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The WTO Facilitation Framework without Africa

Unpacking the Conundrum

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14.1 Introduction

In recent years, we began to witness South–South international investment agreements (IIAs) too. Overall, the IIAs and preferential trade agreements (PTAs) that have investment chapters are estimated to be sitting at 3,300.[1] Most developing countries and least developed countries (LDCs) concluded IIAs with the understanding of attracting investment that every nation so desperately desires while developed nations used them as a shield against uncompensated and/or illegal expropriations by the host. Nevertheless, the IIAs did not lure investors to invest in countries that concluded them; rather, some developing countries and largely LDCs were unable to attract investments.[2] Instead of attracting investment, IIAs became a tool for preventing governments from legislating in the public interest, and this affected all nations – whether developed, developing, or LDCs.[3] The International Centre for

[1] UNCTAD, 'International Investment Agreements Navigator', online at: https://investmentpolicy.unctad.org/international-investment-agreements (last accessed 13 June 2023).

[2] M. Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit – And They Could Bite', Policy Research Working Paper Series 3121, The World Bank, September 2003, online at: https://ideas.repec.org/p/wbk/wbrwps/3121.html (last accessed 13 June 2023); A. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 640–688. In fact, Brazil is a good example that IIAs are not the only tool for increasing FDI because the Southern American giant attracts tremendous amounts of FDI yet the country had no single IIA until its recent investment facilitation and cooperation agreements.

[3] C. Titi, *The Right to Regulate in International Investment Law* (London: Hart Publishing, 2014);F. Morosini and M. R. Sanchez Badin (eds.), *Reconceptualizing International Investment Law from the Global South* (Cambridge: Cambridge University Press, 2017).

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Settlement of Investment Disputes (ICSID) tribunals enforced the IIAs with vigor and handed down hefty awards against recalcitrant governments yet with no mechanism to appeal the tribunals' ruling, even if such rulings are incorrect.

The IIAs became very attractive to senders of capital such that during the negotiations in the first ministerial council's conference post the establishment of the World Trade Organization (WTO) held in Singapore in 1996, mostly developed nations, particularly the European Union (EU) and Japan, wanted investment on the agenda. One will remember that the Trade-Related Investment Measures (TRIMs) Agreement only deals with aspects of investment that affect trade because the WTO is established as a trade body; therefore, a wholesome investment agreement dealing with market access, standards of protection, and investor–state dispute settlement (ISDS) could not be negotiated under the WTO framework. As indicated before, investments (and other issues) that were introduced in Singapore, which mostly developing countries felt that were not in their interest, were taken off the Agenda since the August 1, 2004 Decision.[4]

The scrapping of investment from the WTO Agenda occurred against the backdrop of governments experiencing harsh consequences of the IIAs. Thus, with governments' inability to regulate in the public interest coupled with hefty awards against host governments, many states, developing and developed, started to reflect on the IIAs framework. Some withdrew from the ICSID Convention and/or its Additional Facility,[5] while others renegotiated their IIA's commitments and/or revised their model BIT.[6] Yet others sought to find alternatives to the IIA regime altogether.[7] Specifically with the latter, Brazil is at the forefront of advancing investment facilitation and cooperation agreements, which focus more on cooperation than on adversarial provisions in the IIAs while limiting the scope of protection normally found in the IIAs.

[4] World Trade Organization (WTO), 'Doha Work Programme Decision Adopted by the General Council on 1 August 2004' (known as July Package), WT/L/579, 02 August 2004, para (g), online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=42383,81935&CurrentCatalogueIdIndex=1&FullTextSearch= (last accessed 13 June 2023).

[5] Most South American countries such as Bolivia, Venezuela, and Ecuador.

[6] United States renegotiating NAFTA to United States–Mexico–Canada Agreement (USMCA); India Model BIT of 2015; United States Model BIT of 2012.

[7] Brazil is the case in point with its Cooperation and Facilitation Investment Agreements with most African and Latin American countries.

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Brazil took its quest to expand its investment facilitation framework to the WTO. Specifically, in December 2017 at the 11th WTO Ministerial Conference held in Buenos Aires, the group of countries – Friends of Investment Facilitation for Development (FIFD) – sought to have, as part of the outcome of the 11th Ministerial Conference, a proposal to start negotiations towards an agreement on investment facilitation. Accordingly, the forty-three members issued a joint statement on investment facilitation for development (IFD), highlighting a need for structured discussion on the subject.[8] Furthermore, the statement indicated that IFD Agreement would not deal with contentious issues such as market access, standards of protection, and ISDS. Rather, it emphasized, as central to IFD, the following themes: transparency and predictability of investment measures; streamlining administrative procedures and requirements; enhancing international cooperation including exchange of best practices and relations with relevant stakeholders; and dispute prevention.[9] The statement added that the right to regulate would be central to the IFD.[10] Finally, the statement offered technical assistance to developing countries and LDCs toward the implementation of the multilateral agreement on IFD.[11]

As of October 2019, there were seventy countries associating with IFD.[12] Of those seventy member countries, only five were African countries – Benin, Guinea, Liberia, Nigeria, and Togo.[13] This attracts interest because the IFD is prima facie to the benefit of developing countries and LDCs, and some academics have hailed it a game changer that will benefit African countries.[14] By the time of the 12th Ministerial

[8] The European Union and its member states are counted as one member. WTO, 'Joint Ministerial Statement on Investment Facilitation for Development', WT/MIN(17)/59, 13 December 2017, at para. 4, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240870 (last accessed 13 June 2023).

[9] Ibid.

[10] Ibid., at para. 7.

[11] Ibid., at para. 6.

[12] The European Union and its member states are counted as one member. E. Gabor, 'Keeping Development in a Multilateral Agreement on Investment Facilitation for Development' (2021) 22 *Journal of World Investment and Trade* 41–91.

[13] WTO, 'Joint Ministerial Statement on Investment Facilitation for Development', WT/MIN(17)/59.

