

Studies in Trade, Investment and Innovation No. 96

**Investment Facilitation for Sustainable Development
within the Context of the Regional Comprehensive
Economic Partnership, the ASEAN Investment
Facilitation Framework and the WTO Draft
Investment Facilitation Framework
for Development**



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N. Jansen Calamita

Head, Investment Law & Policy, Centre for International Law,
National University of Singapore; Research Associate Professor (CIL),
Faculty of Law, National University of Singapore.

Stefanie Schacherer

Assistant Professor of Law,
Singapore Management University Yong Pung How School of Law.

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For further information on this publication, please contact:

Ms. Rupa Chanda
Director
Trade, Investment and Innovation Division
ESCAP
Rajadamnern Nok Avenue
Bangkok 10200, Thailand
E-mail: escap-tiid@un.org

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Executive Summary

This report analyses investment facilitation commitments for sustainable development within the context of the the Regional Comprehensive Economic Partnership (RCEP), the ASEAN Investment Facilitation Framework (AIFF) and the WTO Draft Investment Facilitation Framework for Development. While the potential role of foreign direct investment (FDI) in promoting sustainable development is well recognised, the report reveals that significant gaps exist in these instruments with respect to linkages between investment facilitation and sustainable development. In light of the gaps identified, the report puts forward a package of recommendations to help policymakers formulate FDI policies and guide investment promotion agencies (IPAs) to better promote and facilitate FDI for sustainable development.

The report is divided into five main sections. Section 1: ‘Concepts and Policy Goals’; Section 2: ‘Landscape of Investment Facilitation Initiatives in ASEAN and RCEP Countries’; Section 3: ‘Stocktaking Investment Facilitation Commitments in ASEAN Agreements’; Section 4: ‘The Draft WTO Framework on Investment Facilitation for Development and its Relation to ASEAN’s instruments’; and Section 5: ‘Recommendations and Way Forward’.

(1) Sustainable FDI for Sustainable Development

Traditional investment facilitation policies have generally proceeded from the premise that increases in FDI will lead to economic growth which will, in turn, lead to development (in the economic sense). The question of whether such development, or such FDI, is sustainable has traditionally not been a direct concern of policymakers. Instead, to the extent that sustainability has been considered, policymakers seem largely to have acted on the assumption that the facilitation of FDI and the stimulation of economic growth necessarily leads to sustainable investment and development. As demonstrated repeatedly in the literature, however, and as borne out through the actual experiences of countries, such assumptions are without foundation. Nevertheless, looking at current discussions on investment facilitation – even those claiming to incorporate sustainable development objectives – one sees that such traditional and discredited assumptions continue to have purchase in policymaking, especially at the regional and international level. As this report highlights, however, the discussion needs to move forward. In order for investment facilitation measures to promote sustainable development, such measures must be crafted specifically with sustainable development in mind. Investment facilitation efforts should therefore support the mobilization of investment towards the Sustainable Development Goals (SDGs) and be designed to that end. Investment facilitation for sustainable development, in this respect, can be understood as a combination of tools, policies and processes that foster a regulatory and administrative framework to facilitate investment that maximises and does not undermine sustainable development objectives.

(2) Recent trends in sustainable investment facilitation in ASEAN and RCEP countries

In order to assess the direction of regional and international policymaking with respect to investment facilitation, it is essential to understand what countries are already unilaterally at the national level. This report thus begins by presenting an overview of the investment facilitation practices and initiatives that have been adopted in ASEAN Member States (AMS) and in their RCEP partner countries. This overview shows that many of the examined countries have recently modernized their investment facilitation frameworks and have adopted new initiatives and mechanisms often – but not systematically – to promote sustainable FDI. The national practice of AMS and their RCEP partners provides background information for the discussion of future steps and regional initiatives that might come within the context of existing frameworks such as RCEP and the AIFF, or a new future instrument altogether. At the same time, the overview brings into focus that the landscape of investment facilitation is different across AMS and RCEP countries reflecting their diverse economic sizes and systems, geographical situations, and socio-political conditions. Hence, the report also underscores that there is no one-size-fits-all solution to investment facilitation for sustainable development as national particularities (and priorities) must always be taken into account.

(3) Limited sustainable development integration in the AIFF and RCEP

With the AIFF and RCEP, countries in the Asia-Pacific region have made initial steps towards building a regional investment facilitation framework that might someday complement or supplement a WTO multilateral agreement on investment facilitation. While the AIFF and RCEP generally seek to promote development in their signatory states, for the moment at least, there are a number of gaps in the AIFF and RCEP with respect to creating linkages between investment facilitation and *sustainable* development. This report concludes that neither regional instrument integrates sustainable development into its investment facilitation commitments. Moreover, the commitments on investment facilitation that these instruments do contain remain largely soft in nature. Indeed, similar to the thinking of the past, both instruments appear to proceed from the assumption that the facilitation of investment is an end in itself or will necessarily lead to sustainable development.

(4) The WTO Framework on Investment Facilitation for Development: open questions

As a comparison to the commitments undertaken in RCEP and the AIFF, this report surveys the provisions under negotiation in the context of the draft WTO Framework on Investment Facilitation for Development. Here too the report notes that concrete approaches to facilitate sustainable investment and linkages to sustainable development are also limited. One major gap is that sustainable investment is not defined or otherwise described in the draft WTO Framework, and nor are the substantive provisions targeted towards sustainability. Indeed, reviewing the most recently available negotiating draft, only provisions can truly be considered as related to investment sustainability. The first is with regard to the promotion of responsible business conduct (RBC), which is cast as a soft commitment for WTO parties to encourage investors to voluntarily incorporate internationally recognized RBC standards into their business practices.

The second is with regard to anti-corruption, whereby the WTO Framework simply restates the parties' existing commitments under the United Nations Convention against Corruption. Beyond these modest provisions, however, this report does not find any significant commitments which would establish concrete or direct links between the investment facilitation obligations that the WTO Framework will create and the sustainable development that the world needs.

(5) The way forward: national, regional, and international approaches to facilitate sustainable investment

This report contains recommendations for possible future policy initiatives across three general headings:

Recommendations to address gaps at the regional/international level:

- Creating obligations for home states, including agreeing on the application (hard or soft) of CSR/RBC frameworks that are commonly implemented.
- Exchanging information on best practices among countries. IPAs and other government entities of different countries can learn from one another and share experiences with policies and approaches. This can include information about tools to facilitate investments (one-stop shops, business registration systems, aftercare services), policies to improve the investment environment (rules on transparency, anti-corruption practices, good governance mechanisms), and processes to maximize the useful of tools and policies (dialogues; interagency coordination).
- Coordinating capacity building and technical support for developing economies with respect to their investment facilitation efforts.

Recommendations for domestic measures that can be taken at the national level of the AIF and RCEP countries in the absence of appropriate commitments at the regional/international level

Ultimately, while international and regional agreements can be useful to establish coordination mechanisms and address matters on which there may be collective action challenges among countries, investment facilitations measures themselves are designed and implemented country by country. At the national level, therefore, the report highlights that host countries have it within their power and discretion to adopt investment facilitation measures that support sustainable FDI and that this can be accomplished by focusing on four priority areas: (i) specific facilitation of SDG-related investments; (ii) preparation of SDG-related project pipelines; (iii) priority treatment by local IPAs in the establishment process of SDG-related investments; and (iv) specialised aftercare services post-establishment for SDG-related investments. In addition, host countries need to recognise and dedicate the resources to ensure that such measures are transparent and that information about these measures and others (such as market entry conditions and incentive schemes) are available to investors.

Looking beyond host countries, this report makes recommendations for investor home country measures to support sustainable investments. For example, in the context of loans for outward investments by home countries, the making of such loans should require prior environmental and social impact assessments, and the underwriting terms should reflect the results of those assessments by conditioning loans on certain SDG-related investor performance, or providing

loans exclusively for investments in certain SDG sectors. (Such an approach could also be adapted to the context of political risk insurance.) Lastly, the report recommends transparency regarding the frameworks, criteria and operation of home country schemes for investment guarantees and loans for outward investments in addition to the adoption of home country measures to ensure that information about investors' corporate social responsibility (CSR) commitments and performance are widely available.

Recommendations concerning the potential role of international organizations in supporting AIFF and RCEP countries:

The report identifies six different areas in which international organizations can play a role in supporting countries in their efforts to facilitate investment for sustainable development:

Action Plan on Sustainable Investment Facilitation. International organisations can play a role assisting AMS and their RCEP partners in navigating legislative and regulatory action to promote and facilitate sustainable FDI. An “Action Plan” or “Action Menu” could be established that provides guidance through a step-by-step approach with concrete tools, policies and processes that all integrate sustainable development concerns, and consequently facilitate sustainable FDI. In this connection, UNESCAP’s 2021 “Outward FDI Policy Toolkit for Maximizing Home Country Sustainable Development” provides an outstanding resource and potential model for additional tools.¹

Platforms for Exchange. Peer-to-peer exchanges of information and experiences among government officials can be a valuable tool for countries to develop and refine their investment facilitation policies. Moreover, such exchanges can serve as peer-to-peer capacity building and technical assistance. This report suggests that international and regional organizations are uniquely placed to serve as platforms for such exchanges, creating establishing mechanisms for regional cooperation between AMS and their RCEP partners.

Technical Assistance and Capacity-Building. Technical assistance and capacity-building are crucial aspects for the successful design and implementation of policies to facilitate sustainable investment and development. This is a principal area in which international organizations can add value, so long as donor countries provide the necessary resources. Within the WTO negotiations, for example, the possibility that a WTO instrument might lead to additional technical assistance and capacity-building support has been repeatedly identified as a top-level priority by developing and least-developed economies. Thus far, however, the WTO draft text remains silent on the degree of commitment that donor countries will make. In RCEP, the prospect of technical assistance and capacity building for investment is specifically recognised, although there are no concrete commitments in the text and none have yet been made since RCEP came into force.

Country-specific Needs Assessments. A fourth area in which international organisations can support AMS and the RCEP partners is with assessments of individual countries' investment facilitation capabilities and needs. Country assessments are critical to coordinating and calibrating technical assistance and capacity-building efforts, ensuring that resources are

¹ UNESCAP, “Outward FDI Policy Toolkit for Maximizing Home Country Sustainable Development” (2021).

focused on areas of greatest importance and concern to each country. The AIFT and RCEP countries, for example, represent a diverse grouping of economies, social units, and political systems. Clearly one size will not fit all. Consequently, country-specific needs assessments are critical to determine the kind of technical assistance and capacity building support that may be appropriate for a specific country.

Local Supplier Databases. Another potential role for international organizations may be to establish and maintain local supplier databases, which have come to be seen as promising tools of investment facilitation for sustainable development by providing foreign investors a resource to easily ascertain the existence of local businesses active in fields ranging from legal services to transportation to materials, etc. Supplier databases are particularly promising for sustainable development insofar as they facilitate the creation of linkages between foreign and domestic firms (an essential part of the SDGs).

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Abbreviations and acronyms

ACIA	ASEAN Comprehensive Investment Agreement
ACFTA	ASEAN-China Free Trade Agreement
AEC	ASEAN Economic Community
AIGCC	Asia Investor Group on Climate Change
AIFF	ASEAN Investment Facilitation Framework
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BOI	Board of Investments Philippines
BOI	Thailand Board of Investment
CDC	Council for the Development of Cambodia
CJCC	Cambodia-Japan Cooperation Center
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DICA	Directorate of Investment and Company Administration (Myanmar)
ESG	Environmental, social and governance
FDI	Foreign direct investment
GER	UNCTAD's Global Enterprise Registration
IF	Investment facilitation
IPA	Investment Promotion Agency
IPC	Investment Promotion Committee (Myanmar)
MIDA	Malaysian Investment Development Authority
MIPP	Myanmar Investment Promotion Plan
MSME	Micro, Small and Medium-sized Enterprises
OECD	Organisation for Economic Co-operation and Development
OFIO	Office of the Foreign Investment Ombudsman (Korea)
RCEP	Regional Comprehensive Economic Partnership
ROK	Republic of Korea
SDG	Sustainable Development Goals
SDT	Special and Differential Treatment
SME	Small and Medium Enterprises
UN	United Nations
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNCTAD	United Nations Conference on Trade and Development
WAIPA	World Association of Investment Promotion Agencies
WTO	World Trade Organization

Introduction

Over the past decade countries have actively adopted measures at the domestic level designed to facilitate investment. In 2019, for example, the World Bank reported a record number of 314 reform measures designed to facilitate doing business in 128 countries.²

At the same time, momentum has gathered to address investment facilitation at the international level, both regionally and multilaterally. In ASEAN, this momentum has culminated in the ASEAN Investment Facilitation Framework (AIFF), concluded in 2021.³ In addition, Asian countries have also included investment facilitation provisions in the Regional Comprehensive Economic Partnership (RCEP),⁴ which entered into force in 2022.⁵ On the multilateral level, World Trade Organization (WTO) members – now totalling more than 110 – have been engaged in structured discussions and negotiations for more than two years, aimed at agreeing to an Investment Facilitation Framework for Development (IFF4D).⁶

Even though regional and international discussions on investment facilitation are in full swing, it is observable that these initiatives have lacked a dedicated focus on the promotion of FDI in support of sustainable development. Most, if not all, current investment facilitation frameworks contribute only indirectly to sustainable development – if at all – as they focus on increasing FDI flows generally, but do not contain language or commitments on promoting investment for sustainable development or sustainable investment more broadly.⁷ That said, ideas and proposals to design investment facilitation provisions capable of more directly addressing the contribution of FDI to sustainable development (or promoting sustainable investment) have been discussed and could be further considered and implemented by countries.⁸

² World Bank, “Doing Business 2019: Training for Reform” (2019), 10.

³ The AIFF sets out a number of “principles and actions regarding facilitation of international investment in ASEAN, which each Member State will endeavour to uphold and implement to the extent practicable and in accordance with its respective domestic laws and regulations, as well as its respective international obligations”. AIFF, Preamble, recital 8. The key investment facilitation measures under the AIFF consist of transparency, streamlining and speeding up administrative procedures, and encompass the use of technologies, the promotion of single digital platforms, and the establishment of advisory services to investors.

⁴ RCEP includes a provision on investment facilitation provisions for the promotion of the transparency and predictability of the members’ investment frameworks as well as the streamlining of administrative procedures. RCEP, Article 10.17. It also envisages the establishment of focal points to assist investors and mechanisms to prevent and resolve investment disputes through grievance management systems. Notably, the investment facilitation provisions of RCEP are not binding and are subject to domestic laws.

⁵ RCEP counts 15 signatories composed of the Association of Southeast Asian Nations (Brunei, Cambodia, Indonesia, Laos PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam) and ASEAN’s free trade agreement partners (Australia, China, Japan, New Zealand, the Republic of Korea).

⁶ See WTO, “Joint Ministerial Statement on Investment Facilitation for Development”, WT/MIN(17)/48 (11 December 2017).

⁷ See, e.g., N. Jansen Calamita, “Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value”, 23 *Journal of International Economic Law* 973 (December 2020); Axel Berger, Manjiao Chi, Bernard Hoekmann, Makane Moïse Mbengue, Karl P. Sauvant, Matthew Stephenson, “Facilitating Sustainable Investment to Build Back Better”, G20 Insights (Sep. 2021).

⁸ At this point in time, the discussion on sustainable investment facilitation remains largely at an expert level. See, e.g., Karl P. Sauvant, Matthew Stephenson, Khalil Hamdani and Yardenne Kagan, “An Inventory of Measures to Facilitate the Flow of Sustainable FDI” in Axel Berger, Karl P. Sauvant (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers* (International Trade Centre, 2022) 86-147.

Against this background, the present study queries whether and how the investment facilitation promoted by RCEP and AIFF can contribute to sustainable development (or promote sustainable investment) in signatory countries. It compares the two frameworks by asking three key questions: 1) What are the common general principles for investment facilitation? 2) What are the general investment facilitation measures under these frameworks? 3) What are the investment facilitation measures in these instruments that seek specifically to promote the sustainable development contribution of FDI?

This study is divided into five main sections. Section 1 clarifies the main concepts used in the study, such as ‘investment facilitation’, ‘sustainable FDI’ and most importantly what can and should be understood as investment facilitation for ‘sustainable development’. Section 2 outlines in a non-exhaustive manner investment facilitation measures that have been adopted unilaterally at the national level by the ASEAN Member States (AMS) and the five other RCEP Contracting Parties. Section 3 presents a stock-taking of investment facilitation provisions in RCEP and the AIFF, critically assessing the scope and legal strength of the investment facilitation provisions in these instruments, and identifying where concrete measures to promote investment facilitation for sustainable development are missing. Section 4, in turn, analyses and compares the AIFF and RCEP with the draft WTO IFF4D to consider whether the WTO’s work might offer suggestions for addressing investment facilitation for sustainable development in the ASEAN region. Finally, Section 5 outlines a number of key policy recommendations for improving the investment facilitation framework for sustainable development currently in place in the AIFF and RCEP.

SECTION 1

**Concepts and
Policy Goals**

SECTION 1

Concepts and Policy Goals

Over the past several years, the topic of “investment facilitation for development” has made its way to the forefront of discussions on international investment law. In those discussions, however, there has been a noticeable lack of clarity as to the meaning and operational content of this concept. For example, is the goal of internationalising investment facilitation to promote development as such or is it to promote *sustainable development*? Further, with respect to the investment which policymakers hope to facilitate, what role does the concept of *sustainable investment* play? Finally, what is investment facilitation, and what are its outer

limits? Where is the line between investment promotion and investment facilitation, for example, and how does investment facilitation interact with market entry conditions and incentive schemes? These are important questions to raise (and for policymakers to answer) as they go to clarifying the central purposes and goals of internationalisation efforts. Without asking and answering these questions, the coherence of international discussions is severely undermined. Against this backdrop, the present section addresses the key concepts and policy goals related to investment facilitation, sustainable development and sustainable investment.

1.1 Investment Facilitation

Investment facilitation covers a wide range of government policies and measures, all with the focus of helping investments to be made and operated efficiently. According to UNCTAD, “[i]nvestment facilitation is the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries”.⁹ More concretely, investment facilitation measures can include improvements in transparency and information available to investors; more efficient and effective administrative procedures for investors; and enhanced

predictability and stability of the legal and policy environment for investors.¹⁰ As surveyed in Section 2 below, the measures available to countries to achieve these objectives are broad and varied, often depending upon human resource and technical capacity. Broadly speaking, however, investment facilitation measures generally aim to promote better cooperation among relevant government agencies, between the government and investors, and, as internationalisation moves forward, among countries at the international level.¹¹

⁹ UNCTAD, “UNCTAD Action Menu for Investment Facilitation” (United Nations, 2016) 4.

¹⁰ UNCTAD, “UNCTAD Action Menu for Investment Facilitation” (United Nations, 2016) 4.

¹¹ Axel Berger, Sebastian Gsell, Zoryana Olekseyuk, “Investment facilitation for development: a new route to global investment governance”, Briefing Paper, No. 5/2019, Deutsches Institut für Entwicklungspolitik (DIE).

Scope of Investment Facilitation

Investment facilitation is not a one-off activity. Rather, it can occur at each stage of the investment cycle, from the pre-establishment phase, through investment installation, to the provision of services during the operation of an investment.¹² The OECD has identified three key functions of investment facilitation related to these stages:¹³

- Investor servicing to provide support to prospective investors in order to facilitate their establishment phase;¹⁴
- Aftercare, which aims to retain established companies and encourage reinvestments by assisting investors with the challenges they face after the establishment of their investments;¹⁵ and
- Policy advocacy, identifying bottlenecks in the investment climate and providing recommendations to the government about how to address them.¹⁶

To these three functions, we would add a fourth, namely the function of assisting investors with the reinvestment of locally earned profits or with the investment of new

capital to expand existing operations or establish new ones.

As noted, host governments can operationalise investment facilitation in various ways. For example, at an operational level, this can be done by providing tools and services – both digital and non-digital – through investment promotion agencies (IPAs) to help investors navigate regulations and procedures when investing. At a policy level this can be done by implementing investment policies and strategies that improve the transparency, predictability, and effectiveness of the regulatory framework for investment; and by developing and implementing processes to make these tools and policies useful and impactful.¹⁷

An important distinction should be made between investment promotion and investment facilitation. Investment facilitation is distinct from investment promotion because the latter is about promoting a location as an investment destination and is therefore “country-specific and competitive in nature”.¹⁸ In other words, investment promotion is more about attracting potential investors that have

¹² UNCTAD, “Investor Nationality: Policy Challenges”, World Investment Report 2016 (United Nations, 2016) 124.

¹³ Ana Novik and Alexandre de Crombrugghe, “Towards an international Framework for Investment Facilitation”, OECD, Investment Insights (April 2018) 3.

¹⁴ This function relates to the key aspects of investment facilitation, i.e., transparency and simplification of administrative procedures. Hence, a number of measures fall under this category. E.g., publication of information on investment measures, authorisation requirements and incentives; the establishment of focal points and single window mechanisms; speeding up of procedures and reduction of documentation requirements.

¹⁵ Generally implemented by Investment Promotion Agencies (IPAs), aftercare services imply a follow up with investors at regular intervals to assist in smooth project implementation and addressing any concern established investors might have. Another important aspect of aftercare services is to update information, e.g., via websites, on investment related measures in the host countries.

¹⁶ This function concerns cooperation and exchange within and among governments in order to constantly improve host states’ investment climates. “Cooperation and exchange” can constitute a variety of mechanisms and settings, such as cooperation among sub-national IPAs, cross-border cooperation between national IPAs, and public-private dialogue.

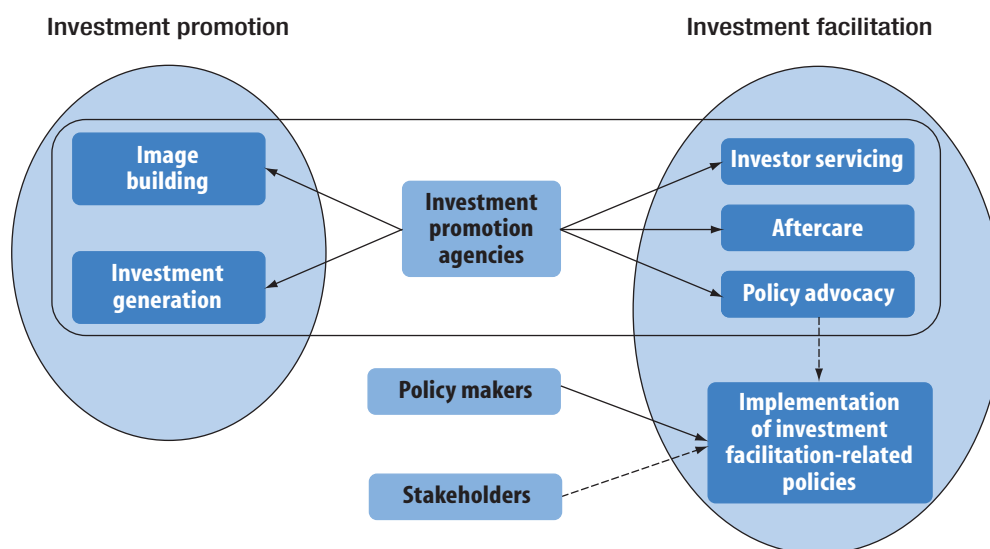
¹⁷ Ana Novik and Alexandre de Crombrugghe, “Towards an international Framework for Investment Facilitation”, OECD, Investment Insights (April 2018) 5. As Berger et al. observe (Axel Berger, Sebastian Gsell, Zoryana Oleksyuk, “Investment facilitation for development: a new route to global investment governance”, Briefing Paper, No. 5/2019, Deutsches Institut für Entwicklungspolitik (DIE)), although there is no commonly accepted definition of investment facilitation, a trend towards convergence around certain key aspects has emerged in recent years. Those key aspects are reflected in the descriptions of investment facilitation found in the work of UNCTAD and the OECD.

¹⁸ UNCTAD, “UNCTAD Action Menu for Investment Facilitation” (United Nations, 2016) 4.

not yet selected an investment destination, while investment facilitation starts at the pre-establishment phase, when an investor has already shown an interest in a location.¹⁹ Investment promotion involves activities and marketing to build a country's image and generate investment leads.²⁰ Traditionally, IPAs

are mandated to both promote and facilitate investment and therefore involved in activities associated with both types of work. Figure 1 below highlights the key differences between investment promotion and facilitation and the actors involved.

FIGURE 1
Difference between Promotion and Facilitation



Source: OECD, Towards an International Framework for Investment Facilitation (2018) 4.

The Policy Goals of Investment Facilitation

Investment facilitation aims to use different mechanisms to reduce or eliminate potential and existing obstacles faced by companies in the host country once they have decided to invest. These obstacles can include “the lack

of clarity on the legislation and administrative procedures, the cost of doing business (in terms of time and resources), the lack of capacities of the civil service, and the risk of corruption when interacting with government officials”.²¹ The ultimate purpose of investment facilitation is to encourage *new investments*

¹⁹ Ana Novik and Alexandre de Crombrughe, “Towards an international Framework for Investment Facilitation”, OECD, Investment Insights (April 2018) 3.

²⁰ OECD, Investment Insights (April 2018) 3. Image building involves fostering the positive image of the host country as a profitable investment destination. Investment generation pertains to direct marketing techniques that often target specific industries, activities, companies and markets.

²¹ Ana Novik and Alexandre de Crombrughe, “Towards an international Framework for Investment Facilitation”, OECD, Investment Insights (April 2018) 3.

and reinvestments while ensuring the benefits of investment are maximised.²² Governments thus face two questions that relate to these intertwined goals: 1) How to increase the flow of foreign investment; and 2) How to maximize the benefits?²³ Many of the technical and policy tools of investment facilitation, which

are designed to enhance the environment in which investments and reinvestments are made, have been noted already. The question of how investment facilitation can contribute to maximising the benefits of investment for the recipient economy, however, must now be addressed.

