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## ON THE WAY OF NEW TECHNOLOGY – INVESTMENT FACILITATION AGREEMENT

### **Abstract**

*It should be noted that, following the establishment of the Working Group on Trade and Investment (WGTI), the key debate was on the exact description of the investment in the World Trade Organization (WTO). When it comes to the need for foreign investment, it is clear that it was an opportunity for workers to increase exports, to grow the economy, and to succeed in Sustainable Development Goals (SDGs) and Member States that were against such foreign investment to gather and lift the multilateral investment problem and call it investment facilitation. In contrast to the full clarification on the meaning of trade facilitation, investment facilitation is a wider term that is not well defined and confused with investment promotion. Therefore, the article discusses, on the one hand, the initial data on Investment Facilitation – scope, principles, its importance to the WTO, and, on the other hand, the proposed model Investment Facilitation Agreement and the proposals and views of some international organizations and states. As a result, the advantages and disadvantages of Investment Facilitation Agreement are noted.*

### **Annotasiya**

*Qeyd etmək lazımdır ki, Ticarət və İnvestisiyalar üzrə İşçi Qrupun (TİİQ) yaradılmasından sonra əsas mübahisələr Ümumdünya Ticarət Təşkilatına (ÜTT) qoyulan sərmayənin dəqiq təsviri ilə bağlı idi. Xarici investisiyaya ehtiyac olduğunda, işçilər üçün ixracatı artırmaq, iqtisadiyyatı böyütmək, davamlı inkişaf məqsədlərinə nail olmaq və bu cür xarici investisiyaların əleyhinə olan ÜTT-yə üzv dövlətlərin çoxtərəfli investisiya problemini aradan qaldırmaq üçün yeni bir fürsət yaradıldı və buna “İnvestisiya Asanlaşdırılması” adı verildi. “Ticarətin asanlaşdırılması” mənası haqqında tam anlayışı olmasının əksinə, “investisiya asanlaşdırılması” dəqiq müəyyənləşdirilməmiş və investisiya təşviqi ilə qarışdırılan daha geniş bir anlayışdır. Buna görə də məqalədə bir tərəfdən İnvestisiya Asanlaşdırılması haqqında irəli sürülmüş ilkin məlumatlar – əhatə dairəsi, prinsipləri, ÜTT-də əhəmiyyəti, digər tərəfdən isə hazırlanmaqda olan model İnvestisiya Asanlaşdırılması Müqaviləsi və beynəlxalq qurum və bəzi ölkələrin təklif və fikirləri müzakirə olunmuşdur. Nəticədə isə “İnvestisiya Asanlaşdırılması Müqaviləsi”nin üstünlükləri və əlverişsiz tərəfləri qeyd edilir.*

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## Introduction

Steve Jobs said that “The overall point is that new technology will not necessarily replace the old one, but it will date it”. The discussions of the multilateral rules on investment started from the 1948 draft Havana Charter for setting up the International Trade Organization (ITO), and the exact Charter highlighted the foreign direct investment problems while introducing responsibilities of investors in front of host countries to propagate most-favored-nation treatment<sup>1</sup> and national treatment.<sup>2</sup> However, it failed to touch on issues such as dispute settlement, performance requirements, and others, which will be discussed in the next chapters. On the other hand, several countries such as the US, Canada, the UK, and Australia were not eager to present national treatment of most-favored-nation treatment to the other member states under the Havana Charter. The planned ITO could not be established because of disagreements on some problems, with the US Congress’s contrast to the very fact that its sovereignty is often challenged in some areas by foreign bodies. Thus, the General Agreement on Tariffs and Trade (GATT) was signed by the member states and came into effect in 1948, but the GATT did not introduce the investment issue either until the Uruguay Round in the late 1980s and early 1990s. During this eighth round of

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<sup>1</sup> The most-favored-nation (MFN) provision requires a state to grant any advantages, rights or exemptions that is provided to another state with a trade agreement, to all other member nations of the WTO as well.