[14] M. M. Mbengu, 'Facilitating Investment for Sustainable Development: It Matters for Africa', Columbia FDI Perspectives, Perspectives on Topical Foreign Direct Investment Issues No.222, 26 March 2018, at 2, online at: www.econstor.eu/bitstream/10419/254056/1/fdi-perspectives-no222.pdf (last accessed 13 June 2023); K. P. Sauvant and K. Hamdani, 'An International Support Programme for Sustainable Investment Facilitation',

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Conference, there were ninety-eight countries, with African countries' representation increasing to nineteen with the additional participation of the following countries: Burundi, Cabo Verde, Central African Republic, Chad, Congo, Djibouti, Gabon, The Gambia, Guinea-Bissau, Mauritania, Seychelles, Sierra Leone, Zambia, and Zimbabwe.[15] The latest accessible membership list as of November 2021 stands at 110, and the African countries' representation increased from nineteen to twenty-two with the addition of Mauritius, Morocco, and Uganda.[16] Looking at the geographic location of African membership to the IFD, the countries are mostly from West Africa, and this does not come as a surprise because Nigeria is at the forefront of IFD discussion. As evidenced by its robust involvement in the IFD, Ambassador Chiedu Osakwe of Nigeria held a press conference on December 11, 2017, announcing that forty-two members, counting the EU and its members states as one member, would begin 'structured discussions with the aim of developing a multilateral framework on investment facilitation,' including on improving transparency, streamlining administrative procedures, and facilitating FDI.

Notable also about the membership of IFD Agreement is that the United States, South Africa, and India are not parties to it; in fact, India issued a statement to the effect that the WTO is not a proper forum for investment.[17] The other salient feature of the membership to the FIFD Group is that developing countries, largely emerging markets that have now become senders of capital, are leading the IFD agenda, while developed nations are just rallying behind with a notable exception of the EU, which has become more involved in the negotiations and starting to incorporate some IFD principles in its own agreements with

E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015.

15 WTO, 'Joint Ministerial Statement on Investment Facilitation for Development', WT/L/1072, 5 November 2019, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=278828,259087,258531,240870,240817&CurrentCatalogueIdIndex=2&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last accessed 13 June 2023).

16 WTO, 'More than Two-Thirds of WTO Membership Now Part of Investment Facilitation Negotiations', 30 November 2021, online at: www.wto.org/english/news_e/news21_e/infac_01dec21_e.htm (last accessed 13 June 2023).

17 WTO, 'Statement by H.E. Mr Suresh Prabhakar PRABHU, Union Minister for Commerce and Industry of India', Ministerial Conference Eleventh Session, WT/MIN(17)/ST/9, 10–13 December 2017, at 2, online at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/ST9.pdf&Open=True (last accessed 13 June 2023).

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third parties such as EU–Angola.[18] Examples of the emerging countries are Brazil, Argentina, China, and Russia. These countries have more at stake than meets the eye; they are not interested in the upliftment of African countries but want to facilitate their own investments in Africa. Brazil is concluding agreements similar to the IFD after being one of the few countries without IIAs. This is so because Brazil has become a sender of capital and seeks to protect its investors abroad while sensitive to the constitutions of other countries abroad.[19] It is for this reason – facilitating investment for Brazilian corporations while protecting their interests – that the cooperation and facilitation investment agreements (ACFIs) were signed with countries that are main recipients of Brazilian FDI.[20] Russia is another rent seeker in Africa.[21] For China, Singh notes,

> In 2016, the combined value of China's outbound mergers and acquisitions (M&As) reached $160 billion. However, some high-profile cross-border M&As deals by Chinese enterprises (both state and privately-owned) have come under increased scrutiny around the world. As Chinese enterprises may face tougher regulatory and political hurdles in pursuing M&As deals, particularly in high technology, infrastructure and strategic sectors, China is getting increasingly concerned with the potential roadblocks to its outward investments. Therefore, investment facilitation and investment protection measures have now become important components of China's new "going out" strategy consisting of outward FDI, financing large-scale infrastructure investments through public and private investments, concessional loans, development aid, and insurance to investors.[22]

Although the negotiations on IFD started way back in 2017, the text was never released to the public until the end of 2021 when the text was

[18] See Chapter 12 in this book.

[19] F. Morosini and M. R. Sanchez Badin, 'The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?', International Institute for Sustainable Development (IISD), Investment Treaty News, Issue 3. Volume 6, August 2015, online at: www.iisd.org/sites/default/files/publications/iisd-itn-august-2015-english.pdf (last accessed 13 June 2023).

[20] Ibid., at 4.

[21] C. Clifford, 'The Bear Is Back: Russian Re-engagement with Africa Is Picking up with Putin in the Driving Seat', SAIIA Daily Maverick, 8 July 2021, online at: https://saiia.org.za/research/the-bear-is-back-russian-re-engagement-with-africa-is-picking-up-with-putin-in-the-driving-seat/ (last accessed 13 June 2023).

[22] K. Singh, *Do We Need a Multilateral Instrument on Investment Facilitation?* (Delhi: Madhyam, 2017), at 7–8, online at: www.madhyam.org.in/wp-content/uploads/2017/05/Briefing-Paper-on-MIIF.pdf (last accessed 13 June 2023).

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leaked on the Internet. Until this time, any academic discussions about fears and potential benefits of this Agreement were done in a speculative manner, as there was no concrete text to base debates on. However, speculations seem not to be too far off from the leaked text of the Agreement as it shall be revealed here.

With this background in mind, this work seeks to interrogate investment facilitation for development with the objective to understand Africa's skepticism against the Agreement, which aims at increasing FDI that will bring development in their respective economies. In so doing, the work will also discuss the consequences of African countries' nonparticipation to the IFD Agreement. Ironically, there are clauses on investment cooperation or regulatory cooperation in African PTAs/IIAs, yet many of African countries are not participating in the WTO debate on IFD. In addition, South Africa being vocal against IFD has ironically developed nonbinding frameworks for investment facilitation with Brazil, Russia, India, and China, yet rejecting IFD,[23] and incorporated IFD principles in its Protection of Investment Act. Perhaps this contribution will explain this conundrum.

14.2 Understanding Investment Facilitation for Development and the Potential Impact on the African Economies

In respect of the themes that the IFD Agreement seeks to cover, it will include the following themes: transparency of investment measures; streamlining and speeding up administrative procedures and requirements; enhancing international cooperation; home state obligations; sustainable investment; and dispute settlement.[24] Although the Group supporting IFD initially emphasized the right to regulate, home country measures and dispute prevention, as being central to the initiative,[25] seem to have lost prominence in the leaked Draft Agreement. The omission of the emphasis on the states' right to regulate is lamentable, especially because critics of IFD, including the Africa Group, fear that an IFD Agreement would restrict their policy space and ability to regulate

[23] K. Singh, 'Investment Facilitation: Another Fad in The Offing?', Columbia Center on Sustainable Investment, Perspectives on topical foreign direct investment issues, No. 232, 13 August 2018, online at: https://academiccommons.columbia.edu/doi/10.7916/D80G52Z4 (last accessed 13 June 2023).

