-portal) to replacing the hard copy publication of the APEC Investment Guidebook (IEG)

• Encourage on-line enquiries and on-line information on all foreign investment issues

• Maintain a mechanism to provide timely and relevant advice of changes in procedures, applicable standards, technical regulations and conformance requirements

• To the extent possible, provide advance notice of proposed changes to laws and regulations and provide an opportunity for public comment

• Explore the possibility of using the international benchmarks on a voluntary basis as a reference point for peer dialogue and measuring progress

#### 2. Enhance stability of investment environments, security of property and protection of investments

• Establish timely, secure and effective systems of ownership registration and / or property use rights for land and other forms of property

• Create and maintain an effective register of public or state owned property.

• Ensure costs associated with land transactions are kept

to a minimum including by fostering competition

- Foster the dissemination of accurate market reputation information including creditworthiness and reliability
- Explore the possibility of using the World Bank *Doing Business* indicator “Enforcing Contracts” as the basis for peer dialogue and benchmarking and measuring progress across APEC
- Encourage or establish effective formal mechanisms for resolving disputes between investors and host authorities and for enforcing solutions, such as judicial, arbitral or administrative tribunals or procedures
- Encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties
- Facilitate commercial dispute resolution for foreign investors by providing reasonable cost complaint-handling facilities, such as complaint service centres, and effective problem-solving mechanisms
- Take steps to accede to an arbitral convention

### **3. Enhance predictability and consistency in investment-related policies**

- Increase use of legislative simplification and restatement of laws to enhance clarity and identify and eliminate inconsistency
- Provide equal treatment for all investors in the operation and application of domestic laws and principles on investment
- Reduce the scope for discriminatory bureaucratic discretion in interpreting investment-related regulations
- Maintain clear demarcation of agency responsibilities where an economy has more than one agency screening or authorising investment proposals or where an agency has regulatory and commercial functions
- Establish and disseminate widely clear definitions of criteria for the assessment of investment proposals
- Establish accessible and effective administrative decision appeal mechanisms including where appropriate impartial “fast-track” review procedures

### **4. Improve the efficiency and effectiveness of investment procedures**

- Simplify and streamline application and, registration, licensing and taxation procedures and establish a one-stop authority, where appropriate, for the lodgement of papers
- Simplify and reduce the number of forms relating to foreign investment and encourage electronic lodgement
- Shorten the processing time and procedures for investment applications.
- Promote use of “silence is consent” rules or no objec-

tions within defined time limits to speed up processing times, where appropriate

- Ensure the issuing of licences, permits and concessions is done at least cost to the investor
- Simplify the process for connecting to essential services infrastructure
- Implement strategies to improve administrative performance at lower levels of government
- Facilitate availability of high standard business services supporting investment

### **5. Build constructive stakeholder relationships**

- To the extent possible, establish a mechanism to provide interested parties (including business community) with opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation
- Continue to share APEC member economies’ experiences of successful stakeholder consultative mechanisms
- Promote the role of policy advocacy within IPAs as a means of addressing the specific investment problems raised by investors including those faced by SMEs
- Continue to share APEC member economies’ experiences of successful public private dialogue to take advantage of the information on successes and problems encountered by established investors
- Promote backward investment linkages between businesses, especially between foreign affiliates and local enterprises including through the promotion of industry clusters
- Encourage high standards of corporate governance through cooperation aimed at promoting international concepts and principles for business conduct, such as APEC’s programs on corporate governance and anti-corruption.
- Examine and share APEC member economies’ experience with responsible business conduct instruments

### **6. Utilize new technology to improve investment environments**

- Promote the introduction and use of new technologies aimed at making the investment process simpler and faster
- Maintain adequate and effective protection of technology and related intellectual property rights
- Where possible, give effect to international norms for property protection

### **7. Establish monitoring and review mechanisms for investment policies**

- Conduct periodic reviews of investment procedures ensuring they are simple, transparent and at lowest possible cost

### **8. Enhance international cooperation**



- To the best extent possible, accede to, or observe, multilateral and/or regional investment promotion and facilitation conventions
- Make use, where appropriate, of international and regional initiatives aimed at building investment facilitation and promotion expertise, such as those offered by the World Bank, UNCTAD and OECD
- Ensure measures exist to ensure effective compliance with commitments under international investment agreements
- Review existing international agreements and treaties to ensure their provisions continue to create a more attractive environment for investment