1.2 Investment Facilitation and Sustainable Development

FDI is a critical component of economic growth and development, especially in developing countries. Countries are well aware of the importance of investment, and particularly foreign investment, in order to advance development goals by bringing capital, employment, export opportunities, greater consumer choice, advanced technologies, managerial know-how and overall economic growth into the host economy. Moreover, FDI can play an important, if not indispensable, role in achieving the goals set out in the 2030 Agenda for Sustainable Development.²⁴ In 2014, for example, UNCTAD reported that achieving the Sustainable Development Goals (SDGs) in developing countries alone would require expenditures of approximately \$3.9 trillion per year, which, at then current levels of developing country finance, left a gap of some \$2.5 trillion, which UNCTAD noted would need to be filled by investment.²⁵ More recently, a survey conducted by ESCAP in

2019 has forecast that Asia-Pacific developing countries in particular will require an additional \$1.5 trillion of investment per year to achieve the SDGs by 2030.²⁶

The COVID-19 pandemic and its stifling impact on FDI has made this situation even more critical. Globally, FDI fell by 42% in 2020 as pandemic-related measures slowed down existing investment projects and curtailed new ones.²⁷ International private investment into developing countries was particularly hard hit, falling 57% year-on-year in the fourth quarter of 2020.²⁸ Moreover, investment in sectors particularly relevant to the SDGs, such as infrastructure, effectively collapsed. In sum, while the need to facilitate investment to achieve the SDGs was already a matter of pressing concern before the global pandemic, these figures indicate how even more pressing the need for effective investment facilitation has become.

²² OECD, *Investment Insights* (April 2018) 3. More generally see, OECD, “Foreign Direct Investment for Development – Maximizing Benefits, Minimizing Costs” (OECD Publications 2002); Laura Alfaro, “Gains from Foreign Direct Investment: Macro and Micro Approaches”, World Bank’s ABCDE Conference (2016) *The World Bank Economic Review*, 2-15.

²³ T20 Japan 2019, “Towards G20 Guiding Principles on Investment Facilitation for Sustainable Development”, 3.

²⁴ UN General Assembly, “Transforming our world: the 2030 Agenda for Sustainable Development” (2015) A/RES/70/1. Simon J. Evenett and Johannes Fritz, “Advancing Sustainable Development With FDI: Why Policy Must Be Reset”, 27th Global Alert Report (CEPR Press, 2021) at 5: “Governments are on record stating that they cannot finance and deliver on the Sustainable Development Goals without private sector engagement.”

²⁵ UNCTAD, *World Investment Report* (2014), Chapter 4: “Investing in the SDGs: an action plan for promoting private sector contributions”.

²⁶ UNESCAP, “Economic and Social Survey of Asia and the Pacific 2019: Ambitions beyond Growth” (2019), vi.

²⁷ 27th Global Alert Report, 2021, 5.

²⁸ 27th Global Alert Report, 2021, 5.

The link between the need for FDI and the achievement of the SDGs highlights the importance of ensuring that ongoing international initiatives on investment facilitation, such as the proposed WTO Multilateral Framework on Investment Facilitation,²⁹ clearly address how they will serve sustainable development purposes. Unfortunately, in many of the discussions to date, development and sustainable development have been used in an interchangeable manner even though sustainable development is a broader objective that goes beyond simple economic growth and development. Investment facilitation for *sustainable development* consequently must go beyond traditional concepts of investment facilitation (see Figure 2 below).

What is Sustainable Development?

Sustainable development has become something of a buzzword in the international community and policy-making circles more broadly. It has often been defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”,³⁰ and it seeks to strike a balance between “[e]conomic development, social development, and environmental protection”.³¹

In September 2015, all 193 UN member states adopted the SDGs.³² The 17 SDGs and 169 individual targets were set out in Agenda 2030, which is designed to guide the global community’s sustainable development

priorities until 2030. The SDGs set an ambitious agenda targeting the end of poverty along with strategies to improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve the world’s oceans and forests.

The decisive role of FDI for the achievement of SDG 8 (Decent Work and Economic Growth), SDG 9 (Industry, Innovation and Infrastructure), SDG 12 (Responsible Consumption and Production) and SDG 17 (Partnerships and Implementation) was directly stated in Agenda 2030.³³ Moreover, as noted above, FDI was recognized further as an essential element to achieving the SDGs more broadly. Thus, FDI can directly and indirectly contribute to the achievement of any of the 17 SDGs.³⁴ For instance, FDI in infrastructure is fundamental for sustainable development as is reflected in SDG 6 (sustainable management of water and sanitation), SDG 7 (access to affordable, reliable, sustainable and modern energy), and SDG 9 (building resilient infrastructure). Another key area where FDI plays a decisive role in the achievement of the SDGs is climate change mitigation and adaptation. The core aim of the Paris Agreement as reflected in SDG 13 requires a move away from fossil fuels and a transition to a low-carbon and climate-resilient world. “Making finance flows [including FDI] consistent with a pathway towards low greenhouse gas emissions and climate-resilient development” is an expressly stated aim of the Paris Agreement,³⁵ which

²⁹ See World Trade Organization’s webpage on Investment Facilitation for Development.

³⁰ UN General Assembly, Report of the World Commission on Environment and Development [1987] A/RES/42/187, para. 27.

³¹ UN General Assembly, “Programme for the Further Implementation of Agenda 21”, [1997] A/RES/S-19/2, para. 23. For the evolution of sustainable development, see Stefanie Schacherer, *Sustainable Development in EU Foreign Investment Law* (Brill, 2021) 19-27.

³² UN General Assembly, “Transforming our world: the 2030 Agenda for Sustainable Development” (2015) A/RES/70/1.

³³ It is noteworthy that under SDG 17, Target 17.5, the need for investment promotion regimes for LDCs was explicitly recognised whereas investment facilitation was not.

³⁴ UNCTAD, SDG Investment Trends Monitor, 2019.

³⁵ 2015 Paris Agreement, Art. 2(1)(c).

recognises that FDI is needed for building energy infrastructure, renewable energy generation, and research and deployment of climate-friendly technologies among others.³⁶ In the SDGs, companies – and not only governments – are identified as critical actors of sustainable development. In order for businesses to make positive contributions towards the achievement of these goals, a change of direction is required from a typical short-term view to a broader view of business serving the needs of people and the planet.

Beyond the SDGs, sustainable development is associated with a number of legal principles pertaining to environmental law (e.g., the principle of prevention, the precautionary principle, and environmental impact assessments);³⁷ to development and equity (e.g., special and differentiated treatment of developing countries);³⁸ as well as to social and human rights (e.g., fundamental principles of the International Labour Organization (ILO)).³⁹ This set of legal principles have led to

a normative framework, which can further guide governments in implementing measures seeking to promote sustainable development.⁴⁰ From a legal policy perspective, the key question is how to design legal frameworks that prevent environmental and social harm and incentivise states, corporations and society as a whole to achieve the SDGs.

What is Sustainable FDI for Sustainable Development?

As mentioned at the outset of this Section, FDI can have a number of positive effects on a country's development objectives (e.g., economic growth, poverty reduction, job creation, expansion of productivity, infrastructure, innovation, technology transfer and the energy transition). In order for countries to make effective policy choices, the challenge consists in identifying what constitutes sustainable FDI. The basic idea of sustainable FDI is a “commercially viable investment that makes a maximum

³⁶ The core objective of the 2015 Paris Agreement is “to strengthen the global response to the threat of climate change”. Art. 2(1). The aim of aligning finance flows with climate change mitigation in Article 2(1)(c) is stated alongside the aims of “holding the increase in global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels”, Art. 2(1)(a), and “increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production”. Art. 2(1)(b).

³⁷ According to the principle of prevention, states have a positive duty to ensure that activities under their control do not cause damage to the environment of another state or in areas beyond the limits of their national jurisdiction. The duty to prevent environmental harm is combined with certain procedural duties, such as to cooperate, to notify, to seek the consent of concerned persons and groups as well as to conduct environmental impact assessments (EIAs) on envisaged economic activities and projects. The idea behind precaution is that a lack of scientific certainty about actual or potential effects of a given activity must not be a reason for a state not to take appropriate measures in order to avoid environmental damage.

³⁸ The equity principles of sustainable development are: 1) Inter-generational equity, which seeks to ensure the distribution of the quality and availability of the Earth's natural resources between present and future generations; and 2) Intra-generational equity, which has the objective of reducing the gaps between developed and developing countries. Intra-generational equity has three sub-categories encompassing the more general aim of eradicating poverty, the acknowledgement of the special needs of developing countries, and the more concrete principle of common but differentiated responsibilities (CBDR).

³⁹ As reflected in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-sixth Session, [1988] (last revision 2010), and the Eight Fundamental ILO Conventions are: (1) Convention Concerning Forced or Compulsory Labour No. 29 [1930]; (2) Equal Remuneration Convention No. 100 [1951]; (3) Convention Concerning the Abolition of Forced Labour No. 105 [1957]; (4) Freedom of Association and Protection of the Rights to Organise Convention No. 87 [1948]; (5) Right to Organise and Collective Bargaining Convention No. 98 [1949]; (6) Discrimination (Employment and Occupation) Convention No. 111 [1958]; (8) Minimum Working Age Convention No. 138 [1973]; (8) Worst Forms of Child Labour Convention No. 182 [1999].

⁴⁰ Stefanie Schacherer, *Sustainable Development in EU Foreign Investment Law* (Brill, 2021).

contribution to the economic, social and environmental development of host countries and takes place in the framework of fair governance mechanisms.”⁴¹ To this end, a number of initiatives have attempted to identify the main characteristics of sustainable FDI (or business activities more broadly) in an effort to concretise more abstract definitions.⁴² In considering these approaches, one essential criterion of any definition of sustainable FDI is that it be flexible enough to adapt over time and to take into account the specific needs of countries and regions. Moreover, in constructing a definition of sustainable FDI by, for example, identifying certain kinds of projects that by their nature can be considered sustainable, it is important not to lose sight of the manner in which such projects operate. For instance, it must be clear that FDI in renewable energy projects such as FDI in solar or wind energy (per definition sustainable FDI) still needs to comply fully with Corporate Social Responsibility (CSR) standards to be considered sustainable. In other words, definitions of sustainable FDI need to capture the entire picture with regard to issues surrounding the sustainability of a company’s operation.⁴³ In sum, a definition of sustainable FDI must go beyond “do no harm” (i.e., undermining social rights and environmental protection) and recognise the need for foreign investment to make an active contribution to

sustainable development. In other words: sustainable FDI for sustainable development.

In the same vein, ESCAP defines sustainable FDI for sustainable development as an investment that contributes to sustained economic growth that is socially inclusive and environmentally sustainable or FDI that follows responsible business conduct and contributes to sustainable development.⁴⁴ As explained by ESCAP, sustainable investment for sustainable development should be understood as comprising three layers:

1. Investment (projects) that can *per se* be considered sustainable, e.g., investment in solar energy, renewables, waste management and green investments in general;
2. Investments that:
 - take place in a sustainable way, i.e., the business conduct of the company is responsible toward people and the environment (with international CSR instruments serving as baseline standards);⁴⁵ or
 - emphasize sustainability, i.e., investments that lead to spill-over effects, create sustainable jobs, increase technology transfer, etc.; and
3. Investments that help countries achieve the SDGs.

⁴¹ Karl P. Sauvart and Howard Mann, “Towards an Indicative List of FDI Sustainability Characteristics”, The E15 Initiative (2017) 2.

⁴² Karl P. Sauvart and Howard Mann, “Towards an Indicative List of FDI Sustainability Characteristics”, The E15 Initiative (2017) 2. See also the many current policy approaches in sustainable finance, e.g. OECD, “Developing Sustainable Finance Definitions and Taxonomies” (OECD 2020).

⁴³ UNESCAP, Handbook on Policies, Promotion and Facilitation of Sustainable Foreign Direct Investment (2022).

⁴⁴ UNESCAP, Handbook on Policies, Promotion and Facilitation of Sustainable Foreign Direct Investment (2022). Baseline standards in this regard are centered around international instruments such as the 2011 Update of the OECD Guidelines for Multinational Enterprises and the 2011 United Nations Guiding Principles on Business and Human Rights.

⁴⁵ Such as the 2011 OECD Guidelines for Multinational Enterprises, the 2011 United Nations Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact Principles, and the ISO 26000 Guidance on Social Responsibility.

What is Sustainable Investment Facilitation or Investment Facilitation for Sustainable Development?

Concepts of investment facilitation are centred around increasing transparency, making administrative processes more efficient and effective, and stabilizing the legal environment. Traditional investment facilitation measures start from the recognition that FDI can contribute to sustainable development or at least development (in the economic sense), and that this is the reason that countries have an interest in facilitating FDI. Many of today's discussions on investment facilitation – even those claiming to incorporate sustainable development objectives – stick to the traditional concepts of investment facilitation.⁴⁶

However, like other investment policy areas, facilitation initiatives need to form part of the country's broader investment for sustainable development agenda aimed at maximizing the benefits of investment and minimizing negative side effects. Investment facilitation efforts should therefore support the mobilization of investment towards the SDGs.⁴⁷

Following that aim, the guiding principles of investment facilitation for sustainable development should encompass, together with investor-oriented policies, environmental protection, local economic and social development, gender balance and female entrepreneurship, industrial up-grading, employment and skills training, the respect for human rights, public health and climate change mitigation and adaptation. Investment

facilitation for sustainable development, in this respect, can be understood as a combination of tools, policies and processes that foster a regulatory and administrative framework to facilitate investment that maximises and does not undermine sustainable development objectives.⁴⁸ As a consequence, traditional investment facilitation measures need to be supplemented with investment facilitation measures that “not only can help increase the flow of FDI but also specifically seek to advance the [sustainable] development of host countries”.⁴⁹ (See Figure 2)

It is important to underline that currently there is no sufficient state practice or common agreement as to what tools, policies and processes are necessary or desirable for countries to facilitate investment for sustainable development. Considerable debate also exists on whether investment facilitation tools are best implemented at the national, regional, or international level and whether they require binding or non-binding instruments.⁵⁰ In addition, who should be in charge of implementing the measures deserves further analysis. In this respect, the host country is the key actor, but the investor itself and the investor's home state, together with international treaty networks and international organizations, also have important roles to play in setting the framework of investment facilitation for sustainable development. Finally, it warrants stating expressly that not all investment facilitation measures for sustainable development are relevant for every country at

⁴⁶ Brooke Skartvedt G.yen, “Investment Promotion and Facilitation for Sustainable Development” (2020).

⁴⁷ UNCTAD, “UNCTAD Action Menu for Investment Facilitation” (United Nations, 2016) 4-5.

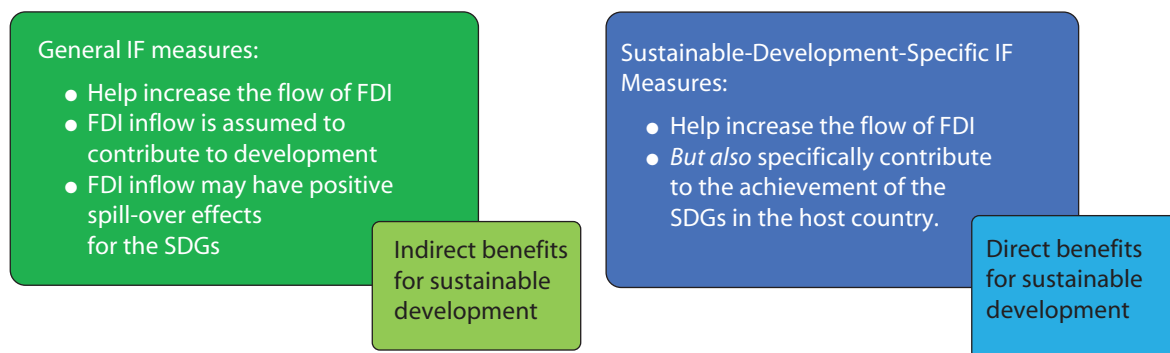
⁴⁸ Brooke Skartvedt G.yen, “Investment Promotion and Facilitation for Sustainable Development” (2020).

⁴⁹ Karl P. Sauvant, Matthew Stephenson, Khalil Hamdani and Yardenne Kagan, “An Inventory of Measures to Facilitate the Flow of Sustainable FDI” in Axel Berger, Karl P. Sauvant (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers* (Geneva: International Trade Centre, 2022) 86.

⁵⁰ See e.g., N. Jansen Calamita, “Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value”, 23 *Journal of International Economic Law* 973 (2020); Martin Dietrich Brauch, “Investment Facilitation for Sustainable Development: Getting it Right for Developing Countries”, IISD (2019).

FIGURE 2

General and Sustainable-Development-Specific Investment Facilitation (IF) Measures



Elaborated from Sauvant et al., “An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI” (2021).

all times.⁵¹ Moreover, many measures require implementation (human resource/technical) capacity since weak implementation might end up obstructing rather than facilitating sustainable FDI.

As far as the tools and measures of investment facilitation for sustainable development are concerned, Sauvant and his co-authors have established a list of measures, which they consider “directly help to increase the development impact of FDI”.⁵²

The list of 13 measures is contained in Table 1 below. Their enumeration provides a concrete understanding of what investment facilitation for sustainable investment could look like in practice. At the same time, Table 1 goes beyond simple enumeration and notes which actors (e.g., host country, home country, investor) should be responsible for implementation and the level of governance (e.g., national, international) at which rules might be made.

⁵¹ Karl P. Sauvant, Matthew Stephenson, Khalil Hamdani and Yardenne Kagan, “An Inventory of Measures to Facilitate the Flow of Sustainable FDI” in Axel Berger, Karl P. Sauvant (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers* (Geneva: International Trade Centre, 2022) 86.

⁵² Ibid. Sauvant et al. culled the list from various sources such as the structured discussions at the WTO, various publications, countries’ sustainable investment projects, discussions with the private sector, expert meetings, webinars, and workshops.

TABLE 1
Examples of Sustainable-Development-Specific IF Measures

	Measure	Responsible Actor	Governance level
1	Publish internationally recognized guidelines/standards of responsible business conduct and strongly encourage investors to observe these guidelines through, e.g., requesting in application forms to acknowledge that these guidelines have been read and understood.	<ul style="list-style-type: none"> ● Host country ● Investor 	<ul style="list-style-type: none"> ● National
2	Create a special category of “Recognized Sustainable Investor” (RSI) to incentivize investors to invest sustainably. RSIs receive additional benefits if they meet certain publicly available conditions.	<ul style="list-style-type: none"> ● Host country ● Treaty network ● International organizations 	<ul style="list-style-type: none"> ● National ● Regional ● International
3	Designate a corporate social responsibility (CSR) coordinator to facilitate investor relations with local communities, stakeholder associations and civil society.	<ul style="list-style-type: none"> ● Host country 	<ul style="list-style-type: none"> ● National
4	Develop targeted marketing strategies facilitating sustainable FDI, e.g., “red carpet” service for investments having a significant positive sustainable development impact.	<ul style="list-style-type: none"> ● Host country 	<ul style="list-style-type: none"> ● National
5	Assess the potential development impact of large FDI projects through ex ante impact assessments, to ensure they align with sustainable development goals.	<ul style="list-style-type: none"> ● Host country 	<ul style="list-style-type: none"> ● National
6	Establish supplier-development programmes to increase the number and capacity of qualified local enterprises that can contract with foreign affiliates.	<ul style="list-style-type: none"> ● Host country 	<ul style="list-style-type: none"> ● National
7	Build and maintain a database of local enterprises to help investors identify potential subcontractors, with the information freely available to all.	<ul style="list-style-type: none"> ● Host country 	<ul style="list-style-type: none"> ● National
8	Encourage partnerships between foreign affiliates and local suppliers to help upgrade the latter, through regular workshops hosted by a CSR coordinator.	<ul style="list-style-type: none"> ● Host country 	<ul style="list-style-type: none"> ● National
9	Foster partnerships between foreign affiliates and local universities or other bodies to create centres of excellence for training or research and development.	<ul style="list-style-type: none"> ● Host country 	<ul style="list-style-type: none"> ● National

TABLE 1 (continued)

	Measure	Responsible Actor	Governance level
10	Provide technical assistance to developing countries' IPAs to enhance their ability to facilitate sustainable FDI, based on need assessments.	<ul style="list-style-type: none"> ● Treaty network ● International organizations 	<ul style="list-style-type: none"> ● Regional ● International
11	Provide clear guidelines on CSR and responsible business conduct to outward investors. For sectors with high development and environmental sensitivities, such investor education could be made mandatory.	<ul style="list-style-type: none"> ● Home country 	<ul style="list-style-type: none"> ● National ● Regional ● International
12	Establish clear criteria linking home-country support measures to the observation of internationally recognised standards of responsible business conduct, the acceptance and observance of corporate CSR policies and (in the case of projects with substantial impacts), ex ante developmental, environmental and social impact assessments.	<ul style="list-style-type: none"> ● Home country ● Treaty network ● International organizations 	<ul style="list-style-type: none"> ● National ● Regional ● International
13	Facilitate sustainable FDI projects through partnerships between investment authorities in host and home economies, including to help investors find bankable projects quickly.	<ul style="list-style-type: none"> ● Home country ● Host country ● Treaty network 	<ul style="list-style-type: none"> ● Regional ● International

SECTION 2

**Landscape of
Investment
Facilitation
Initiatives
in ASEAN
and RCEP
Countries**

SECTION 2

Landscape of Investment Facilitation Initiatives in ASEAN and RCEP Countries

This Section provides an overview of the landscape of investment facilitation practices and initiatives adopted in ASEAN Member States (AMS) and in their RCEP partner countries.⁵³ As this survey shows, many of the examined countries have recently modernized their investment facilitation frameworks and have adopted new initiatives and mechanisms often – but not systematically – to promote sustainable FDI.⁵⁴ The rich national practice of AMS and their RCEP partners provides important background for the discussion of

future steps and regional initiatives that might come within the context of existing frameworks such as RCEP and the AIFF, or a new future instrument altogether (see Section 5).

The Section is organized based on the themes relied upon in the text under consideration in the WTO Structured Discussions on Investment Facilitation for Development (“the Easter Text”),⁵⁵ complemented by additional topics where relevant (see Table 2).

⁵³ This survey is necessarily non-exhaustive. A comprehensive survey of investment facilitation practices and initiatives in AMS and their RCEP partner countries is beyond the scope of the present report.

⁵⁴ The landscape of investment facilitation practices and initiatives in AMS and in their RCEP partners is based on desk research focusing on the online resources made available by the Investment Promotion Agencies of the AMS and their RCEP partners. Additional resources include reports published by UNCTAD and the ASEAN Secretariat. The initiatives and practices featured in this report were selected based on their relevance against the landscape of facilitation measures in general, as well as on their significance for the country considered. Featuring measures from all fifteen RCEP countries was an additional selection criterion.

⁵⁵ WTO Structured Discussions on Investment Facilitation for Development: Consolidated Text by the Coordinator: “Easter Text”, INF/IFD/RD/74/Rev. 6 (9 February 2022). For previous versions, see: “WTO Structured Discussions on Investment Facilitation for Development: Consolidated Text by the Coordinator: ‘Easter Text’ – MC12”, INF/IFD/RD/74/Rev. 5 (25 November 2021); “WTO Structured Discussions on Investment Facilitation for Development: Working Document”, INF/IFD/RD/39 (24 July 2019). It bears noting that none of the drafts are officially publicly available.

TABLE 2
Overview of Initiatives and Practices Reviewed in Section 2

Transparency and predictability of investment measures (2.1)	<ul style="list-style-type: none"> ● Access to national investment laws ● Access to international investment agreements and regulations relating to investment ● Information on sectors open to investors and authorisation to invest ● Practical steps: establishment, re-submission, rejection, appeal ● Information on incentive schemes
Speeding up administrative procedures (2.2)	<ul style="list-style-type: none"> ● Simplification of procedures ● Digital windows
Focal points and dispute prevention (2.3)	<ul style="list-style-type: none"> ● Focal points ● Ombudsperson mechanisms
Cross-border cooperation and capacity building (2.4)	<ul style="list-style-type: none"> ● Cross-border cooperation ● Capacity building
Sustainable development specific investment facilitation measures (2.5)	<ul style="list-style-type: none"> ● Sustainable investment ● Responsible business conduct ● Investments that help achieve the SDGs

2.1 Transparency and Predictability of Investment Measures

The publication, in a centralized and accessible online location, of the laws, regulations, judicial decisions and administrative rulings that are relevant for foreign investment is necessary to enable informed decision-making and regulatory compliance by investors. Prompt and comprehensive publication of these materials and making sure that they remain up to date are critical for investors and investment facilitation. Similarly, the availability of such resources in the English language – at least for the most important texts – is another important aspect of enhancing the utility of publication for investors and investment facilitation.

Access to national investment laws. Most RCEP countries have adopted specific laws addressing foreign investment, which often set out the rights and obligations of the investor and of the host country, market entry conditions, priority investment sectors, authorised and restricted activities, incentives schemes, processes for the review and approval of investment projects, permits and licenses, etc.⁵⁶ In some cases, these laws also contain provisions which express the country’s investment vision and objectives, such as the Lao People’s Democratic Republic Law on Investment Promotion (2016) which expresses a strong focus on investment facilitation and sustainable development.⁵⁷

⁵⁶ The RCEP countries which have adopted *specific* foreign investment laws are: China, New Zealand, the Philippines, the Republic of Korea, Thailand.

⁵⁷ The Lao People’s Democratic Republic Law on Investment Promotion (2016), Article 1, stating that the law’s objectives are to “enable convenient, expeditious, transparent and proper investments [...] contributing to the continuous growth of national socio-economic development *in line with green direction and sustainability*”. (Emphasis added.)

Unfortunately, notwithstanding the importance of these laws for providing information about the legal framework for investment, many of the government websites of the RCEP parties⁵⁸ do not contain links to the texts of their national investment laws,⁵⁹ a comment which is applicable to other laws and regulations relevant for FDI as well.

Access to international investment agreements and regulations relevant to the legal environment for investment. Some IPAs provide a list of free trade agreements and bilateral investment treaties they have signed, as it is the case for Myanmar.⁶⁰ In other countries, lists of trade agreements and bilateral investment treaties may be found on the websites of other government agencies, such as ministries of foreign affairs⁶¹ or ministries of trade and/or investment,⁶² although it bears noting that these lists are sometimes incomplete or materials are not available in English (or even the country's

native language).⁶³ In some countries, IPAs make available laws and regulations by types of activity. For example, on the website of the Council for the Development of Cambodia (CDC) the relevant laws and regulations are listed by sector (agriculture and fisheries, education, tourism, etc.).⁶⁴ The CDC provides a number of helpful unofficial translations of these texts in English. Such translations are missing on most governments' websites.