[24] WTO, 'Joint Ministerial Statement on Investment Facilitation for Development', WT/MIN(17)/59.

[25] Ibid., at para. 7.

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investment entering their markets. Finally, the statement and hence the Draft Agreement offer technical assistance to developing countries and LDCs toward the implementation of the multilateral agreement on IFD. This section will discuss these themes with a view to determine the potential impact of the IFD Agreement on the African countries. Interestingly, many of the themes in the Draft Agreement resemble the principles that the Organisation for Economic Co-operation and Development (OECD) subscribes to, and these include transparency, consultation, impact assessments, and maximization of benefits.[26] Indeed, discussions on Investment Facilitation were conducted at the OECD before they reached the WTO's agenda.

14.2.1 Scope of the Investment Facilitation for Development Agreement

FIFD, in their joint statement, gave a negative list of issues that would not form part of the multilateral agreement on IFD, and those were market access including decision by competent authorities on whether or not to admit investment, investment protection, and ISDS. These exclusions were indeed omitted from the July 23, 2021 Revised Easter Text,[27] which then gives assurances to those members that feared sneaking market access through the back door. The Agreement will not apply to the existing or future IIAs; as such, IIAs will not be used to interpret the IFD Agreement, and vice versa.[28]

There, however, seems to be a discord with regard to market access as it relates to the decision by the competent Authority on whether or not to admit investment. While this is excluded from the scope of the IFD Agreement, it seems to be brought through the back door because of the following:

– Definition of investor: It includes a would-be investor by reference to a person or entity that "attempts to make" an FDI in the territory of

[26] L. Ghiotto, 'A Critical Review of the Debate on Investment Facilitation', Investment Treaty News, 17 October 2018, online at: www.iisd.org/itn/2018/10/17/a-critical-review-of-debate-investment-facilitation-luciana-ghiotto/#_ftn1 (last accessed 13 June 2023).

[27] Revised Easter Text, Article 2, especially Article 2.1.2.

[28] WTO, 'WTO Structured Discussions on Investment Facilitation for Development: Consolidated Document by the Coordinator – Easter Text – Revision', INF/IFD/RD/74/Rev.1, 23 July 2021, at Article 4, online at: www.bilaterals.org/IMG/pdf/wto_plurilateral_investment_facilitation_draft_consolidated_revised_easter_text-2.pdf (last accessed 13 June 2023).

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another member.[29] The person who is attempting to make investment will undoubtedly be dealing with admission challenges. One can therefore conclude that it is not true that this Agreement will not deal with market access as long as investor includes a person who is attempting to make investment in the territory of another member state.

– General principles of authorization: This obligates members to ensure that authorization measures it adopts or maintains do not unduly delay establishment.[30] Furthermore, any such authorization procedures should be based on objective and transparent criteria[31] and provide reasons, in writing, when an application is rejected.[32] One cannot think of a better way to secure market access than by requiring members to publicize criteria for admission (authorization of application) and where the applicant is unsuccessful, to be furnished with reasons in writing, which can be subject to review or appeal.[33] Whereas these obligations may seem just, investment is different from trade to the extent that the former allows for establishment of a foreign entity within the borders of the host state. Despite the quest for inward FDI for developing countries, especially African countries, not every investor is desirable, even though a sector may have been opened. The origin of investor is crucial, as some investors may threaten national security.[34] Therefore, states need to play their cards very closely in as far as inward FDI is concerned. We have recently seen how countries reacted toward Chinese investments.[35]

When the IFD Group first shared the themes that IFD would cover, there was caution from some scholars that IFD should focus on transparency in the administrative requirements for investors who are already

[29] Ibid., at Article 2*bis*.
[30] Ibid., at Article 13.1.
[31] Ibid., at Article 13.2.
[32] Ibid., at Article 14.
[33] Ibid., at Article 19.
[34] L. Parsons, ‘Furious China Accuses Australia of “Weaponising National Security” by Blocking a $300 million Takeover of a Major Building Company’, *The Daily Mail*, 13 January 2021, online at: www.dailymail.co.uk/news/article-9139979/China-accuses-Australia-weaponising-national-security-blocking-300million-takeover.html (last accessed 13 June 2023); E. Braw, ‘Chinese Acquisitions of Western Firms Threaten National Security’, *Foreign Policy Magazine*, 24 August 2020, https://foreignpolicy.com/2020/08/24/chinese-acquisitions-of-western-firms-threaten-national-security/ (last accessed 13 June 2023).
[35] Ibid.

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established in the host state, instead of creating certain expectations and obligations for host states regarding entry.[36] However, the Text has done the opposite – expectations are created for would-be investors. This can only be seen as facilitating market access. The Agreement does not only limit itself to administrative issues but also to investment measures, a term that is very broad and far-reaching.

14.2.2 *Transparency of Investment Measures and Cooperation*

Before delving into the discussion on transparency of investment measures, we first need to understand the term "investment measures". Investment measures refer to a set of requirements, conditions, and processes expressed in law, policies, or administrative actions, which are often imposed on the foreign investors/investments, upon entry, operation, or exit. On a procedural level, there is typically a long, complex, and expensive process for getting authorizations from the authorities in a host government, and this frustrates the flow of FDI. On a substantive level, the most typical investment measures are local content requirements, transfer of skills, export restrictions, and others. The adverse nature of these conditions attracted the attention of the GATT/WTO membership such that members adopted TRIMs to govern the imposition of these measures because of their restrictions to free trade. Specifically, the TRIMs Agreement prohibits imposition of local content requirements that violate Article III of the GATT (nondiscrimination) and quantitative restrictions that violate Article XI of the GATT. It follows that the FIFD refers to the transparency in the application of investment measures that are not prohibited by TRIMs such as skills transfer, technology transfer, hiring of local staff, and others. Ordinarily, these investment measures are often quite transparent, especially for the developing countries who are always clear that they expect investors to transfer skills and technology while creating employment. As an example, South Africa imposes investors to have equitable representation of black people in the staff complement, beneficiation, skills development, and others as contained in the Employment Equity Act, Mining Charter, and several other pieces of legislation. Predictably, investors seldom transfer skills and technology because foreign firms use local staff

[36] A. Ghouri, 'What Next for International Investment Law and Policy? A Review of the UNCTAD Global Action Menu for Investment Facilitation' (2018) 15 *Manchester Journal of International Economic Law* 197–198.