### **Annex 3: Transparency elements under the 2011 draft domestic regulation negotiations at the WTO**

Full text of the articles as they appeared in the draft text of 2011, which was based on the draft text of 2009:

**Extract from draft domestic regulations text annexed to the report of the Chairman of negotiations on trade in services (TN/S/36, 21 April 2011)**

#### **CHAIR'S MARCH 2009 TEXT**

#### **IV. TRANSPARENCY**

13. Each Member shall publish promptly, through printed or electronic means, measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards, as well as detailed information regarding these measures. This information shall include, *inter alia*:

- (a) whether any authorization, including application and/or renewal where applicable, is required for the supply of services;
- (b) the official titles, addresses and contact information of relevant competent authorities;
- (c) applicable licensing requirements and criteria, terms and conditions of licences, and licensing procedures and fees;
- (d) applicable qualification requirements, criteria and procedures for verification and assessment of qualifications including fees;
- (e) applicable technical standards;
- (f) procedures relating to appeals or reviews of applications;
- (g) monitoring, compliance or enforcement procedures including notification procedures for non-compliance;
- (h) where applicable, how public involvement in the licensing process, such as hearings and opportunity for comment, is provided for;

(i) exceptions, derogations or changes to measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards; and

(j) the normal timeframe for processing of an application.

Where publication is not practicable, such information shall be made otherwise publicly available.

#### **AGREEMENT REACHED ON AN AD REFERENDUM BASIS**

13. Each Member shall publish promptly, through printed or electronic means, all measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards. This shall include the following information, where it exists, *inter alia*:

(k) requirements for authorization, requirements for periodic renewal of such authorization, and generally applicable terms and conditions of such authorization;

(l) the official titles, addresses and contact information of relevant competent authorities;

(m) applicable licensing requirements and procedures (including requirements, criteria and procedures for application and/or renewal, and applicable fees);

(n) applicable qualification requirements and procedures (including requirements, criteria and procedures for application and/or renewal, and applicable fees);

(o) applicable technical standards;

(p) applicable procedures relating to appeals or reviews of decisions concerning applications for licenses and for the verification and assessment of qualifications;

(q) applicable procedures for monitoring or enforcement of the terms and conditions of licenses and for the verification and assessment of qualifications;

(r) where applicable, opportunity and associated procedures for public involvement such as through hearings and opportunity for comment;

(s) established timeframe for processing of an application.

Where publication is not practicable, such information shall be made otherwise publicly available, and shall be provided to service suppliers upon request. Nothing in this paragraph shall be construed as requiring a Member to adopt or maintain any measure not otherwise required by these disciplines.

#### **CHAIR'S MARCH 2009 TEXT**

14. Each Member shall maintain or establish appropriate mechanisms for responding to enquiries from any service suppliers regarding any measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards. Such enquiries may be addressed through the enquiry and contact points established under Articles III and IV of the GATS or any other mechanisms as appropriate.

### AGREEMENT REACHED ON AN AD REFERENDUM BASIS

Same as above.

### CHAIR'S MARCH 2009 TEXT

15. Each Member shall endeavour to ensure that any measures of general application it proposes to adopt in relation to matters falling within the scope of these disciplines are published in advance. Each Member should endeavour to provide reasonable opportunities for service suppliers to comment on such proposed measures. Each Member should also endeavour to address collectively in writing substantive issues raised in comments received from service suppliers with respect to the proposed measures.

### SINGLE ALTERNATIVE

15. Each Member shall endeavour to publish in advance any [measures] [regulations] of general application it proposes to adopt in relation to matters falling within the scope of these disciplines. Each Member [should endeavour to] [shall to the extent practicable] provide reasonable opportunities for service suppliers [and other interested parties] to comment on such proposed [measures][regulations] [prior to their entry into force]. [Each Member should also endeavour to address collectively in writing substantive issues raised in comments received from service suppliers [and other interested parties] with respect to the proposed [measures] [regulations].]

### Annex 4: Examples of WTO jurisprudence tackling Article X GATT on 'Publication and Administration of Trade Regulations'

Source: WTO Analytical Index

[https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/analytic\\_index\\_e.htm](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm)

◆ **In EC – IT Products<sup>44</sup>, the panel addressed the term “promptly”.** The Panel’s opinion was that: “the meaning of prompt is not an absolute concept, i.e. a pre-set period of time applicable in all cases. Rather, an assessment of whether a measure has been published ‘promptly’, that is ‘quickly’ and ‘without undue delay’, necessarily requires a case-by-case assessment. Accordingly, we will look at the time span between the moment the CNEN amendments were ‘made effective’ and the time they were ‘published’, and assess whether this is prompt in light of the facts of the case.” The Panel then found that in the circumstances of the case and in light of the nature of the measures at issue, publication in the EU Official Journal eight months later than the measure was made effective was not “prompt”.