A review of these websites shows that the online compilation of administrative rulings and judicial decisions pertaining to FDI is not a common practice. While in some cases relevant texts might be mentioned sporadically in the "News" section of the website, they are usually not organised in a user-friendly fashion.⁶⁵ Moreover, as noted, a review of RCEP-country websites shows that the online compilation of international investment agreements is similarly not a common practice.⁶⁶

⁵⁸ The IPAs of the 10 ASEAN States and their 5 RCEP partners were reviewed.

⁵⁹ Only a few examples were found of IPAs making the country's foreign investment law easily available on their websites. Cambodia's IPA, for example, does so on its homepage, while Myanmar's foreign investment law may be found on the website of its IPA, albeit in a much less prominent manner. (The Myanmar foreign investment law is found in the "Laws, Rules and Notifications" section, where a search of "investment law" was successful in retrieving the text.) China's Foreign Investment Law (2020) is available in the "Policies" section of the website of China's National Development and Reform Commission. In some countries, foreign investment laws may be found instead on the websites of other government agencies, e.g., Japan Ministry of Finance website: Home > The Policy > International Policy > Foreign Direct Investment Regime > Foreign Direct Investment Regime Related Laws and Regulations.

⁶⁰ Myanmar Directorate of Investment and Company Administration (DICA) website: Resources > Policy and Law > Investment Agreements.

⁶¹ See e.g. Australia Department of Foreign Affairs and Trade website: Home > Trade and investment > About foreign investment > Australia's bilateral investment treaties.

⁶² See e.g. Singapore Ministry of Trade and Investment website: Home > Trade > International Investment Agreements.

⁶³ See Malaysia Ministry of International Trade and Investment website: Promoting Trade > Free Trade Agreements & Malaysia Ministry of International Trade and Investment website: Promoting Trade > Investment Guarantee Agreements (IGAs). The list of Malaysia's investment treaties is incomplete and some, like the bilateral investment treaty with China, are not available in either English or Bahasa Melayu. See also New Zealand Department of Foreign Affairs and Trade website: Home > Trade > Free Trade Agreements. Notably, while the New Zealand website lists the FTAs to which New Zealand is a party, some of which contain chapters on investments, the website does not list or provide information about the bilateral investment treaties to which New Zealand is a party.

⁶⁴ See CDC website: Laws and regulations.

⁶⁵ For instance on Laos PDR's IPA's website, Order No. 03/PM, which is subject to a post in the "News" section, is not listed under "Laws and Regulations".

⁶⁶ It bears noting that simply because many countries' IIA texts are not found on official government websites, this does not mean that these texts are not publicly available. The websites of international organisations, like UNCTAD, for example, host vast libraries of IIA texts online. That said, the websites of international organisations do not contain complete collections of all countries' IIAs. As a result, the absence of these texts from the websites of countries' IPAs or other agencies, remains an issue with respect to the transparency of the legal environment for investment.

Information on sectors open to investors and authorisation to invest. While the websites of government agencies in RCEP countries often the full text of the country's laws on foreign investment or lists of the country's international investment agreements, most of the IPA websites in RCEP countries provide substantial, although not necessarily comprehensive information, regarding the sectors open to investors and the processes for authorisation to invest (where required). Thus, most IPA websites indicate which sectors are open to investors, but do not

generally provide a list of sectors that are prohibited or restricted for foreign investors. This may be because information about restricted sectors is often contained in national investment laws or accompanying regulations (see example in Box 1) and as noted, most IPA websites in RCEP countries do not provide the texts of these instruments. Implementation of the obligation to make national investment laws systematic available on, e.g., IPAs' websites, as required under RCEP and other treaties discussed in Section 3, would address this gap.

BOX 1. Thailand Foreign Business Act (1999)

In the annexes of Thailand's Foreign Business Act (1999), three lists are provided of prohibited, restricted and open sectors:

- List 1: "Businesses that foreigners are not permitted to engage in for special reasons";
- List 2: "Businesses concerning national security or safety that could have an adverse effect on art and culture, customs, or native manufacture/handicrafts, or with an impact on natural resources and the environment";
- List 3: "Businesses in which Thais are not ready to compete in undertakings with foreigners".

(Notably, neither the full English text nor a summary of Thailand's Foreign Business Act (1999) can be found on the English version of Thailand Board of Investment's website. It is only on an unindexed page of the French version of the BOI's website that one can find a summary of the Act, but, again, no full text. Information about restricted and open sectors for investment – but not the text of the Act – may also be found in the BOI's *A Business Guide to Thailand* (2019), pp. 87-90.

While the decision whether to admit foreign investment into particular sectors is often set out as a matter of rule in lists, in some cases such decisions may be subject to case-by-case evaluation. Even in countries which do not take a negative list approach to inward FDI, countries are increasingly establishing

mechanisms for case-specific evaluations under investment screening processes. While some websites of RCEP government agencies make available the texts of relevant legislation and provide detailed guidance with respect to, e.g., review processes, grounds for review, and the review of investments into particular

sectors,⁶⁷ most do not go beyond providing general information on the application process pertaining to such authorisations (if the information is available at all).⁶⁸

BOX 2. Australia Foreign Investment Review Board

In 2020, Australia's Productivity Commission released a research paper⁶⁹ that looked at the trends, drivers and effects of foreign investment in Australia. While the conclusion was that the design of the national interest test applied in the screening of foreign investment applications ensured a weighing of the economic benefits against risks – and resulted in an approval of investment applications in the great majority of cases – the paper identified possible improvements such as:

- improving guidance to investors and their advisors about the evolving interpretation of the national interest, through the publication of decisions (not necessarily at the time they are taken);
- giving certainty and improved transparency about timelines, through early advice to investors when standard time frames will not be met and the publication of more detailed annual statistics.

Following that report, the website of the Australia Foreign Investment Review Board, which administers Australia's screening mechanism contains the texts of the relevant statutes and regulations and includes detailed guidance with respect to, e.g., review processes, grounds for review, and the review of investments into particular sectors. In addition, the website contains a series of “guidance notes” to assist investors and other stakeholders understand the foreign investment review framework:

- | | |
|---------------------|--|
| 1. Overview | 8. National Security |
| 2. Key Concepts | 9. Exemption Certificates |
| 3. Agriculture | 10. Fees |
| 4. Commercial Land | 11. Principles for Developing Conditions |
| 5. Mining | 12. Tax Conditions |
| 6. Residential Land | 13. Conditions Reporting |
| 7. Business | 14. Compliance – Residential |

⁶⁷ The website of the Australia Foreign Investment Review Board, for example, provides the texts of the relevant statutes and regulations, but also provides detailed guidance with respect to, e.g., review processes, grounds for review, and the review of investments into particular sectors.

⁶⁸ For example, China's Rules on Security Review of Foreign Investment were promulgated by the National Development and Reform Commission and the Ministry of Commerce in December 2020 and came into force in 2021. The new rules stipulate the types of foreign investment subject to review, review body, scope of review, review procedures, supervision for the implementation of review decisions and handling violations, etc. Although their promulgation was designed to improve transparency with respect to the security review mechanism under China's Foreign Investment Law (2020), the text of the Rules on Security Review of Foreign Investment is not available in English on Chinese government websites. The only information in English are brief summaries of the rules contained, e.g., in a number of “News” stories on the websites of the Ministry of Commerce and the State Council of the People's Republic of China.

⁶⁹ Foreign Investment in Australia, Productivity Commission Research Paper, Government of Australia (23 June 2020) 81.

Practical steps: establishment, re-submission, rejection, appeal. Most websites of RCEP IPAs provide information regarding the practical steps to be followed to invest in the country (applications for approval, licenses etc.), sometimes in the form of handbooks, FAQs and/or factsheets⁷⁰ which are available for investors to download.⁷¹ Occasionally, agencies' websites also provide information about the timelines of application decisions,⁷² although such information is also

sometimes contained directly in the foreign investment law itself.⁷³

Cambodia's Investment Law (2021) provides an example of the development and implementation of a simplified approval mechanism, involving automatic approvals which render timelines for approval unnecessary. Table 3 shows the evolution of Cambodian policy in this respect.

TABLE 3
Evolution of Project Registration Provisions in Cambodia

1994 Law on Investment	2021 Law on Investment ⁷⁴	Comments
A conditional registration certificate lists all the licences, permits to be issued in order to obtain the final registration certificate.	"If the proposed Investment Project is not on the Negative List, [...] the CDC shall issue the registration certificate to the applicant within 20 working days ". (Article 12)	The registration process has been simplified by the adoption of an <i>automatic approval system</i> where the investment project is approved by default unless the contemplated activity is in the negative list of activities.
Government officials handling requested permits who, "without proper reason" fail to address the applicant's request within 28 days from the date of the conditional registration certificate "shall be punished by law". (Article 7)	"Investment Projects that have obtained a Registration Certificate may be implemented automatically but it does not exempt the Investment Project from obtaining other permits as required by the laws and regulations in force." (Article 13)	The effort to improve <i>efficiency</i> though the possibility of sanctions against delinquent government officials is replaced by the adoption of an automatic approval system. The process thus no longer relies upon timely action by individual officials.

⁷⁰ About 50 factsheets are available on Thailand's EEC-OSS's website on application for licenses ("Starting a business building and factory construction", "Sanitation management" etc.). See also the factsheets provided by the Australia Foreign Investment Review Board, which highlight "some of the obligations [under Australian law] of which foreign investors should be aware...", e.g., Corporate Governance Principles; Compliance with Corporate Law Administered by the Australian Securities and Investments Commission (ASIC); Directors' Obligations; Competition and Consumer Protection Laws; OECD Guidelines for Multinational Enterprises; National Environmental Law.

⁷¹ Approval and licensing information is sometimes provided in the countries' national investment laws themselves, in particular the recently adopted ones, as it is the case for Myanmar. See Chapter VIII. Submission of proposal; Chapter IX. Submission of endorsement application.

⁷² See, e.g., Toitū Te Whenua Land Information New Zealand: information on assessment timeframes.

⁷³ In Thailand's Foreign Business Act (1999), section 17, for example, the application process for a business license is explained in detail, including the possibility to appeal. The information, although not the original text, is also available in A Business Guide to Thailand (2019), pp. 91-92.

⁷⁴ Available on the website of the Council for the Development of Cambodia.

TABLE 3 (continued)

1994 Law on Investment	2021 Law on Investment	Comments
“Issuance of the Final Registration Certificate does not release [the investor] from obtaining any other approvals specified by competent ministries-entities”. (Article 7)		That said, the obligation for investors to obtain the permits required by law for their activities remains unchanged.
	“All Investment Projects shall be subject to monitoring and inspection through the One-Stop Service mechanism coordinated by the CDC to ensure their compliance with the laws and requirements for obtaining the Registration Certificate”. (Article 13)	The 2021 law establishes a new post-registration compliance check by Cambodia’s IPA, balancing the automaticity of project approvals.

Finally, it bears noting that information regarding the rejection of applications and avenues of recourse appear to be generally absent from IPA websites, along with information about the opportunity to make additional submissions in the case of an incomplete application. That said, New Zealand’s IPA is an example of a website that provides explanations on how to submit further information, as well as the process when declining an application.⁷⁵

Information on incentives schemes. Whether incentive schemes constitute investment facilitation as such, or are better characterised

as investment promotion, has been addressed in Section 1. Here we take a broad understanding of investment facilitation and include incentive schemes in our survey of the availability of information on the websites of the RCEP countries.

Information about incentive schemes is commonly found on IPA websites.⁷⁶ Among the examples of websites that provide substantial information regarding investment incentives are Cambodia and Thailand. Cambodia, for example, under its new 2021 Investment Law, has adopted a new regime of incentives for investors with the potential to

⁷⁵ See, e.g., website of Toitū Te Whenua Land Information New Zealand: information on declining application.

⁷⁶ The Lao People’s Democratic Republic provides an exception to this ease of access, which is notable given that the country’s Law on Investment Promotion provides a comprehensive list of activities eligible for incentives. Under the Law, incentives can be given to investments, which involve the “use of innovative, environmental-friendly [technology] application, and efficient use of natural resource and energy; clean, toxic-free agriculture, planting seed production, animal breeding, industrial plantation, forestry development, protection of environment and bio-diversity, activities promoting rural development and poverty reduction; environmental-friendly and sustainable natural, cultural and historical tourism development industry and construction of modern hospitals, pharmaceutical and medical equipment.” See Law No. 14/NA on Investment Promotion, Article 9. The details of the incentive regime do not seem to be available on the website of the Lao People’s Democratic Republic’s IPA. (Thus, the “Instructions on the Promotion of Investment Incentives Concerning the State Land Rental and Concession Fees”, published by the Laotian government in 2021, and mentioned by the website ASEAN Briefing, could not be found online on a Laotian government website.)

contribute to national economic development, including projects that contribute to skills training (especially for SMEs), or to the development of the infrastructure, environmental protection and biodiversity conservation) Details of this new regime are available on CDC's website.⁷⁷ Similarly, details of the incentives available for investments in Thailand are compiled on Thailand IPA's website.⁷⁸ Notably, among the incentive schemes adopted by Thailand is the announcement of the Board of Investment No. 7/2564, addressed to investment in Special

Economic Zones, which sets out the rules and procedures for facilitating investments for the “distribution of socioeconomic growth at both local and regional levels thoroughly”.⁷⁹

The degree to which countries have been adopting tax and non-tax incentive measures for investments in sustainable types of activities and highlighting that information on government websites, especially IPAs, is encouraging. As discussed in Box 3, the Philippines provides another example of this kind of approach to incentives.

BOX 3. Philippines CREATE Act

The Philippine CREATE Act is part of a number of corporate fiscal reforms undertaken by the Philippines since 2019. The principal purpose of the law was to alleviate the negative impact of the COVID-19 pandemic on the Philippine economy by giving the Government greater flexibility to grant incentives. Further, the Act establishes that foreign investors are eligible for a scheme of “enhanced deductions”, such as 50% additional deduction on power expenses, 100% additional deduction on Research and Development or 100% additional deduction on training expenses.⁸⁰

The CREATE Law provides for the creation of the Strategic Investment Priority Plan (SIPP). Notably, in order to be included in the SIPP, all sectors and industries must undergo an evaluation process to assess the potential of the investment project to promote long-term growth and sustainable development, and the national interest.⁸¹

⁷⁷ Council for the Development of Cambodia, “Special Briefing, Law on Investment” 3-5. As noted, the complete text of the Cambodian Investment Law, which addresses incentives, is also available.

⁷⁸ The Thailand IPA's website provides information on policies for investment promotion (including incentives) and specific incentive policies relevant to investments for industrial development in border provinces in southern Thailand; in Special Economic Zones; in the Eastern Economic Corridor (EEC); in the “Grassroots Economy”; in targeted industries; and for companies to be listed on the Stock Exchange of Thailand (SET) or the Market for Alternative Investment (MAI).

⁷⁹ Thailand's Board of Investment, website.

⁸⁰ Website of the Philippines' IPA: table summarizing the investment incentive regime available to investors.

⁸¹ See, e.g., Philippines Fiscal Incentives Review Board website.

2.2 Speeding up Administrative Procedures

The simplification of procedures is a key aspect of investment facilitation, aimed at improving the efficiency of procedures from throughout the investment life-cycle (including the pre-investment stages). Throughout the

RCEP countries there are numerous examples of government reforms aimed at speeding up administrative procedures. Table 4 provides examples of the wide range of approaches taken by governments.

TABLE 4
Recent Examples of Simplification of Procedures

Brunei: Stamp Act amendment	In 2017, the Stamp Act was amended, removing the requirement for Memoranda and Articles of Association and Share Certificates as part of the process of incorporation. ⁸²
Indonesia: Simplification of approval requirements and licensing	<p>In 2018, the Indonesian Investment Coordination Board (BKPM) issued a regulation (Reg. 24/2018), setting out new rules governing how to obtain investment approvals. Among other things, Reg. 24/2018 abolished the approval requirement for many corporate actions involving a foreign investment company, such as changes of shareholders, changes of capital structure and/or conversion of a domestic company into a foreign investment company.⁸³</p> <p>In 2020, the “Omnibus Law” was enacted to attract investment, create jobs and stimulate the economy by, among other things, simplifying licensing processes and land acquisition processes.⁸⁴</p>
China: Temporary and geographically limited trial simplification measures	From 1 January 2020 to 31 December 2021, the provinces of Shanghai, Jiangsu, Zhejiang and Anhui published three trial measures in relation to foreign-invested enterprises (“FIEs”): (1) Administrative Measures on Permitting Domestic Natural Persons to Invest In and Establish FIEs, (2) Trial Measures on Simplifying Registration Materials and Implementing Mutual Recognition of Subject Qualification Evidence Documents, (3) Trial Measures on Foreign Natural Persons Holding Permanent Resident ID Cards Establishing Science and Technology Enterprises. The goal of these measures, among other things, was to simplify the formality requirements on with respect to documents such as passports of foreign individuals and incorporation registration certificates of foreign companies. ⁸⁵

⁸² See Ministry of Finance, Brunei Darussalam, Press Release, Companies Act (Amendment) Order, 2017 Stamp Act (Amendment) Order (10 May 2017).

⁸³ See BKPM, Regulation No. 24 of 2018 on Electronic Integrated Business Licensing Services (in Bahasa Indonesia). For an English summary, see UNCTAD, Investment Policy Monitor (July 2018).

⁸⁴ UNCTAD, Investment Policy Monitor (February 2021).

⁸⁵ CMS, “Yangtze River Delta further facilitates Foreign Investment” (2 January 2020).

TABLE 4 (continued)

Singapore: Patent Fast Track Programme	In 2020, the Intellectual Property office of Singapore launched a two-year programme aimed at expediting the application-to-grant process of patents in all technology fields to six months, compared with the typical duration of two years. The programme has since been extended until 30 April 2024. ⁸⁶
Thailand: “Regulatory Guillotine”	In 2017, Thailand launched the “regulatory guillotine” initiative with the aim of simplifying Thailand’s laws and regulations for foreign investors, through a Fast-Action Law Reform Committee under the Prime Minister’s Office. The initiative involved a whole-of-government review of legal acts, licenses, procedures, and regulations to determine which were no longer necessary, out-of-date and constraining Thailand’s competitiveness and negatively affecting its World Bank Doing Business ranking. ⁸⁷

Digital windows. A large number of IPAs offer on their websites “one-stop shops/service” or “single electronic windows” (SEWs) for investors to submit all documents required to establish/expand their investments and obtain necessary licenses and permits. Provisions regarding this addressing the establishment of this type of mechanism are sometimes contained in investment laws themselves. Under the Lao People’s Democratic Republic’s Law on Investment Promotion, for instance, “the one-stop investment services” [shall] be delivered conveniently, fast, transparently, efficiently and lawfully”.⁸⁸

While this SEW/“one stop” terminology is widely used by IPAs, the services offered under this banner vary greatly.⁸⁹ A number of IPAs make application forms available online but do not offer an online submission system, or do so only for certain procedures, and not always in English.⁹⁰ At the other end of the spectrum, a few agencies offer a single gateway portal to access all applications across government agencies. Malaysia’s MIDA, for example, provides a real-time tracking system for companies to follow up on the status of their project and various applications.⁹¹ Further, some, but not all,

⁸⁶ See Intellectual Property Office of Singapore website.

⁸⁷ Board of Investment Thailand, “Regulatory Guillotine reforms the law, increasing the country’s competitiveness”.

⁸⁸ Laos PDR Law No. 14/NA on Investment Promotion, Article 5.

⁸⁹ Some countries use this terminology to refer to brick and mortar services centres (for example the “One stop service”).

⁹⁰ For example, on Indonesia’s IPA, although the checklist for investment procedures is in English, many of the forms are in Bahasa Indonesia, as is the link for a Consultation at the Online Single Submission for licenses: Pendaftaran Konsultasi.

⁹¹ See Malaysia IPA’s website. Similarly, Myanmar’s DICA website has a section on “post-permit” activities for both operational and corporate procedures, for example to import machinery or raw materials, or transfer shares.

SEWs provide for an online payment option. According to UNCTAD’s Global Enterprise Registration (GER)⁹² ten out of the fifteen countries examined in the present study offer SEWs with an online payment feature.⁹³

UNCTAD has reported a steady increase in the creation of SEWs, in particular in developing countries, where the number of SEWs increased by 34% from 2016 to 2021.⁹⁴ Nevertheless, UNCTAD concludes that “there

is still significant scope for countries to improve, particularly by establishing good single windows.”⁹⁵ UNCTAD’s ranking of the “best” SEWs suggests that some of that improvement needs to occur in ASEAN and among its RCEP partners. It is notable, for example, that UNCTAD’s list of the best SEWs does not feature any ASEAN countries.⁹⁶ Moreover, among ASEAN’s five RCEP partners, only two – Australia and New Zealand – are on that list.⁹⁷

BOX 4. UNCTAD Digital Government Platform for Investment Facilitation

Through this programme UNCTAD acts on requests from national, provincial, and municipal authorities and “works with government officials and local consultants to map, simplify and automate procedures”.⁹⁸ Solutions offered by UNCTAD are SEWs, step-by-step information portals, online fiscal Services (online tax calculation and services), social security administration systems, digital residency (allowing investors to register their company from overseas), and systems for handling digital documents (e.g., to allow the issuance of verifiable government documents in digital format). The programme aims not only to provide technical assistance but to build sustainable capacity by helping government officials train their colleagues to use and further develop the platform.

UNCTAD’s website regarding the programme gives a number of examples of “success stories”. Notably, none of the AMS or the RCEP partners feature in those examples.

⁹² See the UNCTAD Global Enterprise Registration (GER) website. The GER provides a useful source of information with respect to two of the principal tools for investment facilitation: online single windows and information portals, although its ratings do not capture certain crucial qualitative aspects, such as availability in the English language or user friendliness. The GER complements other global indexes, such as the OECD’s FDI Regulatory Restrictiveness Index, which measures statutory restrictions on foreign direct investment in 22 economic sectors across 69 countries, and the German Development Institute’s Investment Facilitation Index, which maps the adoption of investment facilitation measures at country level for 86 World Trade Organisation members along 6 policy areas.

⁹³ Some of these facilities are quite new. In Cambodia, for instance, through the newly launched (2020) Single Portal, fees are paid online through various e-payment channels. See Official Diary of the Union, Central Bank Resolution No. 4.852 of 27 August 2020, 31 August 2020.

⁹⁴ See UNCTAD Investment Policy Monitor, “Investment Facilitation: Progress on the Ground”, January 2022, 1.

⁹⁵ Ibid, 5.

⁹⁶ Ibid, 6.

⁹⁷ Ibid.

⁹⁸ Website of UNCTAD’s digital government platform for investment facilitation.

2.3 Focal Points, Ombudsperson and Aftercare Services

Focal points “are a safety net when there is investor confusion or to capture outlier requests”.⁹⁹ The IPAs are natural focal points for investors. Although the digitalization of services can be an effective way to streamline and speed-up administrative procedures, the efficiency of the investment process can also benefit from the existence of focal points and

dedicated professionals to respond to investors’ queries and assist them. Invest Viet Nam, for example, provides “online advisors” who can be contacted for consultations.¹⁰⁰ These advisors are business practitioners who have themselves incorporated their companies in Viet Nam.

BOX 5. Thailand Board of Investment In-person and Online Clinics

The website of the Thailand BOI provides a standing platform for investors to set up online and in-person consultations.¹⁰¹ In setting up consultation appointments, investors are asked to pre-identify either the sector of their investment or the regulatory issue to which their inquiry pertains, allowing for investors to speak with the most relevant BOI officials during their consultation slots. Consultations may be held in Thai or English, and there is a facility for investors to request translators for Chinese and Japanese.

In addition, the BOI has a further system for online consultations regarding immigration matters for investors – the SMART Visa Online Clinic.¹⁰² These services are available in Thai, English and Japanese.

Given that foreign investments may be made throughout a country’s territory, in many cases RCEP countries have established country-wide networks for their IPA services. The Board of Investments of the Philippines, for example, provides on its website a list of all subnational IPAs with individual contacts.¹⁰³ In the Lao People’s Democratic Republic, the “investment one-stop service office” has two branches: a central office and a provincial office.¹⁰⁴ Similarly, in Malaysia, MIDA was is

supported sub-nationally by bodies such as “Invest Kuala Lumpur”, “Invest Penang” etc. Some countries’ IPAs also have presences abroad to assist with investments. Japan’s IPA, for example, has 45 offices in Japan and 74 overseas. Republic of Korea has 127 overseas branches.

Ombudsperson mechanisms aim to assist investors facing investment-related difficulties (relating to laws and procedures) and to

⁹⁹ Karl P. Sauvart, Matthew Stephenson, Khalil Hamdani and Yardenne Kagan, “An Inventory of Measures to Facilitate the Flow of Sustainable FDI” in Axel Berger, Karl P. Sauvart (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers* (Geneva: International Trade Centre, 2022) 94.

¹⁰⁰ Viet Nam IPA’s website: Online advisors.

¹⁰¹ Viet Nam IPA’s website: Booking for in-person Clinic and BOI Online Clinic.

¹⁰² Thailand’s BOI website: SMART Visa Online Clinic.

¹⁰³ The Philippines’ BOI website.

¹⁰⁴ The Lao People’s Democratic Republic’s Law No. 14/NA on Investment Promotion, Article 80.

address complaints and grievances at an early stage in order to avoid escalation into formal legal disputes. Ombudspersons have the potential to “encourage investor retention and reinvestment”.¹⁰⁵ On the website of Myanmar’s IPA, an application form, for instance, is available for investors to submit a complaint.¹⁰⁶ A full ombuds grievance mechanism was created in 2016 (see below).

An often-cited example of an ombuds mechanism that combines a process for receiving complaints with an investor aftercare service is Republic of Korea’s Office of the Foreign Investment Ombudsman.¹⁰⁷ Other types of aftercare services and post-investment support may be found in different countries, such as Malaysia’s Post-Investment Division (see below).