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for administrative and menial jobs, often arguing lack of skilled labor in the developing countries and LDCs. Nevertheless, the culprits, when it comes to the use of investment measures that are nontransparent, are developed countries. Specifically, developed countries mask investment measures under the umbrella of rules of origin, voluntary export restraints, and antidumping measures. Accordingly, the IFD Agreement will be important to developing countries to the extent that it will require developed nations to be transparent in their use of investment measures.

It is worrying that member states will have to undertake impact assessment of their investment measures when preparing major regulatory measures as required in the Revised Easter Text.[37] This is so because there is plenty of literature discouraging investment measures on economic grounds.[38] Consequently, it is highly likely that any impact assessment undertaken on major investment measures will disqualify such measures. Once this happens, the losers of IFD Agreement will be capital-importing countries – developing countries and LDCs – because they often impose investment measures, which capital-exporting countries view as bad for investment. Meanwhile, investment measures are probably the only strategy through which capital-importing countries can force investment to yield development.[39] As an example, if broad-based black economic empowerment (BBBEE) were to be subjected to impact assessment in South Africa, it would not fly through as studies have proved its negative impact on business competitiveness;[40] meanwhile, BBBEE is probably the only way in which black people can be included in the economy in South Africa, thereby redressing apartheid legacies. In the same manner, Article 17 of the Pan African Investment

[37] WTO, 'WTO Structured Discussions on Investment Facilitation for Development', at Article 22.

[38] T. H. Moran, *The Impact of Trade-Related Investment Measures on Trade and Investment: Theory, Evidence and Policy Implications* (New York: United Nations, 1991), at 32; T. H. Moran, *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition* (Washington, DC: Institute for International Economics, 1998); E. Chalamish, 'The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?' (2009) 34 *Brooklyn Journal of International Law* 303–354.

[39] G. Kelly, 'Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations' (2000) 39 *Columbia Journal Transnational Law* 484–532.

[40] L. P. Krüger, 'The Impact of Black Economic Empowerment (BEE) on South African Businesses: Focusing on Ten Dimensions of Business Performance' (2011) 15 *South African Business Review* 207–233; A. Fauconnier and B. Mathur-Helm, 'Black Economic Empowerment in the South African Mining Industry: A Case Study of Exxaro Limited' (2008) 39 *South African Journal of Business Management* 1–14.

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Codes, which embraces performance requirements, would not see light of the day, if impact assessment were to be undertaken on these measures.

The Easter Text provides obligations for members to publicize their existing laws and other investment measures and to accord other actors an opportunity to make submissions in respect of proposed new laws, administrative decisions, and other investment measures.[41] In addition, members are encouraged to undertake periodic review of their measures to determine if such measures need to be streamlined, revised, or repealed to respond to investment facilitation needs.[42] On a positive note, it seems as though IFD will ensure that existing laws relating to investment measures are made available to the public, and this is a noble objective, given how tedious it can be to look for applicable laws and other measures in some countries. In fact, 10 percent of the investment measures recorded by United Nations Conference on Trade and Development between 2010 and 2017 were about inefficiencies caused by inaccessible and tedious administrative processes.[43]

There is no doubt that the cost of having to find hidden laws, policies, and regulations governing foreign investment can be very high. Often times, the investor has to hire local firms just to get hold of laws and policies relating to investment. In some countries, even the locals do not know the applicable policies and laws governing investments. The result can be even more catastrophic when the investor enters a particular economy and only to be surprised by undesirable measures after entry, which the investor could not have known.

On a suspicious note, we are confronted with a situation where member states have to undertake periodic review of their investment measures and be transparent in adopting new measures by giving foreign actors a platform to make comments/submissions in respect of new measures, which must be considered and not just window-dressing. There is no doubt that members may find themselves coerced, under the guise of technical assistance, into changing their laws (investment measures), as also advanced by some scholars,[44] so that they are

[41] WTO, 'WTO Structured Discussions on Investment Facilitation for Development', at Article 9.

[42] Ibid., at Article 10.1.

[43] K. Hamdani, 'Investment Facilitation at the WTO Is Not Investment Redux', Columbia FDI Perspective No. 226, 21 May 2018, at 1, online at: www.econstor.eu/bitstream/10419/254060/1/fdi-perspectives-no226.pdf (last accessed 13 June 2023).

[44] K. P. Sauvant, 'China Moves the G20 toward an International Investment Framework and Investment Facilitation', in J. Chaisse (ed.), *China's Three-Prong Investment Strategy:*

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conducive and transparent to the investors. This aspect – reviewing and revising national laws/policies on investment measures – goes against the current wave in which national governments want to reclaim policy space to regulate. Consequently, IFD may seem to be worse than IIAs because IIAs never sought to change national frameworks to ensure smooth entry, operation and exit of investors; rather, IIAs were largely used as protection mechanisms.

Furthermore, IFD requires member states to accord foreign actors a platform for comments in the design of investment measures.[45] With this comes the threat of interference by foreign investors and foreign governments. Nevertheless, this may not be as alarming as it sounds;[46] thus, foreign actors and governments make submissions on the proposed laws of another country from time to time without necessarily forcing parliaments to yield to their demands. For example, when the Protection of Investment Bill of South Africa was read in Parliament, stakeholders, including foreign representatives in South Africa, made their submissions expressing their discontent about the Bill, alleging that the Bill would scare the investors away from South Africa.[47] Convinced of the legitimacy of the Bill, the South African Parliament passed the Bill into law, despite the international outcry. On the other hand, the United States' influence on the South African Copyright Amendment Bill has been so huge that the President returned this Bill to Parliament, probably fearing

Bilateral, Regional, and Global Tracks (Oxford: Oxford University Press, 2018), at 311–328.

[45] Ghiotto, 'A Critical Review of the Debate on Investment Facilitation'.

[46] Stakeholders stepped in with the introduction of the idea that they should have an opportunity to comment on new laws, regulations and policies proposed by a state, as well as on future changes of pre-existing regulations. The private sector would have a decisive role in a country's legislation, directly participating in the creation of regulatory frameworks. For example, under the Transatlantic Trade and Investment Partnership (TTIP), this mechanism is included as the notice-and-comment system, which implies that stakeholders can make their own proposals and they must be invited to present their comments on regulations through contact points. The comments of these sectors have to be "taken into account", Ghiotto, 'A Critical Review of the Debate on Investment Facilitation'.