◆ **In Dominican Republic – Import and Sale of Cigarettes<sup>45</sup>, the panel addressed the terms “shall be published”.** The Panel’s opinion was that: “[U]nder its Article X:1 obligations, the Dominican Republic

should have either published the information related to the Central Bank average-price surveys of cigarettes or, alternatively, publish[ed] its decision to not conduct these surveys and to resort to an alternative method, in such a manner as to enable governments and traders to become acquainted with the method it would use in order to determine the tax base for the Selective Consumption Tax on cigarettes.”

◆ **In Thailand – Cigarettes (Philippines)<sup>46</sup>, the panel addressed the terms “shall be published”.** It considered a claim regarding failure to publish the methodology for determining MRSPs (an element of the tax rate for cigarettes). The Panel rejected Thailand’s argument that listing eight elements of the MRSP in each published MRSP notice constituted compliance with Article X:1, finding: “The listing of the components consisting of the MRSP would not enable importers to become acquainted with the detailed rules pertaining to the general methodology within the meaning of Article X:1. We are of the view that for importers to become acquainted with the methodology for determining the MRSP, it is important for them to become familiar with, for instance, how the information they provide is processed. Also, they need to be informed on how Thai Excise determines the marketing costs where the information provided by importers is not accepted.”

◆ **In China - Raw Materials<sup>47</sup>, the panel addressed the term “promptly” under Article X.1 GATT.** The Panel was of the opinion that by failing to publish promptly its decision not to authorize an export quota for zinc in such manner as to enable governments and traders to become acquainted with it, China had violated Article X:1 of the GATT 1994.

◆ **In United States – Certain Country of Origin Labeling (US - COOL)<sup>48</sup> the panel addressed the term “reasonable” and noted that:** “whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case. This is confirmed by previous disputes where the requirement of reasonable administration was understood as requiring the examination of the features of the administrative act at issue in the light of its objective, cause or the rationale behind it”.

### Annex 5: Examples from investment facilitation elements included under existing BITs

The following are examples of investment facilitation clauses, focused on transparency by States, included in existing investment agreements. The provisions of these agreements were mapped by UNCTAD (Source of data: <http://investmentpolicyhub.unctad.org/IIA/mappedContent>).

According to UNCTAD, these provisions were found in 295 treaties out of 1958 agreements mapped by the UNCTAD programme. Following are a few examples:

#### 1. Agreement between Australian and Lithuania

**(entered into force in 2002)**

Article 6:

“Each Party shall, with a view to promoting the understanding of its laws that pertain to or affect investments or associated activities in its territory by investors of the other Party, make such laws public and readily accessible”.

**2. Agreement between Canada and Barbados for reciprocal promotion and protection of investments (entered into force in 1997)**

Article XVI(2):

“...2. Each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them”.

**3. Agreement between Bolivia and the US (entered into force in 2001, terminated in 2012)**

Article II (5)

“Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that pertain to or affect covered investments are promptly published or otherwise made publicly available”.

**4. Agreement between Brazil and Malawi (signed in 2015 - not yet in force)**

Article 11 Transparency

“1. In line with the principles of this Agreement, each Party shall ensure that all measures that affect investment are administered in a reasonable, objective and impartial manner, in accordance with its legal system.

2. Each Party shall ensure that its laws and regulations related to any matter covered by this Agreement, in particular regarding qualification, licensing and certification, are published without delay and, when possible, in electronic format.

3. Each Party shall endeavor to allow reasonable opportunity to those interested stakeholders in the private sector and civil society in expressing their opinions on the proposed measures.

4. The Parties shall give due publicity of this Agreement to their respective public and private financial agents, responsible for the technical evaluation of risks and the approval of loans, credits, guarantees and related insurances for investment of the territory of the other Party”.

**5. Agreement between China and Turkey (entered into force in 1994)**

Article II.4:

“Each Contracting Party shall make public all laws,

regulations and rules that pertain to or affect investments”.

**6. Agreement between Finland and Guatemala (entered into force in 2005)**

Article 15

“1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the investments of investors of the other Contracting Party in the territory of the former Contracting Party.

2. Nothing in this Agreement shall require a Contracting Party to furnish or allow access to any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice legitimate commercial interests of particular investors”.