BOX 6. Republic of Korea’s Office of the Foreign Investment Ombudsman

The Office of the Foreign Investment Ombudsman (OFIO) was established in 1999 under the Foreign Investment Promotion Act as an alternative mechanism for resolving disputes arising from the business activities of foreign investors in the Republic of Korea. The OFIO is an independent body which works closely with Korean government agencies and the Korea Trade-Investment Promotion Agency (KOTRA) but is not controlled by them.

The ‘Foreign Investors Aftercare Office’ (FIAO) within the OFIO serves as the grievance committee to which foreign investors can submit petitions and complaints. Though this process the investor may submit a claim to an executive consultant, also referred to as a ‘home doctor’ – specialists from various fields, such as finance, accounting, law, etc. – who receives complaints on behalf of FIAO. While considering complaints, FIO is authorised to demand cooperation from relevant public authorities, such as requiring them to explain their actions, requesting site visits, or demanding the provision of information if necessary for ‘investigating whether a foreign investment related system complies with international practices or standards’. The public authority must respond to the request within seven days. Upon completion of the investigation, FIO may make a recommendation. FIO’s recommendations, including corrective measures, are not legally binding, but the public authorities must present reasonable reasons to reject them.¹⁰⁸

¹⁰⁵ Karl P. Sauvart, Matthew Stephenson, Khalil Hamdani and Yardenne Kagan, “An Inventory of Measures to Facilitate the Flow of Sustainable FDI” in Axel Berger, Karl P. Sauvart (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers* (Geneva: International Trade Centre, 2022) 133.

¹⁰⁶ Myanmar IPA’s website: Form (16) for the investor to submit a complaint.

¹⁰⁷ Korean Office of the Foreign Investment Ombudsman.

¹⁰⁸ See the Korea Trade-Investment Promotion Agency (KOTRA) website. See also Younsik Kim, “The Impact of Investment Treaties on the Rule of Law in Korea” in N. Jansen Calamita and Ayelet Berman (eds), *Investment Treaties and the Rule of Law Promise: The Internalisation of International Commitments in Asia* (Cambridge University Press 2022).

BOX 7. Myanmar Investor Grievance Mechanism

Myanmar's Investment Law (2016) called for the Myanmar Investment Commission (MIC) to “establish and manage a grievance mechanism to resolve and prevent the occurrence of disputes and carry out the relevant inquiries for the investment issues before reaching the stage of legal dispute”. Under the accompanying Myanmar Investment Rules (2017), the MIC established an Investor Assistance Committee (IAC) to temporarily implement the mandate of the Investment Law until an investor grievance mechanism (IGM) with greater powers and a more formalised legal structure could be established.

In 2020 MIC issued Notification No. 9/2020 pursuant to which it announced it would be establishing a formal IGM. In light of political events in Myanmar, it remains unclear as to whether and when the IGM will be established.¹⁰⁹

BOX 8. Malaysia Investment Development Authority Post-Investment Division

The Malaysian Investment Development Authority's (MIDA) Post-Investment Division serves as a support mechanism for foreign investors in Malaysia. Among the services provided include:

- End-to-end facilitation including handholding services for all projects approved by the National Committee of Investment (NCI) through its Project Acceleration and Coordination Unit (PACU)
- The acceleration from approvals of through working closely with state agencies and utility & telecommunication providers
- The periodic review of issues and formulation of appropriate solutions for the smooth implementation and operation of projects.¹¹⁰

Aftercare Services comprise all potential services offered by IPAs to (a) facilitate the successful start-up and continuing development of a foreign affiliate and (b) ensure the sustainability of an investment.¹¹¹ As noted, in many countries, ombudspersons and focal points may perform such services. In the

Philippines, these services are provided by the BOI's “Strategic Aftercare Programme (SIAP)”.¹¹² The SIAP is a proactive programme that aims to create high quality, trust-based working relationships with important existing foreign investors.¹¹³

¹⁰⁹ See Jonathan Bonnitcha, “The Impact of Investment Treaties on the Rule of Law in Myanmar” in N. Jansen Calamita and Ayelet Berman (eds), *Investment Treaties and the Rule of Law Promise: The Internalisation of International Commitments in Asia* (Cambridge University Press 2022).

¹¹⁰ See the MIDA Post-Investment Division website.

¹¹¹ UNESCAP, *Handbook on Policies, Promotion, and the Facilitation of Foreign Direct Investment for Sustainable Development in Asia and the Pacific* (2022), 296.

¹¹² See the SIAP website.

¹¹³ UNESCAP, *Handbook on Policies, Promotion, and the Facilitation of Foreign Direct Investment for Sustainable Development in Asia and the Pacific* (2022) 298, Box 10.9.

2.4 Cross-border Cooperation and Capacity Building

Cross-border cooperation among investment agencies can help with peer-to-peer learning and can facilitate the creation of partnerships between investment authorities in different countries. To this end, a number of initiatives have been launched aimed at enhancing the cooperation for investment facilitation and

development between AMS, as well as between AMS and their RCEP partners. The Cambodia-Japan Cooperation Center (CJCC) is one example of a cooperation project between an ASEAN country and an RCEP partner.

BOX 9. Cambodia-Japan Cooperation Center

The “Cambodia-Japan Cooperation Center (CJCC)” was established in 2004 with the assistance and cooperation of the Japan International Cooperation Agency (JICA).¹¹⁴ Among a wide variety of programmes, the CJCC offers an “Accelerator Program” that is designed to grow “investment ready entrepreneurs” by providing business capacity development as well as creating business collaboration and fundraising opportunities with Cambodian and Japanese businesses. Further, the CJCC offers Japanese language courses for business as well as management-related courses to Cambodian citizens.

Other examples of cooperation between ASEAN and RCEP partners include the ASEAN-Republic of Korea Plan of Action (2021-2025),¹¹⁵ which is notable for its targeted concern for specific kinds of investors and investments, including, notably, investments in green technology.

Capacity building is another area covered by international cooperation collaboration in which donor countries help to build expertise in developing countries’ IPAs. While available information on such country-to-country

collaborations is limited,¹¹⁶ it is possible to identify a number of initiatives provided by international organisations.¹¹⁷ Moreover, as discussed further in Section 5, direct technical assistance and capacity-building is also provided by international organisations.¹¹⁸

In addition, a number of cooperation projects and platforms touch upon capacity building for investment facilitation, although sometimes without necessarily labelling it as such. Some of them have been in operation for many years, such as the World Association of

¹¹⁴ See the CJCC website.

¹¹⁵ See the ASEAN-Korea Cooperation Fund website.

¹¹⁶ As discussed below in Sections 4 and 5, one of the proposals in the WTO’s ongoing negotiations for a multilateral framework on investment facilitation would require governments to submit information to the WTO Committee on initiatives taken in support of capacity building. Such reporting would promote transparency with respect to bilateral programmes.

¹¹⁷ As discussed in detail in Section 5 below, policy initiatives on investment facilitation have been put forward by UNESCAP (2019), Asia Pacific Economic Cooperation (APEC) (2008), OECD (2015), the G20 (2016), the African Union (2016) and UNCTAD (2016).

¹¹⁸ For example, by UNESCAP, UNCTAD, OECD, the World Bank, and the Asian Development Bank.

BOX 10. ASEAN-Republic of Korea Joint Vision Statement for Peace, Prosperity and Partnership

In 2020, ASEAN and the Republic of Korea released a Plan of Action to Implement the Joint Vision Statement for Peace, Prosperity and Partnership (2021-2025). Some notable aspects of the Plan of Action are:

“2.1.4 Encourage ASEAN-Korea Centre (AKC) to facilitate and promote trade and investment opportunities such as green technology, and innovations of Fourth Industrial Revolution (4IR), as well as in manufacturing industries”.

“2.4.3 Promote the role of the ASEAN-ROK Business Council (AKBC) as a business-driven consultative body, and the ASEAN Coordinating Committee on Micro, Small and Medium Enterprises (ACCMSMEs) as a focal point in MSMEs, in order to assist ASEAN and the Republic of Korea MSMEs in entering each other’s markets and in promoting bilateral trade and investment”.

“2.10.1 Promote tourism between ASEAN and the Republic of Korea through joint programmes on marketing and promotions, travel and investment facilitation, improvement of the environment to receive tourists in local areas, sharing of best practices, exchange of information on tourism statistics and investment opportunity, capacity building and encourage training and advancement programs for tourism professionals, including MSMEs and other relevant sectors, so that they can benefit from the development in tourism industry.”

Investment Promotion Agencies (WAIPA), which was created in 1995.¹¹⁹ WAIPA is a non-governmental organization established under Swiss Law. Its members are IPAs or government bodies and it “functions as a platform for exchange of knowledge and experience and provides capacity building through advocacy for technical and financial assistance, with the aim of creating more empowered, efficient and successful IPAs”.¹²⁰ From 2020-2021, WAIPA undertook

a project called “Capacity Building for Least Developed Countries on Investment Promotion”.¹²¹ The project aims to improve coordination of IPAs in LDCs via regional and global networking coordination and advocacy. Cambodia, Myanmar and the Lao People’s Democratic Republic were among the participating countries. As part of its “FDI Excellence Series”, WAIPA also organized a training on investment attraction and facilitation in 2019.¹²²

¹¹⁹ See the WAIPA website: “About WAIPA”.

¹²⁰ See the WAIPA website: “Capacity Building for LDCs on Investment Promotion”.

¹²¹ See the WAIPA website: “Capacity Building for LDCs on Investment Promotion”.

¹²² See the WAIPA website: “FDI Excellence Series”.

2.5 Sustainable Development Specific Investment Facilitation Measures

The following subsections highlight some observed measures or initiatives taken by the AMS and their RCEP partners seeking to facilitate FDI for sustainable development.¹²³ Some of the initiatives are at this point policy statements and do not go beyond general statements with respect to the importance of promoting sustainable development through FDI.

Foreign Investment for Sustainable Development. A sustainable development dimension is increasingly incorporated into governments' policies and objectives for FDI, sometimes via a terminology that combines economic development with sustainability elements. In the Indonesian Law Concerning Investment (2007), for example, the objective of foreign investment is identified, among others, to include the improvement of "sustainable economic development".¹²⁴ The Philippine CREATE Law on the other hand provides for the creation of the Strategic Investment Priority Plan (SIPP) and requires that in order to be included in the SIPP, all sectors and industries must undergo an

evaluation process to assess the potential of the investment project to promote long-term growth and sustainable development, and the national interest.¹²⁵

The extent to which governments place emphasis on allowing entry or extending specific incentives to businesses that are sustainable is variable by nature. Some of governments focus on investment in a mix of targeted priority sectors or types of activities, not all of which may related to *sustainable* development. For example, priority areas for FDI are established under Cambodia's Investment Law: "new industries" (including natural resources processing); SMEs in all sectors (e.g., drugs and medical equipment, and construction materials); agro-industrial production; activities supporting regional production chains; and industries of future strategic importance (e.g., information and communications technology, energy, heavy industry, culture, green technology).¹²⁶ Similar variations may be found in the policy statements of other countries.

Box 11. Philippines Investment Law "Declaration of Policy"

Article 2 of the Philippines Investment Law contains the following statement of policy:

"Foreign investments shall be encouraged in enterprises that significantly expand livelihood and employment opportunities for Filipinos; enhance economic value of farm products; promote the welfare of Filipino consumers; expand the scope, quality and volume of exports and their access to foreign markets; and/or transfer relevant technologies in agriculture, industry and support services".

¹²³ For discussion of sustainable FDI, see Section 1.

¹²⁴ Law of the Republic of Indonesia Number: 25 of 2007 Concerning Investment, Article 3.1

¹²⁵ See, e.g., Philippines Fiscal Incentives Review Board website.

¹²⁶ Law on Investment of the Kingdom of Cambodia (2021), Art. 24. See also Cambodia IPA's website ("Priority sectors").

BOX 12. Myanmar Investment Promotion Plan

In Myanmar, one of the stated aims of the Investment Promotion Committee is to facilitate the implementation of the Myanmar Investment Promotion Plan, the vision of which is to create a “fair and prosperous society by promoting responsible and quality investment”.¹²⁷

New Zealand offers the most rigorous example of an FDI vision based on sustainable development, especially environmental protection, and natural resources preservation. Indeed, the role of New Zealand’s Overseas Investment Office is to “help realize the benefits of overseas investment, while protecting New Zealand’s sensitive land and assets”.¹²⁸ This vision is in line with New Zealand’s Investment Law, the purpose of which is to “acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and (b) imposing conditions on those overseas investments”.¹²⁹

Responsible Business Conduct. Investment laws or IPAs usually do not require that potential investors incorporate principles of responsible business conduct in their internal corporate policies. At the same time, it is not unusual for investment laws and/or agency websites to emphasise that investors must comply with local laws and avoid doing harm within the host country. For instance, among Myanmar’s stated objectives for FDI is to “welcome quality and compliance-based investment”¹³⁰ and to develop “businesses

which do not cause harm to the natural environment and the social environment”.¹³¹

On its website, Australia’s IPA reminds protentional investors generally of their obligation “to be mindful of Australia’s regulatory environment and abide by all relevant laws and requirements”.¹³² More direct statements with respect to responsible business conduct are included on the website of Cambodia’s IPA, where under “Laws and Regulations”, the relevant legal provisions for employment and the environment are stated highlighting that “[a]ll forms of discrimination against women shall be abolished” and “[t]he exploitation of women in employment shall be prohibited”.¹³³ Japan’s stance is similar. The government of Japan has a dedicated page on its website on diversity, headed by the following phrase: “Dynamic engagement of women, foreign national professionals and seniors makes a difference in achieving sustainable growth”.¹³⁴ In so doing, both Japan and Cambodia highlight a core pillar of sustainable FDI, which is to advance social development encompassing gender equality and increased female participation in the economy (see Sustainable Development Goal 5).

¹²⁷ Myanmar Investment Committee, Myanmar Investment Promotion Plan 2016/17-2035/36 (2018) 8.

¹²⁸ New Zealand government’s webpage on the Overseas Investment Office.

¹²⁹ New Zealand Overseas Investment Act (2005), Art. 3.

¹³⁰ Myanmar Investment Committee, Myanmar Investment Promotion Plan 2016/17-2035/36 (2018), Summary 3.

¹³¹ Myanmar Investment Law (2016), Art. 3.

¹³² See Austrade website: “Approval for foreign investment in Australia”.

¹³³ See Council for the Development of Cambodia website: “Employment and Labour”.

¹³⁴ See Government of Japan website: “Diversity and Inclusion”.

Investments that help achieve the SDGs.

Given the critical role that foreign investment is seen as playing in helping countries (especially developing and LDCs) to achieve the UN Sustainable Development Goals,¹³⁵ there has been an increase in measures by countries that seek to channel FDI into critical sectors for sustainable development. Thus, countries have increasingly adopting incentive programmes addressed to investments that are considered sustainable by nature or have the potential to contribute, more concretely, to the achievement of the SDGs. For example, incentives are available in the Lao People's Democratic Republic for investments the

following sectors and activities (among others): “innovative, environmental-friendly [technology] application”, “clean, toxic-free agriculture, planting seed production”, and “environmental-friendly agricultural processing industry”.¹³⁶ In other countries, initiatives target the development of domestic capacities that are seen as promoting sustainable development and meeting the needs of prospective investors. In this vein, InvestPenang (a Malay state IPA) provides local universities with information on the skills its graduates will need to be competitive among targeted potential investors.¹³⁷

BOX 13. R&D Centers in Shanghai, China

In 2020, the Shanghai Municipal Commission of Commerce adopted “Regulations on Encouraging the Establishment and Development of Foreign-funded Research and Development Centers”. The goal of these regulation is “further opening up Shanghai, enhancing Shanghai’s function of global resources allocation, strengthening its advantage as a scientific and technological innovation source, and encouraging foreign investors to set up research and development centers” in Shanghai.¹³⁸ In connection with the Regulations, the Shanghai government introduced support measures for foreign investors setting up R&D centers, including in conducting necessary environmental impact assessments and hazardous waste management (Art. XIII).

In addition to seeking to promote Australia as a destination for investment, Australia’s IPA emphasis their positive contributions of foreign investors in financing the SDGs by featuring “success stories”, such as the venture of a Korean investor that expanded its business into green hydrogen,¹³⁹ and through the issuance of awards for investors able to demonstrate “the ability to sustain...growth”

and to provide “evidence of sustainable competitive advantage”.¹⁴⁰

Similar contributions are also encouraged in Japan where the Japan SDG Awards were launched in 2017. With this initiative, foreign investors are, like national businesses, eligible for recognition for their efforts towards the SDGs.¹⁴¹

¹³⁵ UNCTAD, World Investment Report (2014), 140.

¹³⁶ The Lao People’s Democratic Republic, Law No. 14/NA on Investment Promotion, Art. 9.

¹³⁷ UNCTAD, IPA Observer No. 3 (2014), “Skills and foreign direct investment promotion: What Can an Investment Promotion Agency Do?”

¹³⁸ Shanghai “Regulations on Encouraging the Establishment and Development of Foreign-funded Research and Development Centers” (2020).

¹³⁹ Australia Trade and Investment Commission, “Sun Metals Corporation finds a sustainable future in Australia” (11 December 2020).

¹⁴⁰ Australia Trade and Investment Commission, Judging Criteria, 60th Australian Export Awards.

¹⁴¹ Ministry of Foreign Affairs of Japan, “Japan’s Efforts for Achieving the SDGs” (June 2020).

BOX 14. Japan Sustainable Development Awards

All companies and organizations based in Japan are eligible for the Award. The principal criterion is that the company or organization make “outstanding efforts, either domestically or internationally, to achieve the SDGs”.¹⁴² More specifically, winners are selected by the Japan’s SDGs Promotion Headquarters, led by the Prime Minister and other participating ministries, based on criteria which follow Japan’s Implementation Guidelines for the SDGs: universality, inclusiveness, participation, integration, and transparency and accountability.

¹⁴² Ibid., 6.

SECTION 3

**Stocktaking
Investment
Facilitation
Commitments
in ASEAN
Agreements**

SECTION 3

Stocktaking Investment Facilitation Commitments in ASEAN Agreements

This Section tracks the development of investment facilitation provisions in ASEAN's agreements. It provides a stocktaking of the key provisions addressing investment facilitation in (i) the 2009 ASEAN Comprehensive Investment Agreement (ACIA); (ii) ASEAN's free trade agreements with Australia, China, Hong Kong, China, India, Japan, Republic

of Korea, and New Zealand; (iii) the 2020 Regional Comprehensive Economic Partnership (RCEP); and (iv) the 2021 ASEAN Investment Facilitation Framework (AIFF). It further notes the degree to which ASEAN's agreements address (or not) the facilitation of investment for sustainable development.

3.1 The Development of Investment Facilitation Provisions in ASEAN Agreements

1. 1998 Framework Agreement on the ASEAN Investment Area

ASEAN's collective action on investment facilitation began with the 1998 Framework Agreement on the ASEAN Investment Area (AIA). In the AIA, AMS agreed, among other things, to pursue a range of investment facilitation measures in order 'to establish a competitive ASEAN Investment Area with a more liberal and transparent investment environment amongst Member States'.¹⁴³ To that end, the AIA included a commitment to develop and implement a cooperation and facilitation programme under which individual

AMS would (i) increase the transparency of the Member State's investment rules, regulations, policies and procedures through the publication and dissemination of such information on a wide and regular basis; (ii) simplify and expedite procedures for applications and approvals of investment projects at all levels; and (iii) expand the number of bilateral Double Taxation Avoidance Agreements among AMS.¹⁴⁴ The AIA also included a commitment among AMS for collective action designed to facilitate investment, such as the establishment of an ASEAN database for ASEAN Supporting Industries and ASEAN Technology Suppliers,

¹⁴³ AIA, Art. 3(a).

¹⁴⁴ AIA, Sch. I.

as well as a database to enhance the flow of ASEAN investment data and information on investment opportunities in ASEAN.¹⁴⁵ The facilitation of investment for sustainable development was not addressed.

2. 2009 ASEAN Comprehensive Investment Agreement

Investment facilitation was included in the subsequent ASEAN Comprehensive Investment Agreement (ACIA), which replaced the AIA. The ACIA addresses investment facilitation in two ways. First, it contains a number of articles under which the AMS make “qualified” commitments, whereby they “endeavour” to cooperate with respect to aspects of investment facilitation and/or take specific investment facilitation measures subject to their laws and regulations. Second, the ACIA contains one “hard” commitment whereby AMS agree to enact specific measures related to investment facilitation. Notably, like its predecessor, the ACIA contains no language whereby investment facilitation is linked to the goal of sustainable development, nor any provisions by which investment for sustainable development is especially facilitated and/or promoted as a priority.

Qualified Commitments

Dedicated Article on Investment Facilitation & the Improvement of Administrative Processes. Investment facilitation obligations of “endeavour” are contained in ACIA, Article 25, entitled “Investment Facilitation”. The provisions of Article 25 generally address the intention of AMS to cooperate with respect to investment facilitation measures designed to improve administrative efficiency. Specifically, under Article 25 AMS agree to

“...endeavour to cooperate in the facilitation of investments into and within ASEAN through, among other things:

- a) creating the necessary environment for all forms of investments;
- b) streamlining and simplifying procedures for investment applications and approvals;
- c) promoting dissemination of investment information, including investment rules, regulations, policies and procedures;
- d) establishing one-stop investment centres;
- e) strengthening databases on all forms of investments for policy formulation to improve ASEAN’s investment environment;
- f) undertaking consultation with the business community on investment matters; and
- g) providing advisory services to the business community of the other Member States.”¹⁴⁶

Entry and Temporary Stay. A second qualified investment facilitation commitment is with respect to the entry and temporary stay of investors and key personnel in connection with an investment. Under Article 22, AMS “shall grant entry, temporary stay and authorisation to work” to investors and key personnel for the purpose of establishing, developing, administering, or advising on the operation of an investment to which they “have committed or are in the process of committing a substantial amount of capital or other resources”. Although the commitment in Article 22 is phrased in the mandatory “shall”, the obligation is softened considerably by the proviso that the commitment is “[s]ubject to [the state’s] immigration and labour laws,

¹⁴⁵ Ibid.

¹⁴⁶ ACIA, Art. 25 (emphasis added). It is notable that Article 25 not only does not address or target *sustainable* investment or investment for *sustainable development*, but rather expresses the view that investment facilitation measures should be directed toward “all forms of investments”.

regulations and national policies relating to the entry, temporary stay and authorisation to work, and consistent with its commitments under AFAS”.¹⁴⁷

Hard Commitments

Transparency of the Legal Environment. There is only one “hard” commitment on investment facilitation in the ACIA. Under Article 21, AMS commit to take specific measures in order to ensure a transparent legal environment for investment. Specifically, “each Member State shall... make publicly available, all relevant laws, regulations and administrative guidelines of general application that pertain to, or affect investments in the territory of the Member State”.¹⁴⁸ Furthermore, in order to operationalise this commitment, Article 21 requires each AMS to establish or designate an enquiry point “where, upon request of any natural person, juridical person or any other Member State, all information relating to the measures required to be published or made available... may be promptly obtained.”

Cross-Cutting Provisions

In addition to the investment facilitation commitments in the ACIA noted above, several cross-cutting provisions relevant to investment facilitation should be noted.

Special and Differential Treatment & Technical Assistance. The ACIA’s articles on investment facilitation are subject to the ACIA’s general provision on “Special and Differential

Treatment for the Newer ASEAN Member States”, which applies to the ACIA in its entirety. The special and differential treatment (“SDT”) provision provides that the AMS “recognise the importance of according special and differential treatment to the newer ASEAN Member States, though, among other things, the provision of “technical assistance to strengthen their capacity in relation to investment policies and promotion, including in areas such as human resource development...”¹⁴⁹ Thus, although the SDT provision does not address investment facilitation specifically, it does contain a general recognition that capacity development is an important aspect of ensuring that the newer, developing members of ASEAN are able to enjoy the benefits of the ACIA.

Dispute Settlement. Notably, none of the investment facilitation provisions in the ACIA – even the hard commitments on transparency – may serve as the basis for an investor claim pursuant to the ACIA’s ISDS mechanism,¹⁵⁰ although in principle disputes regarding these provisions would fall within the ACIA’s state-to-state dispute procedures.¹⁵¹

3. ASEAN-Plus Investment Agreements

Since 2008, ASEAN as a community has signed six plurilateral investment agreements with its “ASEAN-Plus” partners: Australia and New Zealand;¹⁵² China;¹⁵³ Hong Kong, China;¹⁵⁴ India;¹⁵⁵ Japan;¹⁵⁶ and the Republic

¹⁴⁷ AFAS is the “ASEAN Framework Agreement on Services”, signed in Bangkok, Thailand on 15 December 1995.

¹⁴⁸ Emphasis added.

¹⁴⁹ ACIA, Art. 23.

¹⁵⁰ ACIA, Art. 32 (limiting potential investor claims to obligations under certain articles).

¹⁵¹ ACIA, Art. 27 (disputes between AMS).

¹⁵² ASEAN – Australia-New Zealand Free Trade Agreement (AANZFTA).

¹⁵³ ASEAN – China Investment Agreement.

¹⁵⁴ ASEAN – Hong Kong, China SAR Investment Agreement.

¹⁵⁵ ASEAN – India Investment Agreement.

¹⁵⁶ ASEAN – Japan Comprehensive Economic Partnership Agreement (CEPA).

of Korea¹⁵⁷ (“ASEAN-Plus agreements”).¹⁵⁸ Investment facilitation has been addressed in all of the ASEAN-Plus agreements to varying degrees. In some of these treaties the way in which investment facilitation has been addressed is similar to the ACIA; in others, the approach is quite different.¹⁵⁹ Highlights of key similarities and differences among the ASEAN-Plus agreements and in relation to the ACIA may be noted here:

Dedicated Article on Investment Facilitation.