[47] Business Raises the Alarm Over Investment Bill, online at: www.bdlive.co.za/business/2015/02/19/business-raises-the-alarm-over-investment-bill (last accessed 13 June 2023); Reuters Staff, 'South Africa Investment Law Overhaul Sparks Concerns', REUTERS Switzerland Market Report, 4 November 2013, online at: www.reuters.com/article/safrica-investment-idUSL5N0IP1BM20131104 (last accessed 13 June 2023).

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United States's antagonism.[48] While foreign influence is strong on the executive in many countries, it is not so much so on parliaments, which are fortunately the law-making arms of governments. Of course, one cannot completely rule out foreign influence on national parliaments or parliamentary capture by foreign actors, especially in weak democracies, which are common in developing countries and LDCs. Furthermore, international influence in the domestic affairs will always be there; thus, even powerful nations such as the United States have allegedly experienced international influence, especially in the presidential election, which saw President Trump moving into the White House. Therefore, developing countries, especially LDCs, should remain on guard against ruthless lobbying by powerful foreign stakeholders; otherwise, their legislative process might be hijacked.[49]

In light of this discussion, it is not hard to imagine why most African states, and indeed other states, have not warmed up to the IFD yet because many countries have experienced the harsh effects of IIAs. Even developed nations such as United States are skeptical of some FDI, particularly Chinese FDI, and reacted by strengthening regulation and review mechanisms for screening inward FDI.[50] Therefore, to expect states, especially weaker states, to give in to the mechanism that seeks to change national laws in order to relax investment measures, thereby ensuring smooth entry, operation, and exit of investment is a bit too much at this stage.

14.2.3 Streamline and Speeding up Administrative Procedures

It is trite that in many, if not all, countries, an investor has to move from one government department to the other during entry, operation, and exit in order to fulfill the administrative requirements such as licenses and registration of the company. The process is time-consuming and expensive because often investors need to engage local consultants to do this job. It is therefore understandable that the FIFD Group want the IFD

[48] S. Flynn, 'Making Sense of South Africa's New Copyright Bill and US Trade Threats', *The Conversation*, 15 December 2019, online at: https://theconversation.com/making-sense-of-south-africas-new-copyright-bill-and-us-trade-threats-128418 (last accessed 13 June 2023).

[49] Ghouri, 'What Next for International Investment Law and Policy?', at 207.

[50] Sauvant, 'China Moves the G20 toward an International Investment Framework and Investment Facilitation'.

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Agreement to streamline administrative procedures to lower the cost of investment.

The text under this theme seems to focus more on authorization of an investment,[51] and this is not what one would expect under this theme. Under this theme, one would expect to see emphasis on one-stop shops, and indeed many countries have, to date, made efforts to streamline their administrative procedures and requirements through Investment Promotion Agencies.[52] However, to achieve wholesome streamlined administrative procedures is difficult due to different structures of governance among and within countries and outside the remit of IPAs.[53] The complexity of streamlining administrative processes is compounded by the fact that even within one country, different regions have different administrative requirements and processes because different regions deal with different challenges. Nevertheless, the Revised Easter Text rather requires one-stop shops to the extent that it requires member states to avoid subjecting applicants to more than one competent authority in seeking the approval of their investment.[54] This is a fair requirement, and it is beneficial not only to LDCs but also to all countries seeking speedy processing of investment administrative requirements.

Going back to authorization of investments, which is at the heart of streamlining and speeding up administrative processes, the requirement is that members should ensure that their measures do not unduly delay establishment, acquisition, management, operation, expansion, or sale/disposal of the investment.[55] Furthermore, the requirements for authorization must be objective and reasonable. In addition, there must be adequate procedures for applicants to demonstrate whether they meet the requirements.[56] Once an application has been submitted, members must ensure that it is processed without undue delay and that reasons are provided for in the event that the application is rejected.

[51] WTO, 'WTO Structured Discussions on Investment Facilitation for Development', at Section III.

[52] Global Reference Point for FDI, online at: https://waipa.org/members/ (last accessed 13 June 2023).

[53] F. Hees and P. B. da Rocha Paranhos, 'Investment Facilitation: Moving Beyond Investment Promotion', Columbia FDI Perspectives, Perspectives on Topical Foreign Direct Investment Issues No. 228, 18 June 2018, at 2, online at: https://academiccommons.columbia.edu/doi/10.7916/D87D4C1V (last accessed 13 June 2023).

[54] WTO, 'WTO Structured Discussions on Investment Facilitation for Development', at Article 15.

[55] Ibid., at Article 13.1.

[56] Ibid., at Article 13.2.

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As indicated under the theme on transparency, whereas the ideals pursued herein seem noble to the extent that they require transparency in dealing with authorizations and that authorizations must be done within a reasonable time or within specified time lines where these are provided for, this approach will expose states to unwillingly accept certain investors they would not want to admit. Thus, whenever an investor applies and meets the requirements as set out by the member in accordance with such a member's national laws, it appears as though the state will be expected to admit such an investor. Consequently, the obligations on authorization threaten members' sovereignty over who to admit or reject, regardless of meeting the specified authorization requirements. This is a threat to national security. Thus, it is not every investor who is desirable, despite meeting the required entry requirements; as an example, countries view Chinese investors with suspicion, and it would threaten countries' national security if they have to admit such investors simply because they meet the requirements.

14.2.4 International Cooperation and Focal Points

The IFD Agreement binds members to have focal points and share information voluntarily or on request regarding investment opportunities, experiences in respect of implementing the IFD Agreement, promotion of facilitation agendas, creation of information networks, and others.[57]

Currently, there are IPAs in about 130 countries, as per data available at the World Association of Investment Promotion Agency, whose main focus is to foster international cooperation and exchanging best practices. It is particularly for this reason that IPAs formed a global association – World Association of Investment Promotion Agencies (WAIPA), which has an overall objective of "provid[ing] the opportunity for investment promotion agencies (IPAs) to network and exchange best practices in investment promotion".[58] IPAs have done very well in achieving this objective to such a degree that many countries today have focal points and one-stop shops, with the latter providing for most administrative services (usually registration and licensing) under one roof, instead of sending the applicant from one department to another. Therefore, there

[57] Ibid., at Article 24.

[58] WAIPA, 'Why WAIPA', online at: https://waipa.org/why-waipa/ (last accessed 13 June 2023).