**7. Comprehensive Economic Partnership Agreement between Japan and India (entered into force in 2011)**

Article 4 on Transparency (not specific to investment chapter)

“1. Each Party shall publish, or otherwise make publicly available, its laws, regulations, administrative procedures, and administrative rulings and judicial decisions of general application, with respect to any matter covered by this Agreement.

2. Each Party shall make available to the public the names and addresses of the competent authorities responsible for laws, regulations, administrative procedures and administrative rulings, referred to in paragraph 1.

3. Each Party shall, upon the request by the other Party, within a reasonable period of time, respond to specific questions from and provide information to the other Party with respect to matters referred to in paragraph 1”.

**8. Canada and Jordan BIT (entered into force in 2009)**

Article 19

“1. Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.

2. To the extent possible, each Party shall: (a) publish in advance any such measure that it proposes to adopt; and (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

3. Upon request by a Party, the other Party shall provide information on the measures that may have an impact on covered investments”.

### Endnotes:

<sup>1</sup> See: G20 Leaders' Communique, Hangzhou Summit, 4-5 September 2016, available at: <http://www.g20chn.org/English/>.

<sup>2</sup> See: Policy Framework for Investment 2011, Ch. 2 (with updates in 2014),

[www.oecd.org/investment/toolkit/policyareas/investmentpromotionfacilitation/41246119.pdf](http://www.oecd.org/investment/toolkit/policyareas/investmentpromotionfacilitation/41246119.pdf)

<sup>3</sup> See UNCTAD discussion note "Investment Facilitation: An Action Menu" (2 February 2016).

<sup>4</sup> UNCTAD Global Action Menu for Investment Facilitation Version 4 -16 September 2016, available online at: <http://investmentpolicyhub.unctad.org/Upload/Documents/GlobalActionMenuForInvestmentFacilitation.v4.16.09.2016.pdf>. UNCTAD adds that: "A review of a sample of recent model IIAs and agreements concluded in 2015 show that investment facilitation provisions are not as prevalent as other major provisions. Even those IIAs that explicitly deal with investment facilitation issues tend to use general treaty language. Brazil's new CFAs are an exception". See also: UNCTAD (February 2017), "Investment Facilitation: A Review of Policy Practices".

<sup>5</sup> See: Presentation by James Zhan (December 2016) "UNCTAD's Global Action Menu for Investment Facilitation: Context, Concept, Content and Configuration", available at: [http://investmentpolicyhub.unctad.org/Upload/Documents/Presentation%20by%20James%20Zhan\\_UNCTAD.pdf](http://investmentpolicyhub.unctad.org/Upload/Documents/Presentation%20by%20James%20Zhan_UNCTAD.pdf).

<sup>6</sup> Presentation by James Zhan (December 2016), Ibid.

<sup>7</sup> See detailed presentation of these ten action lines in the publication "Global Action Menu for Investment Facilitation" (September 2016), available at: <http://investmentpolicyhub.unctad.org/Upload/Documents/Action%20Menu%2001-12-2016%20EN%20light%20version.pdf>

<sup>8</sup> Presentation by James Zhan (December 2016). See reference 5.

<sup>9</sup><http://investmentpolicyhub.unctad.org/Upload/Documents/Action%20Menu%2001-12-2016%20EN%20light%20version.pdf>.

<sup>10</sup> Summit held on 9<sup>th</sup> and 10<sup>th</sup> of July 2016. Available at: <http://investmentpolicyhub.unctad.org/Upload/Documents/Annex%20III%20G20%20Guiding%20Principles%20for%20Global%20Investment%20Policymaking.pdf> (visited on 12.07.2016).

<sup>11</sup> See principle # VII of the G20 Guiding Principles for Global Investment Policymaking.

<sup>12</sup> Regional economic forum of 21 Member countries, predominantly concerned with trade and economic issues. See: <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx>.

<sup>13</sup> APEC investment facilitation action plan, available at: [http://www.apec.org/Press/Features/2009/~/\\_media/5B7A\\_A1499678495193D806C776DEDBCE.ashx](http://www.apec.org/Press/Features/2009/~/_media/5B7A_A1499678495193D806C776DEDBCE.ashx).