Only four of the six ASEAN-Plus agreements include a dedicated article on investment facilitation. In those ASEAN-Plus agreements which do include a dedicated article on investment facilitation, the content closely mirrors the ACIA’s approach whereby the parties broadly commit to “cooperate to facilitate investments”, subject to their laws and regulations, by “(a) creating the necessary environment for all forms of investment; (b) simplifying procedures for investment applications and approvals; (c) promoting dissemination of investment information, including investment rules, regulations, policies and procedures; and (d) establishing one-stop investment centres in the respective host Parties to provide assistance and advisory services to the business sectors

including facilitation of operating licences and permits.”¹⁶⁰

Entry and Temporary Stay. Unlike the ACIA, the ASEAN-Plus agreements do not address the entry and temporary stay of investors and key personnel. Instead, the entry and temporary stay of investors and key personnel is addressed either in a separate agreement on services,¹⁶¹ or in a separate FTA chapter on the “Movement of Natural Persons”.¹⁶² In the main, these provisions are more detailed than those in the ACIA, providing for greater specificity with respect to the states’ commitments and placing limitations on the states’ ability to rely on their national laws to limit entry and temporary stay.¹⁶³

Transparency of the Legal Environment. Like the ACIA, all the ASEAN-Plus agreements include “hard” commitments to ensure a transparent legal environment for investment through the publication of laws and regulations and through the designation of a point of contact for investor enquires.

Special and Differential Treatment. Five of the six ASEAN-Plus agreements contain a specific article providing for special and differential treatment for newer AMS, which applies not

¹⁵⁷ ASEAN – Korea Investment Agreement.

¹⁵⁸ RCEP, which brings together under a common legal framework ASEAN and five of its partners (Australia, China, Japan, the Republic of Korea, and New Zealand), is discussed separately below.

¹⁵⁹ All of ASEAN’s FTAs were signed after the conclusion of the ACIA on 26 February 2009, except for the ASEAN-Japan Economic Partnership Agreement, which was signed in 2008.

¹⁶⁰ ASEAN – China Investment Agreement, Art. 21. Accord ASEAN-Hong Kong SAR Investment Agreement, Art. 16; ASEAN – India Investment Agreement, Art. 18; ASEAN-Japan CEPA (as amended), Art. 51.18.

¹⁶¹ ASEAN – China Agreement on Trade in Services, Art. 1-2 (referencing trade in services through the presence of natural persons (WTO Mode 4)); ASEAN – Republic of Korea Agreement on Trade in Services (signed 21 November 2007), Art. 1-2, referencing trade in services through the presence of natural persons (WTO Mode 4); ASEAN – India Agreement on Trade in Services (signed 13 November 2014), Annex on Movement of Natural Persons; ASEAN – Hong Kong, China FTA (entered into force, 12 February 2021), Art. 8(1)-(2), referencing trade in services through the presence of natural persons (WTO Mode 4).

¹⁶² ASEAN – Australia-New Zealand Free Trade Agreement, Ch. 9 & Annex 4; ASEAN-Japan CEPA (as amended), Ch. 6 *bis* (“Movement of Natural Persons”).

¹⁶³ See e.g. ASEAN-Australia-New Zealand Free Trade Agreement, Ch. 9, Art. 7 (limiting the state’s right to apply its national immigration laws where those measures are “applied in such a manner as to nullify or impair the benefits accruing to another Party under this Chapter” or “unduly impair or delay trade in goods or services or the conduct of investment activities under this Agreement”).

only to investment facilitation commitments but to the agreement as a whole.¹⁶⁴ As in the ACIA, the SDT provisions take note of the importance of providing technical assistance, although they lack specificity with respect to the actual delivery of such technical assistance and the commitment of resources from the developed parties to the agreement.

Dispute Settlement. Like the ACIA, none of the ASEAN-Plus agreements allow for the use of

ISDS with respect to investment facilitation commitments, although some of the ASEAN-Plus agreements allow for the use of state-state dispute settlement procedures with respect to certain commitments, especially entry and temporary stay.

Table 5 provides a tabular overview of the coverage of investment facilitation issues in the ASEAN-Plus agreements with the ACIA included as a reference point for comparison.

¹⁶⁴ The ASEAN – China Investment Agreement does not contain an SDT article, although reference to the different levels of development among AMS is noted in the Preamble.

TABLE 5
Investment Facilitation Provisions in ASEAN-Plus Investment Agreements in Force

Agreement	Signed (S) – Entered into force (EIF)	Specific article on “Investment Facilitation”?	Express linkage between IF & sustainable development?	Obligation to ensure regulatory transparency?	Designated contact point for transparency inquiries?	Commitment to endeavour to improve administrative processes?	Provisions on entry and temporary stay for investors and key personnel?	Special and differential treatment?	Technical assistance?	IF provisions subject to ISDS?
ASEAN – Japan Comprehensive Economic Partnership Agreement (CEPA)	S: 28/03/2008 – EIF: 01/12/2008 1 st Protocol S: 27/02/2019 – EIF: 01/08/2020	Yes. (Art. 51.18)	No.	Yes. (Art. 4) ¹⁶⁵	Yes. (Art. 4(2))	Yes. (Art. 51.8 & Art. 51.18)	Yes. (Ch. 6 <i>bis</i> : ‘Movement of Natural Persons’)	Yes. (Art. 51.16)	Yes. (Art. 51.16)	No. (Art. 51.13(6)) ¹⁶⁶
ASEAN Comprehensive Investment Agreement (ACIA)	S: 26/02/2009 – EIF: 24/02/2012	Yes. (Art. 25)	No.	Yes. (Art. 21)	Yes. (Art. 21(d))	Yes. (Art. 25)	Yes. (Art. 22)	Yes. (Art. 23)	Yes. (Art. 23)	No. (Art. 32)
ASEAN – Australia-New Zealand Free Trade Agreement (AANZFTA)	S: 27/02/2009 – EIF: 10/01/2010	No.	No.	Yes. (Ch. 11, Art. 13)	Yes. (Ch. 11, Art. 13(5))	Yes. (Ch. 11, Art. 13(9)-(11))	Yes. (Ch. 9 & Annex 4: ‘Movement of Natural Persons’)	Yes. (Ch. 11, Art. 15)	Yes. (Ch. 11, Art. 15)	No. (Ch. 11, Art. 20) ¹⁶⁷
ASEAN – Korea Investment Agreement	S: 02/06/2009 – EIF: 01/09/2009	No.	No.	Yes. (Art. 8)	Yes. (Art. 8(4))	No.	No. Limited guarantee contained in separate agreement on trade in services. ¹⁶⁸	Yes. (Art. 16)	Yes. (Art. 16)	No. (Art. 18)

¹⁶⁵ General provision on regulatory transparency; not investment specific.

¹⁶⁶ State-state dispute settlement is provided for certain entry and sojourn claims (Art. 50 *bis*. 8).

¹⁶⁷ State-state dispute settlement is provided for certain for entry and sojourn claims (Ch. 9, Art. 9).

¹⁶⁸ ASEAN – Republic of Korea Agreement on Trade in Services (signed 21 November 2007), Art. 1-2, referencing trade in services through the presence of natural persons (WTO Mode 4).

TABLE 5 (continued)

Agreement	Signed (S) – Entered into force (EIF)	Specific article on “Investment Facilitation”?	Express linkage between IF & sustainable development?	Obligation to ensure regulatory transparency?	Designated contact point for transparency inquiries?	Commitment to endeavour to improve administrative processes?	Provisions on entry and temporary stay for investors and key personnel?	Special and differential treatment?	Technical assistance?	IF provisions subject to ISDS?
ASEAN – China Investment Agreement	S: 15/08/2009 – EIF: 01/01/2010	Yes. (Art. 21)	No.	Yes. (Art. 19)	Yes. (Art. 19(c)) ¹⁶⁹	Yes. (Art. 21)	No. Limited guarantee contained in separate agreement on trade in services. ¹⁷⁰	Preambular reference only	No.	No. (Art. 14)
ASEAN – India Investment Agreement	S: 12/11/2014 –	Yes. (Art. 18)	No.	Yes. (Art. 14)	Yes. (Art. 14(a)) ¹⁷¹	Yes. (Art. 18)	No. Limited guarantee contained in separate agreement on trade in services. ¹⁷²	Yes. (Art. 16)	Yes. (Art. 16)	No. (Art. 20)
ASEAN – Hong Kong, China Investment Agreement	S: 12/11/2017 – EIF: 17/06/2019	Yes. (Art. 16)	No.	Yes. (Art. 7)	No.	Yes. (Art. 16)	No. Limited guarantee contained in separate agreement on trade in services. ¹⁷³	Yes. (Art. 18)	Yes. (Art. 18)	No. ¹⁷⁴

¹⁶⁹ The ASEAN – China Investment Agreement additionally provides that each party “shall endeavour” to establish a one-stop POC for general IF inquiries (Art. 21(d)).

¹⁷⁰ ASEAN – China Agreement on Trade in Services (signed 14 January 2007), Art. 1-2, referencing trade in services through the presence of natural persons (WTO Mode 4).

¹⁷¹ The ASEAN – India Investment Agreement additionally provides that each party “shall endeavour” to establish a one-stop POC for general IF inquiries (Art. 18(d)).

¹⁷² ASEAN – India Agreement on Trade in Services (signed 13 November 2014), Annex on Movement of Natural Persons.

¹⁷³ ASEAN – Hong Kong, China FTA (entered into force, 12 February 2021), Art. 8(1)-(2), referencing trade in services through the presence of natural persons (WTO Mode 4).

¹⁷⁴ The ASEAN – Hong Kong, China Investment Agreement does not provide for any ISDS.

4. Investment Facilitation in the Regional Comprehensive Economic Partnership (RCEP)

The most recent ASEAN-Plus agreement is the Regional Comprehensive Economic Partnership (RCEP). RCEP is one of the world's largest trade and investment agreements, covering almost 30% of global GDP and one-third of the world's population. There are fifteen parties to RCEP: the AMS (Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam) and five of the ASEAN-Plus partners (Australia, China, Japan, New Zealand, the Republic of Korea).¹⁷⁵ RCEP was signed in November 2020 and came into force agreement on 1 January 2022.

In general, the investment treaty commitments contained in RCEP follow closely the models established in the ACIA, although in some cases the provisions in RCEP provide greater detail as compared to ASEAN's prior treaties. The following paragraphs highlight some of the key similarities and difference between RCEP and the ASEAN-Plus agreements.

Dedicated Article on Investment Facilitation. Like most of the ASEAN-Plus agreements, RCEP includes a dedicated article on investment facilitation. Like those agreements as well, the commitments contained in the RCEP investment facilitation article (Art. 10.17) are qualified obligations of endeavour, requiring that “[s]ubject to its laws and regulations, each Party shall endeavour to facilitate investments among the Parties...” through, non-exclusively, “(a) creating the

necessary environment for all forms of investment; (b) simplifying its procedures for investment applications and approvals; (c) promoting the dissemination of investment information, including investment rules, laws, regulations, policies, and procedures; and (d) establishing or maintaining contact points, one-stop investment centres, focal points, or other entities in the respective Party to provide assistance and advisory services to investors, including the facilitation of operating licenses and permits.”¹⁷⁶

While the RCEP investment facilitation article is similar to the investment facilitation articles in prior ASEAN agreements, it also goes further in some respects by expanding on the potential role that contact points, one-stop investment centres, focal points, etc., might play, noting that these institutions may also undertake activities often associated with ombudspersons, such as:

- Receiving and, where appropriate, considering referring or giving due consideration to complaints raised by investors relating to government activities impacting their covered investment;¹⁷⁷ and
- Providing assistance in resolving difficulties experienced by the investors in relation to their covered investments.¹⁷⁸

The RCEP investment facilitation article further suggests two additional measures that RCEP countries may take in order to facilitate investment, which address both the exchange of information within the government of individual RCEP states and among the RCEP parties as a whole. Specifically,

¹⁷⁵ India stepped out of the negotiations in November 2019.

¹⁷⁶ RCEP, Article 10.17.1. This language is identical to the language contained in Art. 21 of the ASEAN – China Investment Agreement and Art. 25 of the ACIA.

¹⁷⁷ RCEP, Article 10.17.2(a).

¹⁷⁸ RCEP, Article 10.17.2(b).

- Establishing a mechanism within each government, subject to the state's laws and regulations, with the competence to make recommendations to relevant government bodies addressing recurrent issues affecting investors of another RCEP party.¹⁷⁹
- Facilitating meetings among the competent authorities of the RCEP parties with the aim to exchange knowledge and approaches to better facilitate investment.¹⁸⁰

Entry and Temporary Stay. Like the ASEAN-Plus agreements, RCEP does not address the entry and temporary stay of investors and key personnel as part of the provisions contained in its investment chapter. Instead, the entry and temporary stay of investors and key personnel is addressed in a separate chapter addressing the “Temporary Movement of Natural Persons”.¹⁸¹ That said, the RCEP provisions with regard to the entry and temporary stay of investors and key personnel are similar to those contained in the ASEAN's earlier agreements. As in those agreements, RCEP contains a general commitment by each party to “grant temporary entry or extension of temporary stay”¹⁸² to “persons are engaged in trade in goods, the supply of services, or the conduct of investment”,¹⁸³ subject to the Schedule of Specific Commitments on Temporary Movement of Natural Persons provided by each party to RCEP. It is these Schedules which specify the conditions and limitations governing each party's commitments, including the length of stay, for each category of natural person covered by the chapter.¹⁸⁴

Transparency of the Legal Environment. Like the ACIA and all the ASEAN-Plus agreements, RCEP includes a “hard” commitment to ensure a transparent legal environment for investment through the publication of laws and regulations and through the designation of a point of contact for investor enquires. In RCEP, this obligation is contained in Chapter 17 pertaining to General Provisions and Exceptions. For example, Article 17.3 requires contracting parties to ensure that their laws, regulations, procedures, and administrative rulings with respect to matters covered under the RCEP (including investment) are promptly published or otherwise made available. Moreover, upon the request of a contracting party, any other contracting party “shall promptly provide information and respond to questions pertaining to any actual or proposed laws, regulations, procedures, and administrative rulings” concerning matters covered by the RCEP.¹⁸⁵

Special and Differential Treatment & Technical Assistance. Unlike the majority of the ASEAN-Plus agreements, RCEP contains no specific article providing for special and differential treatment for newer AMS.¹⁸⁶ That said, RCEP does contain provisions recognising the link between investment facilitation and development cooperation. RCEP chapter 15 is dedicated to ‘Economic and Technical Cooperation’ and sets out a work programme on potential future economic and technical cooperation activities. The scope of those activities is described broadly as involving support for “the inclusive, effective and

¹⁷⁹ RCEP, Article 10.17.3.

¹⁸⁰ RCEP, Article 10.17.4.

¹⁸¹ RCEP, Chapter 9.

¹⁸² RCEP, Article 9.4.

¹⁸³ RCEP, Article 9.2.

¹⁸⁴ E.g., business visitors; intra-corporate transferees; spouses and dependants; etc. See RCEP, Article 9.2-9.3.

¹⁸⁵ RCEP, Article 17.4.

¹⁸⁶ The ASEAN – China Investment Agreement does not contain an SDT article, although reference to the different levels of development among AMS is noted in the Preamble.

efficient implementation and utilisation of this Agreement through economic and technical cooperation activities which are trade or investment related”.¹⁸⁷ Investment facilitation related measures thus would appear to fall within the scope of assistance activities to be included in the RCEP work programme.

The RCEP chapter on Economic and Technical Cooperation further identifies specific priorities for the types of economic and technical cooperation activities that will be supported under the work programme, in particular activities which “(a) provide capacity building and technical assistance to developing country Parties and Least Developed Country Parties; (b) increase public awareness; (c) enhance access to information for businesses; and (d) other activities as may be agreed upon among the Parties”.¹⁸⁸ Moreover, the Economic and Technical Cooperation chapter notes with respect to LDCs that they shall receive special attention under the work programme “to help these Parties implement their obligations and take advantage of the benefits of this Agreement”.¹⁸⁹ This specific concern for the needs of LDCs is further echoed in the preamble to RCEP.¹⁹⁰

Lastly, with respect to RCEP’s work programme on technical assistance and capacity building, it is worth noting that unlike the ASEAN-Plus agreements, RCEP contains provisions addressing the funding for such support. Although the contribution of resources by individual RCEP parties is voluntary, RCEP Article 15.4 establishes the capacity of contributing parties to develop assistance programmes (in line with the objectives stated in Article 15.2) and to do so in cooperation and with contribution from non-parties, and sub-regional, regional or international organizations.¹⁹¹

Dispute Settlement. The provisions on investment facilitation are not subject to any dispute resolution proceedings under the RCEP. With respect to possible investor claims, RCEP does not currently provide for any kind of ISDS.¹⁹² With respect to possible state-to-state claims, the RCEP commitments related to investment facilitation discussed above are not subject to the mechanism for state-to-state dispute resolution contained in Chapter 19.¹⁹³

Table 6 provides a tabular overview of the coverage of investment facilitation issues in RCEP as compared to the ACIA.

¹⁸⁷ RCEP, Article 15.3(1). RCEP, Article 15.3(2) provides a more detailed list of areas in which capacity building and technical assistance will be focused, namely, trade in goods; trade in services; investment; intellectual property; electronic commerce; competition; small and medium enterprises; and “other matters, as agreed upon among the Parties”.

¹⁸⁸ RCEP, Article 15.5(2).

¹⁸⁹ RCEP, Article 15.6.

¹⁹⁰ Among other things, RCEP’s preamble emphasises “the need to facilitate the increasing participation of Least Developed Country Parties in this Agreement so that they can more effectively implement their obligations under this Agreement and take advantage of the benefits from this Agreement, including expansion of their trade and investment opportunities and participation in regional and global supply chains.” Preamble, recital 7. See also RCEP, Article 1.3(a): “taking into account the stage of development and economic needs of the Parties especially of Least Developed Country Parties”.

¹⁹¹ RCEP, Article 15.4.

¹⁹² The possibility of including an investor-state dispute settlement mechanism under RCEP is subject to an ongoing work programme. See RCEP, Article 10.18(b).

¹⁹³ See e.g. RCEP, Article 10.17(5) (noting that nothing in the article on Facilitation of Investment “shall be subject to, or otherwise affect, any dispute resolution proceedings under this Agreement”); Article 15.7 (excluding matters in the chapter of Economic and Technical Cooperation from dispute settlement mechanisms).

TABLE 6

Investment Facilitation Provisions in RCEP Agreement as Compared to the ACIA

Agreement	Signed (S) – Entered into force (EIF)	Specific article on “Investment Facilitation”?	Express linkage between IF & sustainable development?	Obligation to ensure regulatory transparency?	Requirement to designate a contact point for transparency inquiries?	Commitment to endeavour to improve administrative processes?	Provisions on entry and temporary stay for investors and key personnel?	Provision on Special and differential treatment?	Provision on technical assistance?	Are IF provisions subject to ISDS?
RCEP	S: 15/11/2020 – EIF: 01/01/2022 ¹⁹⁴ EIF: 01/02/2022 ¹⁹⁵	Yes. (Art. 10.17)	No. Preamble contains general reference to sustainable development	Yes. (Art. 17.3-17.4) ¹⁹⁶	No. ¹⁹⁷	Yes. (Art. 10.17; Art. 17.5) ¹⁹⁸	Chapter 9 on Temporary Movement of Natural Persons	Yes. (Art. 15.2.3; ¹⁹⁹ Preamble; and Art. 1.3(a)).	Yes. (Art. 15.3-6) ²⁰⁰	Investment facilitation (Art. 10.17) is expressly excluded from any DS mechanism under RCEP. ²⁰¹
ASEAN Comprehensive Investment Agreement (ACIA)	S: 26/02/2009 – EIF: 24/02/2012	Yes. (Art. 25)	No.	Yes. (Art. 21)	Yes. (Art. 21(d))	Yes. (Art. 25)	Yes. (Art. 22)	Yes. (Art. 23)	Yes. (Art. 23)	No. (Art. 32)

¹⁹⁴ For Australia, Brunei Darussalam, Cambodia, China, Japan, the Lao People’s Democratic Republic, New Zealand, Singapore, Thailand, and Viet Nam.

¹⁹⁵ For the Republic of Korea. As for the remaining signatory States, the RCEP Agreement will enter into force 60 days after the deposit of their respective instrument of ratification, acceptance, or approval to the Secretary-General of ASEAN as the Depository of the RCEP Agreement.

¹⁹⁶ Chapter 17, “General Provisions and Exceptions”.

¹⁹⁷ RCEP provides that each party “shall endeavour” to establish a one-stop POC for general IF inquiries (Art. 10.17(d)).

¹⁹⁸ Chapter 17, “General Provisions and Exceptions”.

¹⁹⁹ Chapter 15, “Development Cooperation”.

²⁰⁰ Chapter 15, “Development Cooperation”.

²⁰¹ No ISDS in the investment chapter (subject to work programme 10.18). No state-to-state dispute settlement on investment facilitation related matters.

5. The ASEAN Investment Facilitation Framework

On 8 September 2021, ASEAN Economic Ministers agreed in principle on the text of the ASEAN Investment Facilitation Framework (AIFF). It is the most recent ASEAN instrument addressing investment facilitation.

Like the ACIA, ASEAN-Plus agreements and RCEP, the AIFF makes no specific linkage between investment facilitation and sustainable investment or sustainable development.²⁰² Rather, the stated purpose of the AIFF is to

- (i) improve accessibility and transparency of measures of general application and information related to investment conducive to increased investment;
- (ii) streamline and expedite administrative procedures and requirements for the entry, retention and expansion of investment; and (iii) create favourable conditions for investment and doing business.²⁰³

Although the AIFF refers to “investment” facilitation, it is noteworthy that the term “investment” is not defined in the Framework. Thus, the full scope of the agreement’s application remains unclear. That said, the AIFF states expressly that it is “non-legally binding”.²⁰⁴ Thus the lack of a definition of “investment” is likely to be of minimal practical significance.

The text of the AIFF identifies principles and actions regarding investment facilitation in

ASEAN, “which each Member State will endeavour to uphold and implement to the extent practicable and in accordance with its respective domestic laws and regulations, as well as its respective international obligations”.²⁰⁵ In reading this provision, it is important to recall that the AIFF is not legally binding, and thus the possibility of any conflict arising between the AIFF and another international agreement to which the AMS may be or become parties is non-existent. The commitments under the AIFF are simply political commitments²⁰⁶ and thus cannot raise a legal conflict of norms.

The substance of the AIFF is laid out across eleven articles which set forth principles and actions regarding investment facilitation that the AMS endeavour “to uphold and implement” as stated above. The principles and actions are presented under the following headings.

1. **“Transparency of Measures and Information”**.²⁰⁷ This article contains provisions whereby AMS endeavour to ensure the transparency of and make publicly available measures of general application and information related to investments. Moreover, it contains a commitment for AMS to maintain an appropriate mechanism to answer reasonable about such matters from governments, investors and other interested parties.
2. **“Streamlining and Speeding Up Administrative Procedures and Requirement”**.²⁰⁸ This article contains

²⁰² Recall that RCEP refers to sustainable development in its preamble but does not indicate an express linkage between investment facilitation and sustainable development.

²⁰³ AIFF, Preamble.

²⁰⁴ AIFF, Preamble. Accordingly, the AIFF contains no provisions for dispute settlement.

²⁰⁵ AIFF, Preamble.

²⁰⁶ This contrasts with the obligations of “endeavour” found in the ACIA, ASEAN-Plus agreements, and RCEP. In those agreements, although the obligation of “endeavour” is significantly limited by various provisions, the commitment is nevertheless a legally binding one.

²⁰⁷ AIFF, Article 1.

²⁰⁸ AIFF, Article 2.

provisions whereby AMS endeavour to ensure that all measures of general application related to investment are administered in a reasonable, objective and impartial manner; investment procedures do not act as barriers to the ability of investors to invest; investment procedures and documentation requirements are applied in a manner that does not incur more time and cost than necessary; investment applications are treated in a reasonably timely and transparent manner; investors are given the opportunity to address incomplete applications; and administration fees are reasonable, transparent and do not in themselves restrict investment.

3. ***“Use of Digital and Internet Technologies”***.²⁰⁹ This article contains provisions whereby AMS endeavour to promote the adoption of digital technologies to improve investment application, approval, renewal and aftercare processes; maintain online platforms for the administration of investment applications, renewals and aftercare needs; and promote the option of using electronic documents instead of physical documents and of using electronic payment for fees and charges.
4. ***“Single Digital Platform”***.²¹⁰ This article contains provisions whereby AMS endeavour to encourage the maintenance of a single digital platform for the submission of all documents required by the regulatory bodies involved in the admission, establishment, acquisition and expansion of investments; the publication of measures related to investments through a single digital platform; the provision of information on

the single digital platform that is sufficiently clear, precise and up-to-date so as to be useful for investors; and the provision of a single digital platform for investors to pay all fees and taxes associated with the admission, establishment, acquisition and expansion of investments.

5. ***“Assistance and Advisory Services to Investors”***.²¹¹ This article contains commitments by AMS to endeavour to assist investors in amicably resolving complaints or grievances with government bodies that have arisen during their investment activities, specifically by receiving complaints raised by investors and, where appropriate, considering referring such complaints to the competent authorities, or giving due consideration to such complaints. Further, this article encourages AMS to consider establishing mechanisms to make recommendations addressing recurrent issues affecting investors to each Member State’s competent authorities.
6. ***“Independence of Competent Authorities”***.²¹² This article contains a commitment to ensure that when authorisation for an investment is required, the competent authority will make its decision in a manner independent from any enterprise carrying out the economic activity for which authorisation is required.
7. ***“Temporary Entry and Stay of Business Persons for Investment Purposes”***.²¹³ This article encourages AMS to facilitate the temporary entry and stay of business persons for investment purposes by publishing (preferably online) the current

²⁰⁹ AIF, Article 3.

²¹⁰ AIF, Article 4.

²¹¹ AIF, Article 5.

²¹² AIF, Article 6.

²¹³ AIF, Article 7.