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is no need to have this in a legally binding treaty unless the aim is to turn best practices into legally binding obligations. I want to reiterate here that while this formulation works well for trade issues under Trade Facilitation, it is different with investment because any binding obligations can potentially cultivate fertile ground for market access, which many countries are opposed to. Taken cumulatively, the binding language used in the IFD Agreement, starting with mandating formation of the focal point to forcing members to accept investment that meets entry requirements as set out by the member, has potential to facilitate the market access.

14.2.5 *Investment for Development*

While host countries open their markets for investment in hopes of attaining development, investors have not done their part in terms of ensuring that their investments yield developmental goals in the host. To this end, African countries remain poor, despite significant FDI trickling into the continent. As an example, South Africa is in the top three of African countries recipients of FDI;[59] however, South Africa is in the top 10 countries with the highest levels of poverty.[60] Whereas one admits that FDI alone cannot eradicate poverty or result in economic growth if states do not have absorptive capacity,[61] it is worrying that FDI that flows into South Africa is arguably not improving the country's economic situation, thereby not aiding in attaining development if South Africa can be among the top African countries receiving FDI yet also among the top countries with highest levels of poverty.

The reasons for FDI's failure to result into development in the developing world are twofold: (1) There are no obligations on investors that can cause investment to lead to development, and (2) the home state of the investor is not doing much either to ensure that its investors abroad carry out development investing in the home state. The leaked Draft IFD Agreement contains obligations of the home state,[62] albeit

[59] UNCTAD, 'Regional FDI at the Glance: Africa', online at: https://unctad.org/system/files/non-official-document/Regional_FDI_at_a_glance_Africa.pdf (last accessed 13 June 2023).

[60] 'Poverty Rate by Country 2021', online at: https://worldpopulationreview.com/country-rankings/poverty-rate-by-country (last accessed 13 June 2023).

[61] W. Jyun-Yi and H. Chih-Chiang, 'Does Foreign Direct Investment Promote Economic Growth? Evidence from a Threshold Regression Analysis' (2008) 15 *Economics Bulletin* 1–10.

[62] Ibid., at Section IV*Bis*.

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with disappointing nonbinding language; one would have expected binding obligations similar to TRIPs Articles 66(2) and 67, which bind developed member states to provide incentives to enterprises in order to promote technology transfer to LDCs and to provide technical and financial assistance. In addition, the Revised Easter Text contains soft obligations for member states in respect of their investors. To this end, member states shall encourage investors to voluntarily incorporate international standards, principles, and practices on conducting business in a responsible manner.[63] This is a slap on the face for developing countries. It is notable that the Draft Agreement has no concrete steps toward investing to achieve Sustainable Development Goals, yet it is dubbed investment facilitation for development.

Professor Sauvant argues that all investment is potentially sustainable and that it is a matter of discovering and putting in place the appropriate policy and institutional frameworks.[64] Since most countries have liberalized their markets unilaterally in the quest to attract investment, the starting point for IFD to ensure sustainability for development must be on investor obligations. The irony about all FDI initiatives is that they are largely silent or scanty about investor obligations and the role that the home state can play to ensure that investors invest responsibly, and one would have expected the IFD Agreement to embody these commitments. The home state obligations are particularly important especially for investments in developing and least developed nations because often investors have more economic muscle than these countries, and it would take a home state to bring such an investor to book than the host state. The "state capture" revelations in South Africa indicate how the investor can capture the entire executive to the detriment of country's objectives, thereby requiring home states to intervene.

The 17 Sustainable Development Goals (SDGs) are well known, and there is no need to repeat them here. It is not clear how transparency of investment measures, streamlining and speeding up administrative processes, international cooperation, nonbinding home state, and investor obligation can help developing countries or LDCs to achieve the SDGs; thus, it is not clear how streamlining and speeding up administrative

[63] WTO, 'WTO Structured Discussions on Investment Facilitation for Development', at Section V.

[64] Sauvant and Hamdani, 'An International Support Programme for Sustainable Investment Facilitation'.

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procedures account for the reality of what SDGs require from countries.[65]

Nevertheless, it is commendable that the Draft Agreement seeks to uproot corruption, which has ravaged economies in Africa. As an example, the State Capture Enquiries in South Africa show how one investor, the Gupta family, captured the executive and amassed the country's wealth, leaving state entities crumpling with unprecedented levels of debt due to maladministration emanating from corruption.[66] In Lesotho, the country almost lost its assets (water royalties in South Africa and other assets in Mauritius, the United Kingdom, and the United States) as a result of litigation emanating from a German investor who entered into a corrupt agreement to provide solar energy to Lesotho.[67] In Madagascar, the Malagasy government was overthrown after it entered into a corrupt deal with Daewoo, a deal which could have seen Daewoo getting access to 1.3 million hectares intended for growing maize for export.[68]

14.2.6 Technical Assistance

There exists an established practice that whenever a new agreement is concluded, LDCs and developing countries will require technical assistance in order to implement a new treaty. Accordingly, treaties often have a provision for technical assistance, and this therefore does not come as a surprise that the IFD group intends to include technical assistance in the Agreement.

The envisaged technical assistance will help states streamline administrative processes, obtain transparency in investment measures, foster international cooperation, and establish focal points. Interestingly, developing countries adopt transparent investment measures, while developed nations are typically known for their complicated investment

65 Mbengu, 'Facilitating Investment for Sustainable Development.

66 Republic of South Africa, 'Judicial Commission of Inquiry into State Capture Report', online at: www.gov.za/documents/judicial-commission-inquiry-state-capture-report-part-3-viii-1-mar-2022-0000 (last accessed 13 June 2023).

67 Nthakoana Ngatane, 'Lesotho Govt Fights R850m Frazer Solar Order', Eyewitness News, 19 June 2021, online at: https://ewn.co.za/2021/06/19/lesotho-govt-fights-r850m-frazer-solar-order (last accessed 13 June 2023).

68 R. Vellvé and M. Rakotondrainibe, 'The Daewoo-Madagascar Land Grab: Ten Years On', Thomson Reuters Foundation News, 16 November 2018, online at: https://news.trust.org/item/20181116144408-pdi0a (last accessed 13 June 2023).

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measures, which often masquerade as rules of origin. As said earlier, IPAs are already doing a good job in streamlining administrative processes and sharing of best practices, thereby making technical assistance unnecessary.