<sup>14</sup> See: The E-15 report "The Evolving International Investment Law and Policy Regime: The Way Forward", by Sauvart, Karl P. (2016), page 8, and Sauvart Karl and Khalil Hamdani (2015) "An International Support Programme for Sustainable Investment Facilitation", available at: <http://e15initiative.org/publications/an-international-support-programme-for-sustainable-investment-facilitation/>. See also: China moves the G20 toward an international investment framework and investment facilitation by Karl P. Sauvart, available at:

[http://ccsi.columbia.edu/files/2017/01/KPS-China-the-G20-updated-21-December-2016.pdf?utm\\_source=CCSI+Mailing+List&utm\\_campaign=48e725cbf6-Jan\\_newsletter\\_2017&utm\\_medium=email&utm\\_term=0\\_a61bf1d34a-48e725cbf6-62901385](http://ccsi.columbia.edu/files/2017/01/KPS-China-the-G20-updated-21-December-2016.pdf?utm_source=CCSI+Mailing+List&utm_campaign=48e725cbf6-Jan_newsletter_2017&utm_medium=email&utm_term=0_a61bf1d34a-48e725cbf6-62901385) (Forthcoming in Julien Chaisse, ed., China's Three-Prong Investment Strategy: Bilateral, Regional, and Global Tracks (London: Cambridge University Press, 2017).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid. The proposal suggests that a Sustainable Investment Facilitation Understanding could be launched at the WTO, G20, or UNCTAD or the World Bank or the OECD.

<sup>17</sup> See: "Investment Facilitation – UNCTAD's Useful Agenda For Pragmatism Over Politics", by Peter Robinson, President and CEO, United States Council for International Business, available at: <http://www.investmentpolicycentral.com/content/investment-facilitation-%E2%80%93-unctad%E2%80%99s-useful-agenda-pragmatism-over-politics>.

<sup>18</sup> Comments based on the (IISD) translation of the agreements negotiated between Brazil-Mozambique and Brazil-Angola, available at: <http://www.iisd.org/library/side-side-comparison-brazil-mozambique-and-brazil-angola-cooperation-and-investment>.

<sup>19</sup> See Article 6 of the agreements negotiated between Brazil-Mozambique and Brazil-Angola, available at: <http://www.iisd.org/library/side-side-comparison-brazil-mozambique-and-brazil-angola-cooperation-and-investment>.

<sup>20</sup> See Article 13 of the agreements negotiated between Brazil-Mozambique and Brazil-Angola Cooperation, available at: <http://www.iisd.org/library/side-side-comparison-brazil-mozambique-and-brazil-angola-cooperation-and-investment>.

<sup>21</sup> The Focal Point's role is to act as a facilitator of the relationship between the investors and the host country government, both in terms of dialogue with the relevant authorities and by providing government support, with the ultimate goal of improving the business environment to attract and maintain investments.

<sup>22</sup> The Joint Committee, composed of government representatives of both Parties, is in charge of monitoring the implementation of the Agreement, the sharing of information regarding investment opportunities, bilateral investment cooperation and facilitation initiatives and, above all, joint action to prevent disputes and amicable settlement of any issues related to bilateral investment.

<sup>23</sup> Presentation by: Mr. Alexandre Parola, Director of the Economic Department, Ministry of Foreign Affairs (Brazil). "Approaches by Developing Countries to Reforming Investment Rules; South-South Dialogue and Cooperation", report of a joint event organized by the South Centre and the Permanent Mission of Indonesia in Geneva at UNCTAD XIV in Nairobi, Kenya (20 July 2016). The report was prepared by the Secretariat of the South Centre. Report available at: [https://www.southcentre.int/wp-content/uploads/2016/09/Ev\\_160720\\_UNCTAD-XIV-Investment-Side-event-Report\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2016/09/Ev_160720_UNCTAD-XIV-Investment-Side-event-Report_EN.pdf).

<sup>24</sup> For more information on South Africa's experience in regard to investment treaties, see: Xavier Carim (August 2015) "International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa", Investment Policy Brief 4, South Centre, available at: <https://www.southcentre.int/investment-policy-brief-4-august-2015/#more-7798>.



<sup>25</sup> Presentation by: Dr. Rob Davies, Minister of Trade and Industry of the Republic of South Africa. “Approaches by Developing Countries to Reforming Investment Rules; South-South Dialogue and Cooperation”, report of a joint event organized by the South Centre and the Permanent Mission of Indonesia in Geneva at UNCTAD XIV in Nairobi, Kenya (20 July 2016). The report was prepared by the Secretariat of the South Centre. Report available at:

[https://www.southcentre.int/wp-content/uploads/2016/09/Ev\\_160720\\_UNCTAD-XIV-Investment-Side-event-Report\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2016/09/Ev_160720_UNCTAD-XIV-Investment-Side-event-Report_EN.pdf).