- requirements for temporary entry and stay; maintaining contact points to respond to enquiries; and expeditiously processing applications
8. **“Facilitation of Investment Supporting Factors”**.²¹⁴ This article contains provisions whereby AMS endeavour to assist investors in identifying investment supporting factors such as labour force, funding sources, domestic suppliers and business matchmaking opportunities in the host state.
 9. **“Consultative Mechanism for Investment Policies”**.²¹⁵ This article contains commitments by AMS to endeavour to encourage the maintenance of mechanisms for regular consultation with interested stakeholders, including investors and private sector bodies, and to encourage the regular evaluation of investment measures to ensure that the investment environment remains conducive and responsive to evolving business practices and needs.
 10. **“Cooperation”**.²¹⁶ This article contains commitments by AMS to endeavour to facilitate communication and cooperation with other AMS on matters relating to investment facilitation, including through the exchange of information on procedural requirements, best practices, technical assistance and capacity building.
 11. **“Implementation”**.²¹⁷ This article commits the AMS to work toward implementation of the AIFF by regularly updating the ASEAN Coordinating Committee on Investment.

3.2 Comparing RCEP and the AIFF

The investment facilitation issues covered in RCEP and in the AIFF are largely similar, although several key differences can be observed.

First, it bears repeating that the AIFF, unlike RCEP, does not create legally binding obligations on the AMS. Rather, the AIFF is essentially a political statement of principles and actions regarding investment facilitation that the AMS agree to endeavour to uphold and implement. That said, even though RCEP creates legally binding commitments, there is presently no dispute settlement procedure in RCEP available to enforce these commitments.

Second, RCEP addresses the need to allow for SDT for the newer AMS and includes commitments with respect to the provision of

technical assistance and capacity building on matters including investment facilitation. The AIFF does not address either of these issues.

Third, neither RCEP nor the AIFF note any connection between investment facilitation and sustainable development or sustainable investment. Both appear to proceed from the assumption that the facilitation of investment is an end in itself.

Fourth, RCEP and the AIFF address similar principles and actions that countries should endeavour to take to facilitate investment. Specifically, both agreements refer to:

- i. simplifying procedures for investment applications and approvals;²¹⁸

²¹⁴ AIFF, Article 8.

²¹⁵ AIFF, Article 9.

²¹⁶ AIFF, Article 10.

²¹⁷ AIFF, Article 11.

²¹⁸ RCEP, Article 10.17.1; AIFF, Article 2.

- ii. promoting the dissemination of investment information, including investment rules, laws, regulations, policies, and procedures;²¹⁹
- iii. establishing or maintaining contact points, one-stop investment centres;²²⁰
- iv. establishing or maintaining focal points or other entities to provide assistance and advisory services to investors;²²¹
- v. establishing or maintaining mechanisms for receiving and, where appropriate, considering referring or giving due consideration to complaints raised by investors relating to government activities impacting their covered investment;²²²
- vi. providing assistance in resolving difficulties experienced by the investors in relation to their covered investments;²²³
- vii. establishing or maintaining a mechanism within each government with the competence to make recommendations to relevant government bodies addressing recurrent issues affecting investors;²²⁴
- viii. facilitating meetings among the competent authorities of the agreements with the aim to exchange knowledge and approaches to better facilitate investment;²²⁵
- ix. ensuring a transparent legal environment for investment through the publication of laws and regulations and through the designation of a point of contact for investor enquires.²²⁶

Fifth, although RCEP and the AIFP both address the entry and temporary stay of investors and key personnel, they do so in

substantially different manners. Whereas RCEP addresses the issue in a detailed separate chapter on the “Temporary Movement of Natural Persons” and through scheduled commitments provided by each contracting party,²²⁷ the AIFP is less detailed in its treatment, broadly encouraging AMS to facilitate the temporary entry and stay of business persons for investment purposes by publishing (preferably online) the current requirements for temporary entry and stay; maintaining contact points to respond to enquiries; and expeditiously processing applications.

Sixth, there are several issues which are addressed in one but not the other of the two agreements. These are:

- i. **Facilitating Business Matchmaking.** The AIFP contains provisions for the AMS to assist investors in identifying locally available investment supporting factors such as labour force, funding sources, domestic suppliers, and business matchmaking opportunities in the host state. RCEP contains no similar provision.
- ii. **Technical Assistance and the Special Needs of Developing States and LDCs.** RCEP contains provisions recognising the link between investment facilitation and development cooperation, setting out a work programme on potential future economic and technical cooperation activities, and noting particularly the importance of providing “capacity building and technical assistance to developing

²¹⁹ RCEP, Article 10.17.1; AIFP, Article 1.

²²⁰ RCEP, Article 10.17.1; AIFP, Article 4.

²²¹ RCEP, Article 10.17.1; AIFP, Article 5.

²²² RCEP, Article 10.17.2(a); AIFP, Article 5.

²²³ RCEP, Article 10.17.2(b); AIFP, Article 5.

²²⁴ RCEP, Article 10.17.3. AIFP, Article 9.

²²⁵ RCEP, Article 10.17.4; AIFP Article 10-11.

²²⁶ RCEP, Article 17; AIFP, Article 1.

²²⁷ RCEP, Chapter 9.

country Parties and Least Developed Country Parties”.²²⁸ The AIFF does not include commitments with respect to technical assistance nor language addressing the needs of LDC members of ASEAN.

- iii. ***Independence of Competent Authorities.*** The AIFF contains a specific article whereby the AMS endeavour to ensure that when authorisation for an investment is required, the competent authority will make its decision in a manner independent from any enterprise carrying

out the economic activity for which authorisation is required.²²⁹ There is no similar provision in RCEP.

- iv. ***Use of Digital and Internet Technologies.***²³⁰ The AIFF contains an article whereby the endeavour to promote the adoption of digital technologies to improve the investment environment from application to approval to renewal to aftercare. RCEP does not contain a similar provision encouraging the use of digital technologies.

²²⁸ RCEP, Article 15.5(2).

²²⁹ AIFF, Article 6.

²³⁰ AIFF, Article 3.

SECTION 4

**The Draft WTO
Framework on
Investment
Facilitation for
Development
and its
Relation to
ASEAN's
Instruments**

SECTION 4

The Draft WTO Framework on Investment Facilitation for Development and its Relation to ASEAN's Instruments

For more than four years, World Trade Organization (WTO) members – now totalling more than 110 – have been engaged in structured discussions aimed at agreeing on a multilateral framework on investment facilitation for development (WTO Framework).²³¹ All but three of the RCEP parties (Brunei Darussalam, Thailand and Viet Nam) are participants in the WTO discussions.²³²

The premise of the WTO's work has been “the need for closer international cooperation at the global level to create a more transparent, efficient, and predictable environment for

facilitating cross-border investment”.²³³ To that end, the expressed aim of the structured discussions, and now ongoing negotiations, has been to “develop[] a multilateral framework on investment facilitation”²³⁴ that will, among other things, improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, and the exchange of best practices and relations with relevant stakeholders, including dispute prevention.²³⁵

²³¹ The WTO's work on investment facilitation proceeds on the basis of a Joint Ministerial Statement issued by 70 WTO members at the 11th Ministerial Conference in Buenos Aires in December 2017. The groundwork for the Joint Statement had been laid earlier in 2017 through papers by Argentina, Brazil, China and Russian Federation, which outlined their respective visions for a WTO agreement on investment facilitation; a workshop on investment facilitation organised by the MIKTA group (Mexico, Indonesia, the Republic of Korea, Türkiye and Australia); and the launching of an Informal Dialogue on Investment Facilitation for Development by a larger grouping of members, the “Friends of Investment Facilitation for Development”. (The Friends of Investment Facilitation for Development initially consisted of Argentina, Brazil, China, Colombia, Hong Kong, China, Mexico, Nigeria, and Pakistan. Other states subsequently joined the group.)

²³² See WTO webpage on Investment facilitation for development.

²³³ See WTO, Joint Ministerial Statement on Investment Facilitation for Development, WT/MIN(17)/48 (13 December 2017); Joint Ministerial Statement on Investment Facilitation for Development, WT/L(1072)/Rev.1 (Nov. 2019), para. 2.

²³⁴ 2017 Joint Ministerial Statement, para. 4; 2019 Joint Ministerial Statement, para. 3.

²³⁵ 2017 Joint Ministerial Statement, para. 4.

In this section, we provide an overview of the ongoing WTO process, focusing on the draft negotiating text circulated in February 2022 – the sixth revision of the so-called “Easter Text”.²³⁶ In so doing, we first highlight areas in which the Easter Text, RCEP, and the AIFP address common issues, noting similarities and differences of approach. Thereafter, we

highlight several key issues which are addressed either only in the Easter Text or only in RCEP and the AIFP.²³⁷ Lastly, we take note of two issues which have been raised in the WTO negotiations but on which there is no consensus as yet. Before doing so, however, we address the legal character and structure of the WTO Framework under negotiation.

4.1 Legal Character and Structure of the Draft WTO Text

Legal Character of the WTO Framework

Unlike the AIFP, which expressly does not create legally binding obligations, or RCEP, which does not make its investment facilitation provisions subject to dispute settlement mechanisms, the WTO Framework is conceived as imposing legally binding disciplines on members which will be subject to the Dispute Settlement Understanding (DSU) that governs WTO disputes generally.²³⁸ Further, unlike the AIFP, the Easter Text includes provisions addressing the WTO Framework’s relationship to other international instruments, especially international investment agreements. Specifically, the Easter Text clarifies that nothing in the agreement is to be construed as creating new or modifying existing commitments relating to market access, the protection of investments, or investor-state dispute settlement.²³⁹ Further, the Easter Text makes clear that IIAs may not

serve as a means to interpret or apply the WTO Framework, and, moreover, that the WTO Framework shall not serve as a means to interpret any provision of an IIA or serve as a basis for a claim under an IIA.²⁴⁰

In comparison to the WTO Framework, it warrants noting that RCEP specifically provides that the contracting parties intend for RCEP “to coexist with their existing international agreements”.²⁴¹ Further, RCEP provides that in the event that “any international agreement, or any provision therein, referred to in this Agreement or incorporated into this Agreement is amended, or such an international agreement is succeeded by another international agreement, the Parties shall, on request of any Party, consult on whether it is necessary to amend this Agreement, unless otherwise provided in Agreement”.²⁴² This latter provision is especially noteworthy as one of the

²³⁶ WTO Structured Discussions on Investment Facilitation for Development: Consolidated Text by the Coordinator: “Easter Text”, INF/IFD/RD/74/Rev. 6 (9 February 2022).

²³⁷ We note, by way of caveat, that the Easter Text is only a negotiating text, designed to facilitate negotiations on the basis of a “single text”. As such, the Easter Text is a working document and specific provisions may yet be revisited in light of the negotiations.

²³⁸ See WTO, “Structured Discussions on Investment Facilitation for Development: Negotiating Meeting Held on 24 and 25 September 2020”, Summary of discussions by the Coordinator, INF/IFD/R/16 (7 October 2020), para. 3.30.

²³⁹ Easter Text, Art. 2.2.

²⁴⁰ Easter Text, Art. 3.2. For a discussion of this issue, see George Bermann, N. Jansen Calamita, Manjiao Chi, and Karl P. Sauvant, “Insulating a WTO Investment Facilitation Framework from ISDS”, Columbia FDI Perspectives No. 286 (2020).

²⁴¹ RCEP, Article 20.2.

²⁴² RCEP, Article 20.3.

international agreements referred to in RCEP is the WTO Agreement (meaning the Marrakesh Agreement Establishing the World Trade Organization, done at Marrakesh on 15 April 1994).²⁴³ Going on the WTO's past practice, it seems likely that in the event that a WTO Framework on investment facilitation is concluded, the WTO Agreement itself would be amended to bring the new investment facilitation agreement within its scope (as was done in 2014 when the WTO Agreement was amended to add the Agreement on Trade Facilitation).²⁴⁴ Should that happen, it could give rise to questions by one or more of the RCEP parties as to whether it is necessary to amend RCEP as a result.

The Structure of the Draft WTO Text

The Easter Text is organized into seven sections, each covering a particular aspect of investment facilitation. Within each section, individual articles address specific measures that WTO members will be expected to undertake in implementing their commitments.

The Easter Text is a “without prejudice” document, designed to facilitate further negotiations by indicating in a single text those provisions on which there appears to be common ground among members and those which require further work or discussion. In Table 7, we provide an outline of the Easter Text, noting each draft section and the commitments contained therein. In so doing, we identify consensus provisions within each section through the use of “plain text” and identify provisions on which there is not yet consensus in square brackets.

The seven sections of the Easter Text represent the common ground among negotiators with respect to the structure of the WTO Framework. Additional sections and provisions remain a possibility, however. In Table 8, we identify sections and proposed for inclusion in the WTO Framework, but which currently do not have consensus support among negotiators.

²⁴³ As defined in RCEP, Article 1.2(ii).

²⁴⁴ Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization (27 Nov. 2014).

TABLE 7

Outline of the “Easter Text” Draft WTO Framework on Investment Facilitation for Development

Section No.	Section Heading and Article Titles	Outline of Consensus Commitments
Section I	<p><i>“Scope and General Principles”</i></p> <ol style="list-style-type: none"> 1. Objectives 2. Scope 2. <i>bis</i> Definitions 3. Relation to International Investment Agreements 4. [Most-Favoured Nation Treatment [Non-Discrimination]] 	<ul style="list-style-type: none"> ● Definitions of “measure” and “investment activities” ● Clarification of the relationship between the WTO Framework and other international instruments, e.g., IIAs
Section II	<p><i>“Transparency of Investment Measures”</i></p> <ol style="list-style-type: none"> 5. Publication and Availability of Measures and Information 6. Information to be Made Publicly Available if an Authorization is Required for an Investment 7. Single Information Portal 8. No Fees Imposed for Access to Information 9. Publication in Advance and Opportunity to Comment of Proposed Measures 10. Notification to the WTO 11. Disclosure of Confidential Information 	<ul style="list-style-type: none"> ● Obligation to promptly publish all relevant measures of general application affecting/relating to investment activities ● Obligation to explain purpose and rationale of relevant measures in connection with publication (to extent practicable) ● Obligation to publish electronically information of importance to investors ● Specific obligations with respect to information to be published when an authorization to invest is required: e.g., requirements; forms; procedures for application and appeal; timeframes; fees; contact information for competent authorities ● Encouragement to establish and maintain single information portals ● Prohibition on fees for access to information ● Obligation to publish new measures and changes in advance and to give opportunity for comment on proposed measures (to the extent practicable) ● Obligation to notify WTO of new, or significant changes to existing measures of general application

TABLE 7 (continued)

Section No.	Section Heading and Article Titles	Outline of Consensus Commitments
Section III	<p><i>“Streamlining and Speeding Up Administrative Measures”</i></p> <p>12. Reasonable, Objective and Impartial Administration of Measures</p> <p>13. General Principles for Authorization Procedures</p> <p>14. Authorization Procedures</p> <p>15. Multiple Applications</p> <p>16. Authorization Fees</p> <p>16. bis Authorization Fees – Financial Services</p> <p>17. Use of ICT/E-Government</p> <p>18. Independence of Competent Authorities</p> <p>19. Appeal or Review</p> <p>20. Periodic Review</p>	<ul style="list-style-type: none"> ● Obligation to ensure the reasonable, objective and impartial administration of measures of general application ● Obligation to ensure that investment authorization procedures, where required, do not unduly complicate or delay investment ● Obligations with respect to authorisation procedures, e.g., <ul style="list-style-type: none"> – reasonable periods for applications – reasonable and transparent authorisation fees – acceptance of authenticated copies – electronic submission of applications and payment of fees online – transparency in processing applications – opportunity to complete incomplete applications – statement of reasons for rejected applications – ensure independence of competent authorities ● Obligation to establish or maintain processes for appeal and review of administrative decisions affecting investment (except where inconsistent with constitutional structure or legal system)
Section IV	<p><i>“Focal Points, Domestic Regulatory Coherence and Cross-Border Cooperation”</i></p> <p>21. Focal Points</p> <p>22. Domestic Regulatory Coherence</p> <p>23. Domestic Supplier Databases</p> <p>24. Cross-Border Co-Operation on Investment Facilitation</p>	<ul style="list-style-type: none"> ● Obligation to establish or maintain one or more focal points or other mechanism to respond to enquiries regarding measures of general application affecting/ relating to investment activities ● Encouragement to carry out regulatory impact assessments and to provide interested persons to comment ● Obligation to ensure that competent authorities cooperate with one another to facilitate investment ● Encouragement to establish domestic supplier database(s) ● Obligation to respond to questions from other WTO countries regarding measures of general application affecting / relating to investment activities (to the extent practicable)

TABLE 7 (continued)

Section No.	Section Heading and Article Titles	Outline of Consensus Commitments
Section V	<p><i>“Special and Differential Treatment for Developing and Least-Developed Country Members”</i></p> <p>25. General Principles</p> <p>26. Categories of Provisions, Notification and Implementation</p> <ul style="list-style-type: none"> ● Notification and Implementation of Category A ● Notification and Implementation of Categories B and C <p>27. Other Special and Differential Treatment Provisions</p> <ul style="list-style-type: none"> ● Early Warning Mechanism; Extension of Implementation Dates for Provisions in Categories B and C ● Expert Group to Support Implementation of Category B and C ● Shifting between Categories B and C ● Grace Period for the Application of the Understanding on Rules and Procedures Governing the Settlement of Disputes <p>28. Provision of Assistance and Support for Capacity Building</p> <p>29. Information on Assistance and Support for Capacity Building to be Submitted to the Committee</p>	<ul style="list-style-type: none"> ● Establishment of principles and rules linked to capacity with respect to the extent and timing of implementation ● Mechanisms and criteria to implement special and different treatment for developing country and LDCs ● Agreement by donor countries to facilitate assistance and support for developing country and LDCs in implementation of the WTO Framework, either bilaterally or through appropriate IOs ● Encouragement for donor countries to follow specific principles in the provision of assistance and support ● Obligation for donor countries to make reports to the WTO Committee on Investment Facilitation with respect to their activities providing assistance and support

TABLE 7 (continued)

Section No.	Section Heading and Article Titles	Outline of Consensus Commitments
Section VI	<p><i>“Sustainable Investment”</i></p> <p>30. Responsible Business Conduct</p> <p>31. Measures Against Corruption</p>	<ul style="list-style-type: none"> ● Obligation to encourage investors within its territory (or subject to its jurisdiction) to voluntarily follow internationally recognised principles of responsible business conduct in areas such as labour, environment, gender equality, human rights, community relations and the rights of Indigenous peoples. ● Obligation to ensure measures are taken to prevent and fight corruption (and, possibly, money laundering) with respect to investment activities
Section VII	<p><i>“Institutional Arrangements and Final Provisions”</i></p> <p>32. WTO Committee on Investment Facilitation</p> <p>33. General and Security Exceptions</p> <p>34. Financial Exceptions</p> <p>35. Dispute Settlement</p> <p>36. [Final Provisions]</p>	<ul style="list-style-type: none"> ● Establishment of WTO Committee on Investment Facilitation in order to afford Members the opportunity to consult on the implementation and operation of the WTO Framework ● General exceptions; security exceptions; financial exceptions (e.g., prudential measures) ● Dispute settlement under the DSU ● Exemption of “Sustainable Investment” provisions from dispute settlement provisions

TABLE 8

Overview of Non-Consensus Sections and Provisions Proposed for Inclusion in the WTO Framework on Investment Facilitation for Development

Section No.	Heading	Outline of Non-Consensus Provisions
Section I	<i>“Scope and General Principles”</i>	<ul style="list-style-type: none"> • [Exclusions for public procurement; public concessions; subsidies; tax measures] • [Definitions of “investment”; “investor”] • [Most-favoured-nation application]
Section III bis	<i>“Transparency Provision to Facilitate the Entry and Temporary Stay of Business Persons for Investment Purposes”</i>	<p>Varied among different proposals.</p> <ul style="list-style-type: none"> • Obligation to promptly publish information (online to the extent possible) on the criteria and process for applications for entry and temporary stay of business persons for investment purposes/activities • Obligation to expeditiously process completed applications • Obligation to ensure that documentation required is commensurate with the purpose for which they are collected • Obligation to provide information regarding application status free of charge • Obligation to notify applicants regarding incomplete applications and to provide a reasonable opportunity to complete incomplete applications • Obligation to provide prompt information regarding application outcomes • Obligation to ensure application fees are reasonable or reciprocal • Definition of “business person”
Section III ter	<i>“Transfers and Payments”</i>	<ul style="list-style-type: none"> • Obligation to ensure that measures relating to capital transfer and payment are based on objective and transparent criteria.
Section IV bis	<i>“Supplier-Development Programmes”</i>	<ul style="list-style-type: none"> • Encouragement to implement supplier-development programmes in order to strengthen the capabilities and competitiveness of local companies • List of characteristics of supplier-development programmes • Statement regarding the need for technical assistance to developing and LCDs in establishing and operationalizing supplier-development programmes

TABLE 8 (continued)

Section No.	Heading	Outline of Non-Consensus Provisions
Section IV <i>ter</i>	<i>"Home State Obligations"</i>	<ul style="list-style-type: none"> ● Recognition of the "important role of Home States in facilitating outward [foreign direct] investment which contributes to sustainable development" ● Encouragement for members to adopt or maintain measures to facilitate outward investment, including through: <ul style="list-style-type: none"> – legal frameworks; investment guarantees; investment insurance; technical assistance; investor support services, such as feasibility studies, business missions and matchmaking; financial and fiscal measures, such as loans, equity, tax exemptions, tax deferral; and the provision of information ● Obligation to endeavour to publish home state facilitation measures for outward [foreign direct] investment ● Obligation to endeavour to share information on the operations of investors from home state territories, including their history of responsible business conduct and sustainable investing
Section VII	<i>"Institutional Arrangements and Final Provisions"</i>	<ul style="list-style-type: none"> ● [Possible Anti-Circumvention Clause] ● [Non-Violation Complaints] ● [Final Provisions]

4.2 Comparing the WTO Easter Text with RCEP and the AIFP

General and Structural Characteristics

In comparing the WTO Easter Text with RCEP and the AIFP, several preliminary points may be noted. First, unlike RCEP and the AIFP, the Easter Text contains a textual reference linking investment facilitation and sustainable development. In Article 1.1, the purpose of the WTO Framework is set out as follows:

The purpose of this Agreement is to improve the transparency of measures, streamline administrative procedures, and adopt other investment facilitation measures, as well as to promote international cooperation, as a means of facilitating the flow of [foreign direct] investment between Members, particularly to developing and least developed country Members, *with the aim of fostering sustainable development*.²⁴⁵

A second important point to note is that the legal character of each instrument is different, as is the availability of dispute settlement procedures. As noted above, the AIFP is not legally binding and, accordingly, does not provide for any type of dispute settlement. RCEP is legally binding, although its investment facilitation provisions are specifically exempted from its dispute settlement mechanism. Finally, the Easter Text is intended to create legal binding disciplines and, moreover, to make those disciplines subject to the WTO's DSU.²⁴⁶

A third point concerns the different ways in which each instrument addresses its relationship with other treaties. In the case of the AIFP, the agreement is silent, reflecting the fact that the AIFP is a non-legally binding agreement and, therefore, poses no possibility of legal conflict with other treaties to which the AIFP parties are members. RCEP, on the other hand, specifically provides that the contracting parties intend for RCEP "to coexist with their existing international agreements".²⁴⁷ Finally, the Easter Text includes provisions addressing the WTO Framework's relationship to other international instruments, especially international investment agreements, in an effort to ensure that the WTO Framework is not read as creating new or modifying existing commitments relating to market access, the protection of investments, or investor-state dispute settlement.²⁴⁸

The Content of the Texts

The Easter Text, RCEP, and the AIFP address similar investment facilitation issues, although the way in which these issues are addressed are often quite different. As a general matter the provisions in the Easter Text are more detailed with respect to the commitments of the parties than either RCEP or the AIFP. Moreover, unlike RCEP and the AIFP, most of the commitments in the Easter Text are binding commitments requiring that the contracting parties to take certain measures or achieve certain results. This differs considerably from RCEP, in which the

²⁴⁵ Emphasis added.

²⁴⁶ Easter Text, Article 35.1.

²⁴⁷ RCEP, Article 20.2.

²⁴⁸ Easter Text, Art. 2.2. This statement appears designed to address concerns that the WTO negotiations, which do not involve all of the WTO members, go against the WTO's Singapore Ministerial Declaration: "It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas [e.g., investment protection and market access], will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations." WTO, Singapore Ministerial Declaration (13 December 1996), Art. 20.

investment facilitation provisions are largely phrased as obligations of “endeavour” and, of course, the AIFF, which contains no legally binding obligations at all.

In the sections which follow, we look at the common issues addressed in the Easter Text, RCEP, and the AIFF. In so doing, we note the differences and similarities of the treatment of the issues. Following this analysis of areas of commonality, we turn to look at issues which are addressed in only some, but not all of the instruments. We organise our treatment of the issues raised by following the structure and headings of the Easter Text.

Issues of Common Concern

“Transparency of Investment Measures”

The transparency of investment measures is treated in all three of the instruments. In the AIFF, the AMS “endeavour” to ensure the transparency of and make publicly available measures of general application and information related to investments.²⁴⁹ In RCEP, the contracting parties agree to ensure that their laws, regulations, procedures, and administrative rulings are promptly published or otherwise made available,²⁵⁰ and to promptly provide information and respond to questions pertaining to such laws, regulations, etc.²⁵¹

In the Easter Text the transparency of investment measures is treated differently. The seven articles in Section II of the Easter Text

create obligations well beyond either the AIFF or RCEP and do so through provisions which contain more detail as to the nature of the commitments. In particular, the Easter Text creates binding obligations:

- to promptly publish all relevant measures of general application affecting/relating to investment activities;²⁵²
- to endeavour to explain the purpose and rationale of relevant measures in connection with publication (to the extent practicable and in a manner consistent with its legal system);²⁵³
- to publish electronically information of importance to investors;²⁵⁴
- to publish new measures and changes in advance and to give opportunity for comment on proposed measures (to the extent practicable and in a manner consistent with its legal system);²⁵⁵ and
- to notify the WTO of new, or significant changes, to existing measures of general application.²⁵⁶

Further, the Easter Text includes a number of specific obligations with respect to information to be published when an authorisation to invest is required: e.g., requirements; forms; procedures for application and appeal; timeframes; fees; contact information for competent authorities.²⁵⁷ Finally, the Easter Text encourages parties to establish and maintain single information portals to the extent practicable²⁵⁸ and contains a prohibition on the imposition of fees for access to information.²⁵⁹

²⁴⁹ AIFF, Article 1.