Nevertheless, it is commendable that the Agreement obligates developed states to provide technical assistance and spelling out the themes that technical assistance must address to make it meaningful. Thus, it is generally known that African countries do not attract as much investment as it would be expected, and even when they do get FDI, it does not seem to have a positive impact as one would expect.[69] In fact, it has been established that FDI does not have an unmitigated positive effect on economic growth.[70] Much of the positive effect of the FDI rests on the absorptive capacities of the host,[71] which many African countries lack. Therefore, there is an apparent need for technical assistance in order for African countries to reap the benefits of FDI. On the other hand, the absorptive capacities needed for countries to have impactful FDI are GDP, volumes of trade, and human capital.[72] This means that technical assistance can only respond to the human capital need, while GDP and volumes of trade cannot be addressed by technical assistance. Accordingly, it seems as if even with technical assistance, challenges of having FDI that leads to economic growth and hence development are yet to remain for African countries even after the IFD Agreement comes into force. This bolsters the conclusion arrived at earlier that without incorporating specific commitments toward the realization of SDGs in this Agreement, it is not clear how the IFD Agreement can lead to FDI for development.

14.2.7 Dispute Settlement

The Agreement contains binding obligations, and it is therefore subject to the dispute settlement processes of the WTO, very much to the contrary of how IFD was canvassed initially. Thus, the IFD Agreement was to feature dispute prevention over dispute settlement, which was a

[69] O. D. Awolusi and O.P. Adeyeye, 'Impact of Foreign Direct Investment on Economic Growth in Africa' (2016) 14 *Problems and Perspectives in Management* 289–297.
[70] E. Borensztein, J. De Gregorio, and J. W Lee, 'How Does Foreign Direct Investment Affect Economic Growth?' (1998) 45 *Journal of International Economics* 115–135.
[71] Jyun-Yi and Chih-Chiang, 'Does Foreign Direct Investment Promote Economic Growth?'.
[72] Ibid.

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selling point, given how debilitating adversarial IIAs were on member states. Currently, the agreed text (Article 31.5) on dispute settlement reads as follows:

> For any disputes concerning the interpretation and application of the provisions this Agreement, Members shall only have recourse to the Understanding on Rules and Procedures Governing the Settlement (DSU) of the WTO.

This undoubtedly means that those provisions of the IFD Agreement that carry a binding force shall be subject to the DSU, and this is likely to bite African countries as they have not been active participants under the DSU.[73]

Under the IFD Agreement, one is expecting to see the following issues as subject of dispute settlement processes under the DSU: challenging investment measures for not being transparent, administrative procedures that are not streamlined and failure to allow affected parties to make submissions in the adoption of investment measures and administrative processes, and failure to adopt best practices facilitating flow of investment. Interestingly, corruption seems to be excluded from the DSU, and given how investors have overreached in the host developing countries as shown earlier in countries such as South Africa, Madagascar, Lesotho, and others, there seems to be dereliction of responsibility on corruption that has wreaked havoc in Africa. These issues that form jurisdiction *rationae materiae* are far-reaching compared to jurisdiction *rationae materiae* under IIAs, which was basically founded on standards of protection. The jurisdiction *rationae materiae* under the IFD Agreement goes to the heart of government regulation and makes investors together with their home countries active players in the domestic affairs of the host country in regulating investment.

14.3 Consequences of Staying Outside IFD for South African and African Countries at Large

The picture I painted earlier is not too attractive about the IFD Agreement. However, the title of the proposed agreement – investment facilitation for development – is so attractive that even though the contents pose a lot more questions than answers and also do not really

[73] M. Forere, 'Revisiting African States Participation in the WTO Dispute Settlement through Intra-Africa RTA Dispute Settlement' (2013) 6 *Law and Development Review* 5155–5179.

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point to development, it is worth considering the consequences of being left out for South Africa and many African countries that are not yet taking part in this discussion.

South Africa has specifically distanced itself from this discussion questioning the suitability of the WTO as a forum for hosting this discussion. Whereas the concern is legitimate, especially because UNCTAD is already dealing with reform of investment agreements, we can no longer divorce trade from investment because the two are inextricably linked. Nevertheless, there are concerns that investment issues are more sensitive than trade issues as they are centered on alien presence and ownership of resources; therefore, they argue that to bundle trade with investment and seek to develop harmonized procedures is difficult.[74] Consequently, the expectation would be that the WTO would focus on trade and leave investment to other institutions that are especially tasked to handling investment issues. Nevertheless, the cost of staying outside the agreement is too high, despite these well-founded concerns.

14.3.1 Rule-Takers

Many African countries are new to international diplomacy and international rule-making because these countries are mostly after around sixty years old into independence postcolonization. By staying outside, South Africa and other African countries that often raise an issue that they never had a chance to negotiate international agreements due to colonization when the agreements were concluded deny themselves an opportunity to shape this agreement. Resultantly, they will remain rule-takers because the truth of the matter is that these countries will eventually accede to the agreement. As small players in the global economy, they cannot sustain their absence. In the unlikely event that these countries remain adamant to stay outside of the agreement, the norms of IFD will eventually apply to them as they become internationalized as it was the case with telecommunications agreement negotiated among developed nations, which although it is plurilateral, it ended up being multilateralized.[75] In fact, given that international standards are minimum standards, it is a given that countries will use the IFD Agreement as a blueprint for their bilateral investment facilitation agreements, as indicated in the case of EU where IFD provisions are already prevalent in

[74] Singh, *Do We Need a Multilateral Instrument on Investment Facilitation?*, at 3.
[75] Ibid., at 5.

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the negotiations with Angola and Eastern and South African (ESA) countries; not to mention Brazil, which is a pioneer of the investment facilitation agreements.

If African countries can participate in the discussion of this proposed agreement, they are many enough (54 countries) to influence the outcome of the debate and ensure that their interests are taken into account. At this point in time, the text of the Investment Protocol to the African Continental Free Trade Area is not yet published, and it is difficult to imagine the intention of African countries on investment facilitation. The Pan-African Investment Codes can provide insights on how to take into consideration the interests of African countries. To this end, the objectives of the Codes include facilitation of investment that foster sustainable development.[76] In order to achieve this objective, the Codes impose rights and obligations to states and investors, unlike the IFD Agreement. Thus, chapter 4 of the Codes embodies the investor's obligations, which include corporate governance, sociopolitical obligations, prohibition of bribery, corporate social responsibility, and obligations on the exploitation of natural resources, as well as business ethics and human rights. In addition, chapter 3 of the Codes provides for the development objectives, which include performance requirements and support for investments that have upstream and downstream linkages, as well as technology transfer. The issues highlighted here from the Codes are not featuring in the IFD Agreement, and these are the issues that African countries should fight for their incorporation in the Agreement.