<sup>26</sup> See for example: UNCTAD Global Action Menu for Investment Facilitation Version 4, under Action Line 4. 16 September 2016, available online at:

<http://investmentpolicyhub.unctad.org/Upload/Documents/GlobalActionMenuForInvestmentFacilitation.v4.16.09.2016.pdf>.

<sup>27</sup> This is based on the investment facilitation action lines included under the APEC investment facilitation action plan and UNCTAD investment facilitation action menu.

<sup>28</sup> Article 2 of the TFA: Opportunity to Comment, Information before entry into force, and consultations “1.1 Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit...”.

<sup>29</sup> UNCTAD Action Menu, op. cit.

<sup>30</sup> See: “A Need for Preventive Investment Protection?” by Cezary Wiśniewski and Olga Górska on September 30, 2015, Kluwer Arbitration Blog, available at :

[http://kluwarbitrationblog.com/blog/2015/09/30/a-need-for-preventive-investment-protection/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29](http://kluwarbitrationblog.com/blog/2015/09/30/a-need-for-preventive-investment-protection/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29).

<sup>31</sup> See: “A Need for Preventive Investment Protection?” by Cezary Wiśniewski and Olga Górska on September 30, 2015, Kluwer Arbitration Blog, available at :

[http://kluwarbitrationblog.com/blog/2015/09/30/a-need-for-preventive-investment-protection/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29](http://kluwarbitrationblog.com/blog/2015/09/30/a-need-for-preventive-investment-protection/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29).

<sup>32</sup> See for example: Robert Stumberg (2010), GATS Negotiations on Domestic Regulations, Harrison Institute for Public Law - Georgetown Law; Ellen Gould (2009), The Draft GATS

Domestic Regulation Disciplines - Potential Conflicts with Developing Country Regulations, prepared for the South Centre.

<sup>33</sup> See references under Section II.

<sup>34</sup> Yilmaz Akyuz (2015), “Foreign Direct Investment, Investment Agreements and Economic Development: Myths and Realities”, South Centre Research Paper #63, available on:

<https://www.southcentre.int/research-paper-63-october-2015/#more-7895>

<sup>35</sup> Ibid. .

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> For more information, see: South Centre (2015) (Investment Treaties: Views and Experiences from Developing Countries. For more details, see:

<https://www.southcentre.int/product/investment-treaties-views-and-experiences-from-developing-countries/>.

<sup>39</sup> Kusi Hornberger, Joseph Battat, and Peter Kusek (2011) “Attracting FDI; How Much Does Investment Climate Matter?”, published as World Bank Group - viewPoint: Public Policy for the Private Sector, available at:

<http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/327-Attracting-FDI.pdf>.

<sup>40</sup> See Yilmaz Akyuz, Speaking Notes on Foreign Direct Investment and Development (2014), Annual investment negotiators forum organized by IISD and South Centre.

<sup>41</sup> See: Report from 9<sup>th</sup> Annual Forum of Developing Country Investment Negotiators, page 15, organized by IISD, South Centre, and Government of Brazil, Rio de Janeiro, 16-18 November 2015, Report available at: <https://www.iisd.org/event/9th-annual-forum-developing-country-investment-negotiators>, attended by over 100 participants from 48 countries.

<sup>42</sup> Ibid. 9<sup>th</sup> Annual Forum of Developing Country Investment Negotiators. In this discussion, the complementary roles of investment promotion agencies at the national and regional levels were stressed in regard to investment promotion and facilitation activities.

<sup>43</sup> See a detailed presentation of these ten action lines in the publication “Global Action Menu for Investment Facilitation” (September 2016), available at:

<http://investmentpolicyhub.unctad.org/Upload/Documents/Action%20Menu%2001-12-2016%20EN%20light%20version.pdf>

<sup>44</sup> DS375,

[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds375\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds375_e.htm)

<sup>45</sup> DS302,

[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds302\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds302_e.htm)

<sup>46</sup> DS371,

[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds371\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds371_e.htm)

<sup>47</sup> DS394,

[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds394\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm)

<sup>48</sup> DS384, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds384\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm)



**SOUTH  
CENTRE**

Chemin du Champ-d’Anier 17  
PO Box 228, 1211 Geneva 19

Telephone: (4122) 791 8050  
Fax: (4122) 798 8531

E-mail: [south@southcentre.int](mailto:south@southcentre.int)  
<http://www.southcentre.int>