²⁵⁰ RCEP, Article 17.3.

²⁵¹ RCEP, Article 17.4.

²⁵² Easter Text, Article 5.1.

²⁵³ Easter Text, Article 5.3.

²⁵⁴ Easter Text, Article 5.4.

²⁵⁵ Easter Text, Article 9.

²⁵⁶ Easter Text, Article 10.

²⁵⁷ Easter Text, Article 6.

²⁵⁸ Easter Text, Article 7.

²⁵⁹ Easter Text, Article 8.

“Streamlining and Speeding Up Administrative Measures”

All three texts address the streamlining and speeding up of administrative measures. In RCEP, the commitment is limited to an obligation of endeavour by each party to simplify its procedures specifically for investment applications and approvals.²⁶⁰ The AIFF, on the other hand, contains broader provisions committing the parties to endeavour to ensure that all measures of general application related to investment are administered in a reasonable, objective and impartial manner; investment procedures do not act as barriers to the ability of investors to invest; investment procedures and documentation requirements are applied in a manner that does not incur more time and cost than necessary; investment applications are treated in a reasonably timely and transparent manner; investors are given the opportunity to address incomplete applications; and administration fees are reasonable, transparent and do not in themselves restrict investment. As noted, however, the AIFF's provisions are not legally binding.

Unlike either RCEP or the AIFF, the Easter Text creates binding obligations requiring the contracting parties to take specific measures and achieve certain results with respect to the streamlining and speeding up of administrative

measures. In Section III, across ten articles, the Easter Text lays out provisions that are more detailed than those contained in either RCEP or the AIFF and create obligations well beyond either of those instruments. In particular, the Easter Text creates binding obligations:

- to ensure the reasonable, objective and impartial administration of measures of general application;²⁶¹
- to ensure that investment authorisation procedures, where required, do not unduly complicate or delay investment;²⁶²
- with respect to authorisation procedures:
 - to ensure that measures relating to the authorisation for an investment are based on objective and transparent criteria;²⁶³
 - to ensure that the procedures are impartial, and that the procedures are adequate for applicants to demonstrate whether they meet the requirements, where such requirements exist;²⁶⁴
 - to ensure that the procedures do not in themselves unjustifiably prevent the fulfilment of requirements;²⁶⁵
 - to ensure reasonable periods for applications;²⁶⁶
 - to ensure reasonable and transparent authorisation fees;²⁶⁷
 - to ensure the acceptance of authenticated copies of documents;²⁶⁸

²⁶⁰ RCEP, Article 10.17.1.

²⁶¹ Easter Text, Article 12.

²⁶² Easter Text, Article 13.1.

²⁶³ Easter Text, Article 13.2(a).

²⁶⁴ Easter Text, Article 13.2(b). The AIFF contains a similar provision whereby the AMS endeavour to ensure that when authorisation for an investment is required, the competent authority will make its decision in a manner independent from any enterprise carrying out the economic activity for which authorisation is required. AIFF, Article 6. There is no similar provision in RCEP.

²⁶⁵ Easter Text, Article 13.2(c).

²⁶⁶ Easter Text, Article 14.1(a).

²⁶⁷ Easter Text, Article 16.

²⁶⁸ Easter Text, Article 14.1(b).

- electronic submission of applications and payment of fees online;²⁶⁹
- to ensure transparency in the procedure for processing applications;²⁷⁰
- to ensure, to the extent practicable, the opportunity to complete incomplete applications;²⁷¹
- to ensure, to the extent practicable, the provision of a statement of reasons for rejected applications;²⁷² and
- to ensure that authorisation decisions are made by independent and competent authorities.²⁷³
- to establish or maintain processes for appeal and review of administrative decisions affecting investment (except where inconsistent with constitutional structure or legal system).²⁷⁴

“Focal Points, Domestic Regulatory Coherence and Cross-Border Cooperation”

All three texts address commitments related to establishing or maintaining focal points or other entities to provide assistance and advisory services to investors. The Easter Text addresses these commitments across four articles in its Section IV, creating a firm commitment for each contracting party to establish or maintain one or more focal points

or other mechanism to respond to enquiries regarding measures of general application affecting/relating to investment activities.²⁷⁵ Compared to RCEP, the Easter Text's conception of the role of focal points is limited. Although RCEP only commits the parties to “endeavour” to establish and/or maintain focal points,²⁷⁶ it delimits a broad set of roles that focal points might play, including receiving and, where appropriate, considering, referring or giving due consideration to complaints raised by investors relating to government activities impacting their covered investment,²⁷⁷ as well as providing assistance in resolving difficulties experienced by investors in relation to their covered investments.²⁷⁸ In this respect, the institutional role of focal points contemplated in RCEP is more akin to the role typically granted to ombudspersons, while the conception of focal points in the Easter Text is considerably more limited.²⁷⁹

In addition, the Easter Text encourages each party to carry out an impact assessment of any “major regulatory measures” coming within the scope of the WTO Framework in order to promote domestic regulatory coherence.²⁸⁰ To that end, the Easter Text provides that when a contracting party conducts an impact assessment, it should

²⁶⁹ Easter Text, Article 17.1-17.2. Note that the AIFC contains an article whereby the parties endeavor to promote the adoption of digital technologies to improve the investment environment from application to approval to renewal to aftercare. See AIFC, Article 3. RCEP does not contain a similar provision encouraging the use of digital technologies.

²⁷⁰ Easter Text, Article 14.1(d)-(g).

²⁷¹ Easter Text, Article 14.1(h).

²⁷² Easter Text, Article 14.1(i).

²⁷³ Easter Text, Article 18.

²⁷⁴ Easter Text, Article 19.

²⁷⁵ Easter Text, Article 21.1.

²⁷⁶ RCEP, Article 10.17.1-10.17.2

²⁷⁷ RCEP, Article 10.17.2(a); AIFC, Article 5.

²⁷⁸ RCEP, Article 10.17.2(b); AIFC, Article 5.

²⁷⁹ It should be noted that the role of focal points in the WTO Framework may yet evolve. As bracketed text in Article 21.3 of the Easter Text illustrates, there is not yet consensus on the functions of focal points: “21.3. Members may assign additional functions to the focal points or appropriate mechanisms established under paragraph 21.1 [such as to seek to resolve problems of investors or persons seeking to invest that may arise regarding measures covered by this Agreement or recommend measures to improve the investment environment.]”

²⁸⁰ Easter Text, Article 22.1.

provide opportunities for interested persons to comment on the potential impact of the proposed measure²⁸¹ and ensure that competent authorities within the contracting state cooperate with one another to facilitate investment.²⁸²

The Easter Text also addresses business matchmaking between foreign investors and domestic suppliers. This is similar to the AIFF which contains provisions for the AMS to assist investors to identify locally available investment supporting factors such as labour force, funding sources, domestic suppliers, and business matchmaking opportunities in the host state.²⁸³ The commitment in the Easter text is one of encouragement, advising each contracting party to promote the establishment of one of more domestic supplier databases for use by investors.²⁸⁴

Finally, Section IV of the Easter Text also contains provisions to facilitate cooperation on investment facilitation measures both within government and with respect to the other parties to the WTO Framework. Thus, the Easter Text commits the parties, to the extent practicable, to encourage cooperation between their respective competent authorities with respect to any matter falling within the scope of the WTO Framework²⁸⁵ and, also to the extent practicable, to respond to questions from other parties on any measure covered by the WTO Framework.²⁸⁶ These provisions are similar to those found in

RCEP and the AIFF which obligate the parties to endeavour to facilitate meetings among their competent authorities to exchange knowledge and approaches to better facilitate investment.²⁸⁷

“Special and Differential Treatment for Developing and Least-Developed Country Members”

Special and differential treatment for developing and LDC parties to the WTO Framework is contained in Section V across three articles and numerous sub-articles. In the first part of Section V, the parties set out certain general principles, including that “Members should acknowledge the special difficulties experienced by developing and particularly least-developed country Members in implementing the provisions of this Agreement”,²⁸⁸ and committing that LDCs “will only be required to undertake commitments to the extent consistent with their individual development and financial needs or their administrative and institutional capabilities”.²⁸⁹ These general principles are followed by detailed provisions, which establish rules linking the development status of individual contracting parties with the extent and timing of their implementation of the WTO Framework.²⁹⁰

In the second part of Section V, there is an agreement by donor countries to facilitate assistance and support for developing

²⁸¹ Easter Text, Article 22.2.

²⁸² Easter Text, Article 21.3.

²⁸³ AIFF, Article 8. RCEP contains no similar provision.

²⁸⁴ Easter Text, Article 23. The Easter Text also includes a proposed Section IV *bis*, entitled “Supplier-Development Programmes” which, if adopted, would expand on these commitments, encouraging the parties “to implement supplier-development programmes with the aim to strengthen the capabilities and competitiveness of local companies in light of FDI local sourcing demands and standards”. See proposed Section IV *bis*, Article 1.

²⁸⁵ Easter Text, Article 24.2.

²⁸⁶ Easter Text, Article 24.1.

²⁸⁷ RCEP, Article 10.17.4; AIFF, Article 10.

²⁸⁸ Easter Text, Article 25.1.

²⁸⁹ Easter Text, Article 25.4.

²⁹⁰ Easter Text, Article 26-27.

countries and LDCs in implementation of the WTO Framework, either bilaterally or through appropriate international organisations.²⁹¹ In connection with the facilitation of assistance and support by donor countries, Section V also encourages donor countries to follow specific principles in the provision of that assistance and support.²⁹² Lastly, the Easter Text contains an obligation for donor countries to make annual reports to the WTO Committee on Investment Facilitation with respect to their activities providing assistance and support.²⁹³

RCEP similarly recognises the importance of technical assistance and capacity building for effective investment facilitation.²⁹⁴ In a

separate chapter dedicated to “Economic and Technical Cooperation”, RCEP sets out a work programme on potential future economic and technical cooperation activities designed to address numerous aspects of the agreement, including investment. Further, like the Easter Text, the funding for technical assistance and capacity building is voluntary; there are no firm commitments of support. Instead, RCEP Article 15.4 establishes the right of contributing parties to develop assistance programmes (in line with the objectives stated in Article 15.2²⁹⁵) and to do so in cooperation and with contribution from non-parties, and sub-regional, regional or international organizations.²⁹⁶

4.3 Issues Addressed in Only Some of the Agreements

“Sustainable Investment”

Neither RCEP nor the AIFF note any connection between investment facilitation and sustainable development or sustainable investment. Both appear to proceed from the assumption that the facilitation of investment is an end in itself or will necessarily lead to sustainable development. By contrast, as noted, the Easter Text links the facilitation of investment with the goal of sustainable development²⁹⁷ and, moreover, includes a separate section on “Sustainable Investment.”

Sustainable investment is addressed in Section VI of the Easter Text. It is a brief section, containing only two articles. Notably, the meaning of sustainable investment is not defined in the section (nor elsewhere in the text). Rather, the section identifies two areas of concern with respect to the making and operation of foreign investment that may be considered as related to investment sustainability, although certainly not encompassing all aspects of the concept, as discussed above in Section 1.

²⁹¹ Easter Text, Article 28.1.

²⁹² Easter Text, Article 28.2-28.3.

²⁹³ Easter Text, Article 29.1.

²⁹⁴ RCEP, Article 15.5(2).

²⁹⁵ RCEP lists activities which “(a) provide capacity building and technical assistance to developing country Parties and Least Developed Country Parties; (b) increase public awareness; (c) enhance access to information for businesses; and (d) other activities as may be agreed upon among the Parties”

²⁹⁶ RCEP, Article 15.4. As noted above, the AIFF does not include commitments with respect to technical assistance nor language addressing the needs of LDC members of ASEAN.

²⁹⁷ Easter Text, Article 1.1.

The first issue addressed is “responsible business conduct”. Under this heading, the parties undertake a number of commitments of “encouragement”, such as encouraging investors operating within their territories to “voluntarily incorporate” into their business practices internationally recognized principles, standards and guidelines of responsible business conduct, addressing areas “such as labour, environment, gender equality, human rights, community relations and the rights of Indigenous peoples”.²⁹⁸ Further, the responsible business conduct heading also includes recognition by the parties of the importance of due diligence by investors “in order to identify and address adverse impacts, such as on the environment and labour conditions, in their operations, their supply chains and other business relationships”.²⁹⁹ Again, notably, this recognition is not accompanied by obligations designed to ensure the implementation of due diligence procedures by investors, apart from an agreement for members to “exchange information and best practices”.³⁰⁰

The second article of Section VI, Article 31, concerns measures against corruption. Under this article, each party is obligated to ensure that measures are taken “to prevent and fight corruption [and money laundering] with

respect to matters falling within the scope of this Agreement”.³⁰¹ Given that 189 states are parties to the United Nations Convention against Corruption,³⁰² which already contains this obligation, Article 31 does not appear to add anything to the existing obligations of states under the UN Convention. In any case, Article 31 also includes an agreement for members to “exchange information and best practices” on anti-corruption matters.³⁰³

Entry and Temporary Stay of Investors and Key Personnel

Both RCEP and the AIFF address the entry and temporary stay of investors and key personnel, albeit in different manners. Whereas RCEP addresses the issue in a detailed separate chapter on the “Temporary Movement of Natural Persons” and through scheduled commitments provided by each contracting party,³⁰⁴ the AIFF is less detailed in its treatment, broadly encouraging AMS to facilitate the temporary entry and stay of business persons for investment purposes by publishing (preferably online) the current requirements for temporary entry and stay; maintaining contact points to respond to enquiries; and expeditiously processing applications.³⁰⁵

²⁹⁸ Easter Text, Article 30.1.

²⁹⁹ Easter Text, Article 30.3.

³⁰⁰ Easter Text, Article 30.4.

³⁰¹ Easter Text, Article 31.1.

³⁰² The United Nations Convention against Corruption was adopted by the UN General Assembly on 31 October 2003 and entered into force on 14 December 2005. It is the only legally binding universal anti-corruption instrument and covers five main areas: preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange. As of 18 November 2021, there were 189 parties to the Convention.

³⁰³ Easter Text, Article 31.3.

³⁰⁴ RCEP, Chapter 9. RCEP contains a general commitment by each party to “grant temporary entry or extension of temporary stay” (RCEP, Article 9.4) to “persons [who] are engaged in trade in goods, the supply of services, or the conduct of investment” (RCEP, Article 9.2), subject to the Schedule of Specific Commitments on Temporary Movement of Natural Persons provided by each party to RCEP. It is these Schedules which specify the conditions and limitations governing each party’s commitments, including the length of stay, for each category of natural person covered by the chapter.

³⁰⁵ AIFF, Article 7.

The Easter Text contains no consensus provisions on the entry and temporary stay of investors and key personnel. Instead, at the time of writing two different proposals for addressing the issue remain under consideration. The first proposal would limit the parties' obligations with respect to entry and temporary stay to ensuring the transparency of provisions to facilitate the entry and temporary stay of business persons for investment purposes.³⁰⁶ The second

proposal, which resembles the approach taken in RCEP, would “recognize the importance of temporary movement of business persons to facilitate investment activities and ensure that all measures of general application covered by this Section are administered in a reasonable, objective and impartial manner”,³⁰⁷ while at the same time providing scope for countries to apply the Section's guidelines in accordance with their domestic laws and regulations.³⁰⁸

4.4 Issues Pending Further Discussion in the WTO

Lastly, we take note of two key issues which have been raised in the WTO negotiations but on which there is no consensus. These issues, and proposed language to address them, are set out in the Annex to the Easter Text.

Home State Obligations

Section IV *ter* of the Easter Text Annex sets out proposed text regarding a number of limited obligations for the home states of investors. Generally speaking, these are soft obligations whereby home states are “encouraged to adopt or maintain appropriate measures to facilitate outward [foreign direct] investment, investment which contributes to sustainable development”, including through a variety of different kinds of measures, such as legal frameworks; investment guarantees and insurance; technical assistance; investor

support services; financial and fiscal measures, such as loans, equity, tax exemptions, tax deferral; and the provision of information.³⁰⁹ Moreover, under the proposal, home states would commit to “endeavour” to publish or otherwise make publicly available “their facilitation measures for outward [foreign direct] investment”.³¹⁰ Finally, under this proposed section home states would also commit to endeavour to share information on the operations of investors from their territories, including with respect to their history of responsible business conduct and sustainable investing.³¹¹ This commitment, however, would be subject to the home state's right to withhold the disclosure of confidential information on various grounds,³¹² including that disclosure would “prejudice legitimate commercial interests of particular enterprises, public or private”.³¹³

³⁰⁶ See Easter Text, Annex, Section III *bis* (“Transparency Provision to Facilitate the Entry and Temporary Stay of Business Persons for Investment Purposes”).

³⁰⁷ See Easter Text, Annex, Section III *bis* (“Facilitation of the Entry and Temporary Stay of Business Persons for Investment Purposes”), Article 1.4.

³⁰⁸ See Easter Text, Annex, Section III *bis* (“Facilitation of the Entry and Temporary Stay of Business Persons for Investment Purposes”), Article 1.3 & Article 1.7.

³⁰⁹ Easter Text, Annex, Section IV *ter* (“Home State Obligations”), Article 2.

³¹⁰ Easter Text, Annex, Section IV *ter* (“Home State Obligations”), Article 3.

³¹¹ Easter Text, Annex, Section IV *ter* (“Home State Obligations”), Article 4.

³¹² *Ibid.*

³¹³ Easter Text, Article 11.1.

Neither RCEP nor the AIFC contains any provisions addressing the obligations of investor home states.

Definition of “Investment”

The Easter Text, RCEP, and the AIFC all contain commitments with respect to “investment” facilitation. Thus, it is notable that only RCEP defines the term “investment”.³¹⁴

Under RCEP Article 10.1, the term “investment” is defined for the purposes of the chapter on investment as “every kind of asset that an investor owns or controls, directly or indirectly, and that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gains or profits, or the assumption of risk”. The definition in RCEP follows the classic asset-based definition of investment found in most investment protection treaties.³¹⁵ Notably, the definition in RCEP makes no attempt to distinguish between investments which promote sustainable development and those which do not, nor to identify or define “sustainable” investments. That said, given that RCEP does not otherwise contain any textual linkage between investment facilitation and sustainable development, the absence of these kinds of distinction in its definition of investment is not surprising.

The Easter Text contains no consensus text regarding the definition of investment. Instead, the Annex of the Easter Text notes two different proposals for defining investment under the WTO Framework. The first proposal, put forward by Japan, is for the adoption of an asset-based definition of investment like the definition contained in RCEP.³¹⁶ Thus, the asset-based definition proposed by Japan in the WTO negotiations would not distinguish between investments which promote sustainable development and those which do not.

The second proposal, put forward by Türkiye, advances a so-called “enterprise” definition of investment, whereby “‘investment’ means an enterprise, branch of an enterprise or a representative office”.³¹⁷ Under this definition, an enterprise is defined as “any juridical person or any other entity duly constituted or organised under the applicable laws and regulations, whether or not for profit, and whether private or government owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, organisation or company”.³¹⁸ Again, notwithstanding the different approach to defining “investment” in the proposal by Türkiye, it, like the definition in RCEP and the Japanese proposal, would not make any distinction between investments which promote sustainable development and those which do not.³¹⁹

³¹⁴ Although the AIFC does not define “investment” in the context of its provisions on “investment facilitation”, given the fact that the AIFC is “non-legally binding”, the lack of a definition of “investment” is likely to be of minimal practical significance.

³¹⁵ See Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (3rd ed., Oxford University Press, 2022), 86-89.

³¹⁶ Easter Text, Annex, Section I (“Scope and General Principles”), Article 2 (*bis* Definitions).

³¹⁷ Easter Text, Annex, Section I (“Scope and General Principles”), Article 2 (*bis* Definitions).

³¹⁸ Easter Text, Annex, Section I (“Scope and General Principles”), Article 2 (*bis* Definitions).

³¹⁹ On this point, see e.g. N. Jansen Calamita, “Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value”, 23 *Journal of International Economic Law* 973, 982 (December 2020).

SECTION 5

Recommendations and Way Forward

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Recommendations and Way Forward

As the previous sections have shown, investment facilitation is a combination of different policies, processes and tools that are implemented by different actors and at different levels of governance. With the AIFF and RCEP, countries in the Asia-Pacific region have made initial steps towards building a regional investment facilitation framework that might someday complement or supplement a WTO multilateral agreement. This is to be encouraged as the WTO investment facilitation agreement under consideration seems likely to contain little with respect to sustainable development and investment. And yet, for the moment at least, similar gaps are found in the AIFF and RCEP. As with the WTO draft, neither regional instrument creates linkages between investment facilitation and sustainable development and, in any case, more broadly, the commitments on investment facilitation contained in these agreements remain largely soft in nature. As a result, given the nature of the regional and international commitments currently in place and those under consideration, it remains for individual

countries to take steps to create needed linkages between their investment facilitation efforts and the achievement of sustainable development.

This section contains recommendations for possible future policy initiatives across three general headings: (a) recommendations to address gaps at the regional/international level; (b) recommendations for domestic measures that can be taken at the national level of the AIFF and RCEP countries in the absence of appropriate commitments at the regional/international level; and (c) recommendations concerning the potential role of international organizations in supporting AIFF and RCEP countries in their efforts to facilitate investment for sustainable development. All three sets of recommendations seek to build on the regional initiatives that have developed so far by keeping in mind that not all investment facilitation measures require nor gain added value when regulated at the regional or international level.

5.1 Using Regional or International Approaches to Facilitate Sustainable Investment

National legal and regulatory frameworks are the starting point of investment facilitation. Regulatory issues relating to the transparency of investment regulations, the procedures applicable to an investment and the ways in which linkages with the host country's economy can be facilitated are all defined and implemented at the national level.³²⁰ Similarly, sustainable development strategies and regulations (e.g., linkages with the local economy or environmental protection) are primarily set forth through national laws and policies. From these premises, it is clear that host economy measures have the most direct impact on facilitating sustainable FDI.³²¹

The preeminent position of the host country in the facilitation of investment begs the question as to why or whether investment facilitation should be coordinated at the regional and/or international level. One answer is that coordinated facilitation efforts can promote learning and address certain collective action challenges.³²² Investment facilitation – especially investment facilitation that focuses on sustainable development – has dimensions that go beyond the reach of

national measures of host countries and encompass measures taken by investors' home countries as well. International or regional cooperation can thus allow for the development and implementation of common principles in home and host countries. Moreover, national measures (of home and host countries) may benefit from regional and international exchange as a way of jumpstarting domestic reforms, especially those seeking to align investment facilitation with the achievement of the SDGs.³²³ Further, as proponents of the multilateral agreement at the WTO stress, an international framework is not about “whether investment related policies, laws, and regulations should be changed but rather how those policies, laws, and regulations currently in place are implemented” by asking what could be done to make their implementation more transparent and predictable.³²⁴ In this respect, international or regional cooperation can also allow for more robust support schemes for developing economies that serve to build capacity and provide technical assistance (see further below).

³²⁰ Brooke Skartvedt Güven, “Investment Promotion and Facilitation for Sustainable Development”, Columbia Centre for Sustainable Investment (2020).

³²¹ Martin Dietrich Brauch, Nathalie Bernasconi-Osterwalder, “Report: IISD-SADC Investment Facilitation Workshop”, IISD (2019).

³²² OECD, Ana Novik and Alexandre de Crombrughe, “Towards an International Framework for Investment Facilitation” (April 2018); N. Jansen Calamita, “Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value”, 23 *Journal of International Economic Law* 973 (2020). As Güven (2020) points out: “Corporate structuring can result in eroding tax bases, externalised harms to societies and an inability for home or host economies to effectively obtain information about or regulate corporate conduct. International cooperation and information-sharing relating to corporate families and ways in which the investment chain can be effectively regulated for the social benefit of both home and host country could similarly be a useful basis for supra-national efforts.”

³²³ Karl P. Sauvant, “The Potential value-added of a multilateral framework on investment facilitation for development”, *Transnational Dispute Management* (June 2019).

³²⁴ Evan Gabor, “Keeping ‘Development’ in a Multilateral Framework on Investment Facilitation for Development”, 22 *Journal of World Investment & Trade* 43 (2021).

The following points summarize the principal *potential* benefits of regional and/or international cooperation on investment facilitation.

- Creating obligations for home states, including agreeing on the application (hard or soft) of CSR/RBC frameworks that are commonly implemented.
- Exchanging information on best practices among countries. IPAs and other government entities of different countries can learn from each other on successful practices, such as:³²⁵
 - tools to facilitate investments (one-stop shops, business registration systems, aftercare services);
 - policies to improve investment (rules on transparency, anti-corruption practices, good governance mechanisms); and
- processes to make tools and policies useful (dialogues; interagency coordination).
- Coordinating capacity building and technical support for developing economies with respect to their investment facilitation efforts.³²⁶

For all these points, it remains important for governments to consider, to the extent that regional or international efforts on investment facilitation are pursued, if investment facilitation should be achieved through collaborative, best-endeavour approaches, or through binding commitments.

5.2 Policy Recommendations for Actions at the National Level of RCEP and AIFC Signatory Countries

All RCEP and AIFC signatory countries have a national legal and policy framework on investment facilitation. The varied approaches taken by these countries reveal a broad range of policies and practices (see Section 2). As a result, one should exercise a healthy degree of caution when making recommendations or suggesting “best practices” insofar as each country’s landscape of investment facilitation is different and there is no one-size-fits-all.

It is with this in mind that the following policy recommendations are stated. They are not country-specific but general. They build, to a certain extent, on the gaps that have been

identified in the frameworks of the AIFC and RCEP and include a number of other best practices of investment facilitation measures for sustainable development for possible adoption at the national level by both host and home states.

FDI Host Country Measures

Investment facilitation, especially at the host state level, is something that all states do. AIFC and RCEP countries are no exception. At the same time, there is evidence that developing countries around the world have fewer investment facilitation measures in

³²⁵ OECD, Ana Novik and Alexandre de Crombrughe, “Towards an International Framework for Investment Facilitation” (April 2018); Brauch et al. (2019); N. Jansen Calamita, “Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value”, 23 *Journal of International Economic Law* 973 (2020); Brooke Skartvedt Güven, “Investment Promotion and Facilitation for Sustainable Development”, Columbia Centre for Sustainable Investment (2020).