While it is mostly said that IFD discussions are led by developing countries, these are basically the emerging markets that have become active players in exporting FDI. Accordingly, their interests, which form the agenda of IFD, do not resemble the interests of African developing countries and LDCs, as exemplified earlier with the contents of Codes vis-à-vis IFD Agreement.

It would be prudent therefore to participate now, rather than later and avoid being rule-takers in the twenty-first century.

14.3.2 Bad Signal to Investors

All countries, and African countries in particular, are desperate to attract FDI in order to achieve their developmental goals. Even though the

[76] African Union Commission, Pan African Investment Codes (2016), Article 1.

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discussion in Section 14.2 of this chapter does not necessarily consider the IFD Agreement to potentially result in any development given the scarcity of its provisions, it is not a good signal to investors out there that African countries have stayed away from this discussion, and for South Africa in particular, to openly reject the proposed agreement no matter how legitimate the concerns are.

Whereas international investment agreements, on their own, do not increase FDI inflows.[77] This is so because investors look for things such as market size, participation of the host in the global value chains, and natural resources for extractive industries, they are, however, a very good signal. In fact, international agreements provide for policy certainty, which is key for attracting FDI because there is guarantee that certain minimum standards cannot be changed at the whim of the will of the host. Indeed, UNCTAD also noted the importance of policy certainty as follows:

> In recent months, significant tensions have emerged in global trade, encompassing a number of major economies. The resultant atmosphere of uncertainty could cause [multi-national enterprises] MNEs to cancel or delay investment decisions until the trade and investment climate is more stable. If tariffs come into force, trade and global value chains in the targeted sectors will be affected and so, consequently, would be efficiency-seeking FDI. MNE profitability would be affected in some sectors, further weakening the propensity to invest. MNEs could also be incentivized to relocate production activities to avoid tariffs.[78]

14.4 Conclusion

No doubt investment facilitation for development has taken the international community by storm especially because it is led by developing countries, and in particular Brazil, which is one of the top recipients of FDI. The IFD Agreement is hailed as a game changer for poor developing countries, especially African countries, because it is dubbed as an Agreement that will bring sustainable development through FDI into Africa and other poor countries. However, African countries, other than mostly those in West Africa, have stayed away from the discussions of

77 J. W. Salacuse and N. P. Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harvard International Law Journal* 67–130.

78 UNCTAD, *World Investment Report 2018* (New York: United Nations, 2018), at 12, online at: https://unctad.org/system/files/official-document/wir2018_en.pdf (last accessed 13 June 2023).

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the IFD Agreement, and perhaps this indicates weariness toward solutions that are imposed from abroad. Nevertheless, this contribution examined the text of the leaked IFD Agreement with a view to unravel the skepticism toward the Agreement that is seen as a panacea to African problems. The chapter analyzed the following aspects: scope of the Agreement, transparency of investment measures, streamlining and speeding up administrative processes, international cooperation, investment for development, technical assistance, and dispute settlement.

Concerning the scope of the Agreement, whereas it is commendable that contentious issues such as standards of treatment/protection, ISDS, and market access are excluded, it is also a concern that market access seems to be brought in through the back door. This is so because the definition of an investor extends to natural persons or juristic persons *attempting* to invest in the member's territory as opposed to limiting the definition of the investor to those that have already established in the territory of the host. Accordingly, the investor seeking entry and establishment can challenge investment measures that hinder entry and establishment. The IFD Agreement is therefore far-reaching in this respect to the extent that potential investors can question entry and establishment measures. In addition, to the extent that IFD Agreement pays particular attention to authorization of investment applications in that member states are required to adopt objective requirements for authorizations and avoid undue delay in processing authorizations, this is an indication for facilitating market access. Furthermore, since members are required to provide reasons, in writing, for rejecting applications and that the decision to reject is subject to review or appeal, it is concluded herein that IFD Agreement brings market access in disguise contrary to the initial statements made by the Group. Initially, IFD Agreement ought to have underscored the right to regulate as its central theme – the fact that this theme no longer features in the IFD Text is a cause for concern, especially to developing countries that feared that the IFD Agreement would encroach their regulatory space. Besides exclusion mentioned immediately earlier, IFD Agreement contains a positive list of themes obligations that will guide investment for development, and it is concluded herein that these themes do not seem to have any relationship with sustainable investment for development; rather, they are aimed at reforming domestic regulation and administrative processes relating to investment.

With regard to transparency of investment measures, it is worrying that the Agreement does not only require transparency in the existing measures; rather, it requires members to undertake period review to

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assess the investment measures and revise or repeal them as necessary if they frustrate investment flows. Even more disturbing is the requirement for members to undertake impact assessment of measures whenever they adopt new significant measures. Countries are not only focusing on growing economies but they also have to balance social dynamics, with the latter not always being the most effective tool for robust economic development. As an example, countries such as South Africa need to address apartheid legacies; in doing so, they sometimes have to adopt measures that not only advance the interests of capital but also redistribute justice. If members have to undertake these impacts assessments, it is concluded herein that IFD Agreement will inhibit the right to regulate.

Whereas one would have expected streamlining of procedures to be focusing on one-stop shops to reduce multiple applications and lengthy processes, the IFD Agreement circumscribes conditions for authorizations and seems to force members to admitting investors provided they meet requirements. This is a threat to national security, as countries would sometimes let go a lucrative deal if it threatens national security as we have seen in the case of Australia in respect of Chinese investments.

Finally, although investment for development is supposed to be the central theme to this Agreement, it disappointingly contains nonbinding home state obligations, yet it is accepted that home states can play a positive role in ensuring that their investors carry out responsible investing abroad. Equally, it is accepted that investment can yield development if investors carry obligations to transfer skills and contribute to developmental goals of the host. The theme that was supposed to be central to the Agreement (investment for sustainable development) became its weakest link as the text has no element whatsoever of sustainable development.

Based on the previous discussion, one can understand why most African countries decided to keep away from the Agreement. To this end, the Agreement promises less than canvassed, and it threatens market access as well as regulatory space.

Despite this, it is lamentable that many African countries stayed away from the discussing the text of the Agreement because they will eventually join the Agreement and be rule-takers. To this end, they deny themselves the opportunity to shape the Agreement, thereby ensuring that their interests are taken into account. Equally, it becomes a bad signal to the investment community that African countries are not open to FDI Agreement, yet this is not the case.

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