³²⁶ See generally N. Jansen Calamita, “Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value”, 23 *Journal of International Economic Law* 973 (2020).

place compared to developed countries.³²⁷ The AMS and their RCEP partners are composed of developed, developing and least-developed countries. Their national investment facilitation frameworks differ in degrees of comprehensiveness and implementation. This, in turn, means that there is often a variable need for improvements or reform of the investment facilitation measures in these countries.

Sustainable development and, in particular, the SDGs add new imperatives and require changes in the design of investment facilitation efforts.³²⁸ Such efforts need to focus on the qualitative contribution of FDI to “sustainable economic growth in host countries that is socially just as well as environmentally friendly, and enhances governance capacities of host countries”.³²⁹ More concretely, host states’ investment

facilitation measures for sustainable FDI can be composed of four priority areas:³³⁰

- Specific facilitation of SDG-related investments;
- Preparation of SDG-related project pipelines;
- Priority treatment by local IPAs in the establishment process of SDG-related investments; and
- Aftercare services post-establishment for SDG-related investments.

It is not enough, however, for countries to adopt laws and policies addressed to the capture of SDG-related investments. Transparency concerning those measures (such as market entry conditions and incentive schemes) is crucial. The following table seeks to highlight points on which transparency as to the facilitation framework for SDG-related investments is especially important:

TABLE 9
FDI Host Country Transparency Requirements for SDG-related National Laws and Policies

Investment incentives of host countries related to SDGs	<ul style="list-style-type: none"> • Incentives applicable to SDG-related projects • Conditioning incentives to certain SDG-related investor performances • Special economic zones (SEZs) focusing on SDGs
Rules regarding entry and admission of foreign investment	<ul style="list-style-type: none"> • SDG-related approval requirements for investment • Full or partial entry in SDG-relevant sectors • National security FDI screening mechanism covering SDG sectors

FDI Home Country Measures

The facilitation of sustainable investments is not only a matter for host countries. Home states also have an important role to play. Within the ASEAN and RCEP region, outward SDG-related investments can be supported

through different measures that home countries can take and implement in their jurisdictions.

Home state support (and incentives) has the potential to encourage investors to engage in “commercially viable investment that makes a

³²⁷ German Institute for Development, “Investment Facilitation Index/Investment Facilitation for Development: A New Route to Global Investment Governance” (2019).

³²⁸ See Section 1.

³²⁹ German Institute for Development, “Investment Facilitation Index/Investment Facilitation for Development: A New Route to Global Investment Governance” (2019).

³³⁰ See UNCTAD, “Promoting Investments for Sustainable Development” (2021), Table 5.

maximum contribution to the economic, social and environmental development of host countries and takes place in the context of fair governance mechanisms”.³³¹ On current evidence, there is significant scope to increase the SDG-related contributions made by foreign investments. This is demonstrated by a study of multinational enterprises’ engagement with the SDGs which indicates that companies tend to focus on so-called “avoiding harm” SDG targets whereas their engagement with so-called “doing good”

targets (through infrastructure or commodity projects for instance) remains low.³³² As noted by commentators, “the SDGs that companies engage least with have high degrees of ‘public good’ and ‘doing good’ characteristics”.³³³

Home country measures in support of SDG-related investment can vary widely, ranging from early support services, preferential financial programs, fiscal incentives to political risk insurance and project business development, as illustrated in Table 10 below.

TABLE 10
Toolkit of Home Country Measures³³⁴

Category	Measure	Example
Policy	Legal frameworks	
Early support services	Information	<ul style="list-style-type: none"> • Provision on information on host countries • Provision on information on OFDI • Provision of information on HCMs
	Investment missions	
	Matchmaking services	<ul style="list-style-type: none"> • Connecting with government/business overseas • Maintaining business matchmaking databases • Technical assistance
	Education and training	
	In-depth consultancy and advice	
Financial support	Grants	<ul style="list-style-type: none"> • Pre-investment feasibility studies and research • Establishment of offices overseas • Training and human capital development • Consultancy • Work placement (for training purposes)
	Loans	<ul style="list-style-type: none"> • Concessional loans • Non-concessional loans • Structured financing options • Risk-sharing arrangements
	Financial guarantees	
	Equity participation	
Fiscal support	Tax reduction	<ul style="list-style-type: none"> • Exemptions from corporate income tax • Tax deductions
	Corporate tax rate relief	
	Tax deferrals	
	Tax credits	
	Allowances	
Political risk insurance	Political risk insurance	

³³¹ Rob van Tulder and Jan Anton van Zanten, “MNEs and the Sustainable Development Goals: what do first steps reveal?”, Columbia FDI Perspectives No. 227 (2018) 2.

³³² Ibid.

³³³ Ibid.

³³⁴ UNESCAP, “Outward FDI Policy Toolkit for Maxim Country Sustainable Development” (2021).

Although Table 10 identifies a broad range of investment facilitation measures, it must be noted that such measures do not in and of themselves ensure sustainable investment or investment for sustainable development. Rather, such measures are tools which countries need to link to sustainable development where possible. For instance, in the context of loans for outward investments by home countries: this can include conditioning investment loans on prior environmental and social impact assessments, linking loans to certain SDG-related investor performance, or providing loans exclusively for investments in certain SDG sectors.³³⁵

As noted in Section 4 above, the WTO Easter Text – unlike RCEP or the AIFF – addresses measures to support sustainable investment though the commitment to “encourage investors and enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their business practices and internal policies internationally recognized principles, standards and guidelines of responsible business conduct” (e.g., with respect to labour, environment, gender equality, human rights, community relations and the rights of Indigenous peoples).³³⁶ Other possible home state measures that could be implemented at the national level relate to the transparency and

availability of home country measures to support outward FDI. Language addressing such measures has been discussed in the debates on a WTO instrument, although at present there is no consensus as to whether the final text will address these issues:³³⁷

- Transparency regarding frameworks and operation of home country schemes for investment guarantees and loans for outward investments
- Home and host country laws to require international investors in their territories to make information on their corporate social responsibility (CSR) commitments widely available

In sum, home country measures can be implemented as part of a country’s broader development strategy.³³⁸ Even when adopted by only one home country, measures like these can have wide applicability to many countries and economies. Of course, in order to maximize sustainable developmental outcomes, home country measures need to be tailored to fit the specificities of individual home countries, their national companies, and the nature of their outward FDI flows.³³⁹ Well applied, however, home country measures can contribute to meet a help host countries as well as the home country meet economic, social and sustainable development objectives.

³³⁵ UNCTAD, “Promoting Investments for Sustainable Development” (2021), Table 5. See also Rodrigo Polanco and Azernoosh Bazrafkan, “Investment Promotion and Facilitation for LDCs”, in Manfred Elsig, Michael Hahn, and Gabriele Spilker (eds.), *The Shifting Landscape of Global Trade Governance* (Cambridge University Press 2019) 298.

³³⁶ WTO Easter Text, Art. 30.1. The WTO Easter Text also contains a requirement that “each Member shall ensure that measures are taken to prevent and fight corruption [and money laundering] with respect to matters falling within the scope of this Agreement”. *Ibid.*, Art. 31.1.

³³⁷ WTO Easter Text, Section IV *ter*: “Home State Obligations”, para. 3.

³³⁸ Matthew Stephenson and Jose Ramon Perea, “How to leverage outward FDI for development? A six-step guide for policymakers”, *Columbia FDI Perspectives* No. 242 (2018); Axel Berger and Karl P. Sauvant, “Investment Facilitation for Development: A Toolkit for Policymakers” in Axel Berger and Karl P. Sauvant (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers* (International Trade Centre 2021); Jan Knoerich “Do developing countries benefit from outward FDI?”, *Columbia FDI Perspectives* No. 234 (2018).

³³⁹ UNESCAP, “Outward FDI Policy Toolkit for Maximizing Home Country Sustainable Development” (2021).

5.3 Policy recommendations for support by international organizations

As noted in Section 2, even without the AIFF, RCEP and WTO, countries have not been acting alone in formulating and implementing their policies for investment facilitation.³⁴⁰ Policy guidance has come from international organisations such as UNESCAP (2019),³⁴¹ Asia Pacific Economic Cooperation (APEC) (2008),³⁴² OECD (2015),³⁴³ the G20 (2016),³⁴⁴ the African Union (2016)³⁴⁵ and UNCTAD (2016).³⁴⁶ The range of projects is wide.

In addition to policy guidance, technical assistance and capacity-building have also been provided. For example, since 1999 UNCTAD has undertaken Investment Policy Reviews (IPRs) in more than 50 countries, assisting developing states with bottom-up reforms of the local investment climate.³⁴⁷ Similarly during that period, the OECD has conducted in-depth IPRs for 49 developing and developed states, aimed at assessing the climate for investment at national and

sub-national levels; proposing actions for improving the conditions for investment; and considering the possibility of further reforms.³⁴⁸ Similar projects have been undertaken by the World Bank, the Asian Development Bank, and other international organisations.³⁴⁹

In the specific context of AIFF and RCEP countries, the question thus arises how international organizations can further strengthen regional and national investment facilitation efforts for sustainable development. The following recommendations for international organizations consist of five policy dimensions (see Figure 3). Each of these dimensions illustrate the important role that international organizations can and should play in supporting the facilitation of sustainable FDI in AIFF and RCEP countries. They are discussed individually below.

³⁴⁰ See N. Jansen Calamita, “Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value”, 23 *Journal of International Economic Law* 973, 978-79 (2020).

³⁴¹ See, e.g., UNESCAP, “Regional Seminar on Investment Facilitation on Sustainable Development” (2019).

³⁴² APEC, “Investment Facilitation Action Plan” (2008).

³⁴³ OECD, “Policy Framework for Investment” (2015).

³⁴⁴ G20, “Guiding Principles for Global Investment Policymaking” (2016).

³⁴⁵ African Union, “Draft Pan-African Investment Code” (December 2016).

³⁴⁶ UNCTAD, “Global Action Menu for Investment Facilitation” (2016).

³⁴⁷ See UNCTAD Invest Policy Hub website: “Investment Policy Reviews”.

³⁴⁸ OECD website: “Investment Policy Reviews”.

³⁴⁹ The World Bank provides Advisory Services and Analytics (ASA) to support in part the design and implementation of policies, build capacity, and inform development strategies. ASA outputs include analytical reports, policy notes, impact evaluations, non-lending technical assistance, etc. These projects tend to address more than pure investment facilitation, although aspects of investment facilitation and promotion do fall within them. A list of projects is on the World Bank’s website: “Projects”. In addition, the Bank conducts Systematic Country Diagnostics (SCDs), which assist countries, the Bank and other development partners to focus their efforts around goals and activities that have high impact and are aligned with sustainable development. Like ASA, these projects tend to be broader than pure investment facilitation, although aspects of investment facilitation and promotion are subsumed within them. For FY2020, the World Bank undertook or completed a total of 24 SCDs. For the list, see World Bank website: “Country Engagement”. Similar projects are undertaken by the Inter-American Development Bank (IADB) and the Asian Development Bank (ADB). See IADB website: “Technical Cooperation”; see ADB, “Promoting Investments and Economic Growth in Central and West Asia, East Asia, and South Asia Subregions: Technical Assistance Report”.

FIGURE 3
Five Dimensions of Policy Support from International Organizations



Action Plan on Sustainable Investment Facilitation

As noted in Section 3, neither the AIFF nor RCEP make any linkages between investment facilitation and sustainable development or sustainable FDI.³⁵⁰ Instead, both appear to proceed from the assumption that the facilitation of investment is an end in itself. In other words, while both the AIFF and RCEP are similar with respect to the underlying principles of investment facilitation generally (transparency, predictability and efficiency), more should be done to better define the ultimate goals of investment facilitation, e.g., sustainable development, achievement of the SDGs, and implementation of CSR/RBC. Moreover, beyond clear policy goals, concrete

measures specifically addressed to increasing the sustainable development contribution of FDI are required. It is here that international organizations can play a role assisting AMS and their RCEP partners in navigating legislative and regulatory action to promote and facilitate sustainable FDI. An “Action Plan” or “Action Menu” could be established that provides guidance through a step-by-step approach with concrete tools, policies and processes that all integrate sustainable development concerns, and consequently facilitate sustainable FDI.³⁵¹ In this connection, UNESCAP’s 2021 “Outward FDI Policy Toolkit for Maximizing Home Country Sustainable Development” provides an outstanding resource and potential model for additional tools.³⁵²

³⁵⁰ See Section 3. RCEP does, however, note sustainable development as a general objective in the FTA’s preamble.

³⁵¹ See e.g., UNCTAD, “Global Action Menu for Investment Facilitation” (2016).

³⁵² UNESCAP, “Outward FDI Policy Toolkit for Maximizing Home Country Sustainable Development” (2021).

Platforms for Exchange

The idea behind platforms for exchange is to establish mechanisms for regional cooperation between AMS and their RCEP partners. Such platforms can:

- Bring together peer officials to exchange information and experiences and assist with the dissemination of experiences with different practices and in addressing common challenges.
- Allow for the exchange of experiences among countries. This can be a valuable source for generating policy ideas and providing peer-to-peer capacity building and technical assistance.

Platforms for exchange can function in a variety of ways, from informal peer-to-peer exchanges to more formal sharing (and collection) of information about specific investment facilitation approaches. Both can be valuable as capacity building tools and international organizations can play an important role in facilitating and supporting each. This can be particularly so where country-to-country exchanges involve stock-taking of reform approaches and establishing inventories of investment facilitation measures.³⁵³ In the context of the AIFF and RCEP, signatory countries could turn to international bodies with expertise in the field to support the establishment of comprehensive inventories of investment facilitation practices in the region and beyond,

especially those which are addressed to sustainable FDI.

Beyond the exchange of experiences and information between countries, international organizations can also facilitate multistakeholder consultations.³⁵⁴ Such consultations can include not only investors and representatives of IPAs, but also other stakeholders from academia and civil society. Regular input from stakeholders is essential for governments to understand facilitation needs across the investment lifecycle, and for facilitation efforts to achieve a real impact for sustainable development. Further, multistakeholder consultations can help identify operational constraints on investment that facilitation mechanisms can address.

Looking at RCEP and the AIFF, it warrants recalling that the AIFF contains commitments by AMS to endeavour to encourage the maintenance of mechanisms for regular consultation with interested stakeholders, including investors and private sector bodies, and to encourage the regular evaluation of investment measures to ensure that the investment environment remains conducive and responsive to evolving business practices and needs.³⁵⁵ In this context, UNESCAP's intergovernmental platform, and specifically its FDI Network, could in principle serve neutral platform not only for promoting peer-to-peer knowledge and experience exchange, but also broader, multistakeholder exchanges.

³⁵³ Such inventories can themselves be seen as “a capacity building tools”. Karl P. Sauvart, Matthew Stephenson, Khalil Hamdani and Yardenne Kagan, “An Inventory of Measures to Facilitate the Flow of Sustainable FDI” in Axel Berger, Karl P. Sauvart (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers* (International Trade Centre, 2022) 175.

³⁵⁴ Cf. N. Jansen Calamita, “Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value”, 23 *Journal of International Economic Law* 973, 986-87 (2020) (addressing the broad role that international organizations can play as convenors of peer-to-peer and other stakeholder exchanges).

³⁵⁵ AIFF, Article 9.

Technical Assistance and Capacity-Building

Technical assistance and capacity-building are perhaps the most important areas in which international organizations can add value. For clarity, technical assistance and capacity-building can be distinguished from one another:

- Technical assistance:
 - Providing countries with the technical expertise needed to implement investment facilitation measures designed to promote sustainable development, e.g., developing single-electronic-window platforms; developing economically sound sustainable investment incentive schemes.
- Capacity-building:
 - Providing government officials with lasting, sustained capacity to address issues arising under investment facilitation initiatives and the ability to share that capacity within government, e.g., sustained training programmes

to operationalise focal points/ombudsperson mechanisms.

There is no overstating the importance of technical assistance and capacity-building from the perspective of developing countries and LDCs. Within the WTO negotiations, for example, the possibility that a WTO instrument might lead to additional technical assistance and capacity-building support has been repeatedly identified as a top-level priority by developing countries and LDCs.³⁵⁶ While it seems unlikely that a WTO instrument will contain hard commitments with respect to funding technical assistance and capacity-building,³⁵⁷ one of the potential benefits of a WTO instrument nonetheless could be the way in which it would encourage countries to coordinate capacity building and technical support initiatives. Thus, for example, Article 29 would require “each donor Member assisting developing country Members and least-developed country Members” to submit annually detailed “information on its assistance and support for capacity building that was disbursed in the preceding 12 months and, where available, that is committed in the next

³⁵⁶ See N. Jansen Calamita, “Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value”, 23 *Journal of International Economic Law* 973, 982-84 (2020) and the sources cited therein: e.g., Government of Cambodia, “Statement on Investment Facilitation Joint Initiative”, Regional Consultation in Preparation for the WTO MC12 (Bangkok, 2–3 December 2019): “[T]he issue of investment facilitation should focus on better understanding needs, developing cooperative structures and providing technical assistance and building capacity. We believe that members, in particular LDC members would benefit [sic] from technical supports and capacity building from specialized international organisations and donors to facilitate investment for sustainable development purpose through informed, innovative and efficient decision-making processes”. See also Communication from Kazakhstan, “Advancing the Integration of Eurasian into the Global Economy through Trade and Investment Facilitation for Development – Astana Statement”, WT/GC/194 (1 October 2018), para 1.7 (noting the view within the Friends of Investment Facilitation for Development that a WTO Framework would “serve as a catalyst for mobilising the technical assistance and capacity building required by developing countries...”); Communication from Nigeria, “Deepening Africa’s Integration in the Global Economy Through Trade and Investment Facilitation for Development—Abuja Statement”, WT/MIN/(17)/4, WT/GC/186 (5 November 2017), para 1.6 (noting the view among members that a WTO Framework would be of benefit where it would “enable[e] developing and least-developing countries to increase their participation in global investment flows, including by mobilizing the resources needed to address their technical and capacity constraints”).

³⁵⁷ At present, the consensus text in the WTO negotiations provides that “[d]onor Members agree to facilitate the provision of technical assistance and support for Members on mutually agreed terms, either bilaterally or through the appropriate international organizations”. Easter Text, Art. 28.1. See also Easter Text, Art. 25.2: “Assistance and support for capacity building should be provided to help developing and least-developed country Members implement the provisions of this Agreement, in accordance with their nature and scope”. Notably, notwithstanding these articles, there are no provisions with respect to concrete resource commitments by donor countries.

12 months”.³⁵⁸ Furthermore, the current WTO text would also “invite relevant international and regional organizations” to provide information with respect to their assistance and capacity building activities.³⁵⁹ It would also make expressly clear that the “WTO may collaborate with other international organizations...to comprehensively study and evaluate the needs for investment facilitation of developing Members, especially the least-developed country Members, and at the request of these Members, provide assistance and support for capacity building programs that are commensurate with their development levels and economic objectives”.³⁶⁰

Beyond the WTO initiative, RCEP also addresses the need for technical assistance and capacity building, although not to the same degree of detail. Thus, RCEP contains provisions setting out a work programme on potential future economic and technical cooperation activities, and noting particularly the importance of providing “capacity building and technical assistance to developing country Parties and Least Developed Country Parties”.³⁶¹

Considering the regular regional seminars and capacity building workshops that UNESCAP is already providing to countries in the Asia-Pacific, including the developing and least-developed RCEP countries, it seems likely that in the event that a WTO instrument is adopted or the RCEP work programme develops with respect to capacity building and other assistance, UNESCAP will continue

to have an important role to play in the providing assistance throughout the region.

Country-specific Needs Assessments

Before technical assistance and capacity building efforts are coordinated or provided, it is important to assess a country’s individual investment facilitation capabilities and needs. The AIFF and RCEP countries, for example, represent a diverse grouping of economies, social units, and political systems. Clearly one size almost never fit all. Consequently, country-specific needs assessments are critical to determine the kind of technical assistance and capacity building support that may be appropriate for a specific country.³⁶² Not only do such needs assessments increase the likelihood that assistance will have a positive effect, but it can also help to focus limited assistance resources to the areas most in need. Further, in the context of a possible WTO instrument, developing and least-developed countries will be expected to self-designate in connection with the provisions on special and different treatment. Under one formulation of the WTO negotiating text, which does not presently represent a consensus, such “self-designations shall be guided by the self-assessment of compliance levels and implementation needs of developing and least-developed country Members”.³⁶³ Moreover, under this formulation, it is anticipated that developing and least-developed countries will need external assistance when undertaking these self-assessments.³⁶⁴

³⁵⁸ Easter Text, Art. 29.1. Although not legally binding and not nearly as detailed, the AIFF also contains commitments by AMS to endeavour to facilitate communication and cooperation with other AMS on matters relating to investment facilitation, including through the exchange of information on, among other things, technical assistance and capacity building. AIFF, Article 10.

³⁵⁹ Easter Text, Art. 29.5.

³⁶⁰ Easter Text, Art. 29.6.

³⁶¹ RCEP, Article 15.5(2).

³⁶² Karl P. Sauvart, Matthew Stephenson, Khalil Hamdani and Yardenne Kagan, “An Inventory of Measures to Facilitate the Flow of Sustainable FDI” in Axel Berger, Karl P. Sauvart (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers* (International Trade Centre, 2022) 137.

³⁶³ Easter Text, Art. 26.2.

³⁶⁴ Easter Text, Art. 26.3.

In carrying out these kinds of assessments, international organizations, such as UNESCAP, have a role to play in supporting countries by, for example, helping countries to conduct assessments of the implementation of current investment facilitation measures in their countries in order to identify, tailor and prioritize either the implementation of additional measures or support for the implementation and functioning of existing policies.

Local Supplier Databases

The general business environment of the host country is a key consideration in a foreign firm's decision to invest. The presence of qualified domestic firms that can supply foreign investors with needed inputs, for example, can serve to make a host country a more attractive FDI destination. As a result, the establishment and maintenance of local supplier databases has come to be seen as a promising tool of investment facilitation by proving foreign investors a resource to easily ascertain the existence of local businesses active in fields ranging from legal services to transportation. In terms of sustainable development, supplier databases are particularly promising insofar as they facilitate the creation of linkages between foreign and domestic firms (an essential part of SDGs). Indeed, depending upon the level of detail and sophistication, supplier data bases can include information specifically relevant to the sustainability dimension of local businesses (e.g., the share of women employed or in managerial positions, training provided for employees, carbon offset activities, etc.).

Under the AIFF, AMS endeavour to assist investors in identifying investment supporting

factors such as labour force, funding sources, domestic suppliers and business matchmaking opportunities in the host country.³⁶⁵ In addition, in the WTO negotiating text, there is an as yet non-consensus proposal to encourage member countries “to implement supplier-development programmes with the aim to strengthen the capabilities and competitiveness of local companies in light of FDI local sourcing demands and standards”.³⁶⁶ As with the initiative discussed above, international organisations with technical expertise, experience and resources would seem well-placed to assist countries with establishing and maintaining these kinds of databases.³⁶⁷

Consultation Mechanisms

A final area in which international organisations might play a constructive role facilitating investment for sustainable development is through the provision of services to support or supplement the initiatives of individual countries with respect, for example, to investor aftercare. Examples of this kind of service on a regional basis can already be found in the European Union and ASEAN. Initiatives like this function in many ways like the ombudspersons mechanisms established by in individual countries (see Section 2).

In Europe, the European Commission operates “SOLVIT”, which is a mainly online platform for EU citizens and businesses to submit informal claims that their rights have been breached by the public authorities in another EU country.³⁶⁸ Although the actual SOLVIT services are provided by the national SOLVIT administration in each EU country, the European Commission's centralised SOLVIT platform assists the national authorities

³⁶⁵ AIFF, Article 8.

³⁶⁶ Easter Text, Section IV *bis*: “Supplier-Development Programmes”, Art. 1.

³⁶⁷ See WEF website: “5 Ways the WTO can make investment easier and boost sustainable development”.

³⁶⁸ See European Commission, SOLVIT website: “What is SOLVIT?”

by centralising reports of claims and acting as a clearinghouse to direct those claims through the proper channels. SOLVIT aims to find solutions within 10 weeks from the day on which a case is taken on by the SOLVIT centre in the country where the problem occurred. According to SOLVIT, in the twenty years of SOLVIT's operation, 85% of 28,600 cases for EU citizens and businesses were solved.³⁶⁹

The “ASEAN Solutions for Investments, Services and Trade (ASSIST)” mechanism functions similarly to SOLVIT, on which it is loosely based,³⁷⁰ providing a non-binding and consultative mechanism for the solution of operational problems encountered by ASEAN Enterprises on cross-border issues related to the implementation of the ASEAN Trade in Goods Agreement and also Trade in Services within the ASEAN Economic Community.³⁷¹ Like SOLVIT, ASSIST functions as a process

for directing claims to the proper authorities in the country where the problem occurred. Complaints are filed online, and the process is free of charge. The timeframe for resolution of the ASSIST process is set at 40-60 days, at which point the problem will have been successfully resolved or the complaining party may seek other, more formal recourse.³⁷² Unfortunately, unlike SOLVIT, it does not appear that ASEAN provides a public accounting of the success rate of the ASSIST mechanism.

Given the examples of the mechanisms provided on the EU and ASEAN level, as well as the examples ombudspersons and the like found on the national level, it may be considered whether a similar mechanism might be in the context of RCEP to facilitate the resolution of cross-border grievances related to investment, if not specifically investment for sustainable development.

³⁶⁹ European Commission, “SOLVIT's Helping Hand in the Single Market: celebrating 20 years” (2022), 11.

³⁷⁰ Indeed, ASSIST is supported and funded by the European Union through its ARISE Plus Programme (ASEAN Regional Integration Support by the EU). See ASSIST website.

³⁷¹ See ASSIST website: “What is ASSIST?” When fully operationalized, ASSIST is also intended to allow for the submission of complaints regarding problems occurring in relation to Trade-Related Investment Measures. See ASSIST website: “Welcome to Assist”.

³⁷² See ASSIST website: “Process & Tutorials”.

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