<sup>2</sup> National treatment is the concept of providing the same treatment to others as to the state's own citizens.

multilateral trade negotiations, the member states agreed upon preparation and acceptance of the Agreement on Trade-Related Investment Measures (hereinafter TRIMs).

The Agreement on TRIMs ensures a series of rules on domestic regulation about a foreign investment that is implemented by a state as a component of its industrial policy. It is a necessary point to mark that the 9<sup>th</sup> Article of the Agreement on TRIMs which was reviewed by the Council for Trade in Goods, enounced as below:

*“... In the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy”*.<sup>3</sup>

In this way, the wealthy members of the WTO may form out settled agenda to discuss the investment policy assembled with the competition policy in the future.

After the creation of the WTO, nearly 27 states that were members of Organisation for Economic Cooperation Development (OECD) initiated the discussion on the Multilateral Agreement on Investment (MAI) in 1995. The objective was to provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes, investment protection, effective dispute settlement procedures, open to non-OECD countries.<sup>4</sup> This starting was a simultaneous movement and showed its result with the new proposal of an investment agreement by the EU and Canada in 1996. Despite the proposals by member states, the negotiations of OECD stopped in 1998 because of the strong civil society pressure and French stubbornness that did not need its audio-visual sector to be lined by the OECD MAI. Actually, the biggest defect of those discussions was that the MAI was aimed at the developing world, but they were not in the negotiable spot.

As a result, the trade ministers of the member states raised the investment issue at the WTO's First Ministerial Conference in late 1996. They agreed upon the establishment of the group which was called WGTI and this group would research the relations between investment and trade and find out the range of discussing investment out of the circle of the General Agreement on Trade in Services (GATS) in which Mode 3 of supply-included investment in services and the Agreement on TRIMs.<sup>5</sup>

It is necessary to depict that after the establishment of WGTI, the major discussion was upon the exact description of the investment at the WTO. A

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<sup>3</sup> Agreement on Trade-Related Investment Measures, art. 9 (1994), [https://www.wto.org/english/docs\\_e/legal\\_e/18-trims\\_e.htm](https://www.wto.org/english/docs_e/legal_e/18-trims_e.htm) (last visited March 16, 2020).

<sup>4</sup> Multilateral Agreement on Investment (1995), <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> (last visited Dec. 16, 2019).

<sup>5</sup> World Trade Organization, Singapore Ministerial Declaration, [https://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm) (last visited March 13, 2020).

wider description of investment was accepted with several WGTI documents. However, the perpetually growing nature of international economic relations has formed other foreign investment meanings such as investment in intellectual properties, technology, contractual rights, and services.<sup>6</sup>

When it comes to the necessity of foreign investments, it is obvious that they were an opportunity to make places for employees, enlarge exports, develop the economy and succeed in SDGs. and the member states which were against such foreign investment gathered and raised the multilateral investment issue and called it as investment facilitation.

As a result of this introduction, the definition and scope of investment facilitation, its principles, and strategy at the WTO, Investment Facilitation Agreement (IFA) and the proposals for IFA, and last but not least the Republic of India which is against IFA will be discussed and examined in this paper.

## **I. A brief abstract of Investment Facilitation**

Nowadays, an investment is identified as a significant mechanism of progress and development. For progress and acceptance of IFA at the international level, the EU, some WTO's member states, and states of Asia and America initiated, this mechanism regards to the closer relation among trade, development, and investment. By this relation, the above-mentioned states clarified the definition and scope of investment facilitation, its principles, and the core investment facilitation strategy.

### **A. The scope and definition of Investment Facilitation**

Although the understanding of trade facilitation, which aims to simplify, harmonize and modernize the trade processes such as export and import procedures, has been completed, the definition of investment facilitation is the fundamental problem for now. Investment facilitation is a wider term and it is not well specified and mixed with the investment promotion. However, several international organizations clarified the understanding of investment facilitation.

One of these international organizations is OECD. According to the OECD's approach, investment facilitation should be taken into consideration in a wider aspect.<sup>7</sup> It becomes from the confusion between investment facilitation and trade facilitation. The policy of OECD shows that investment facilitation was not clearly defined and mixed with investment promotion<sup>8</sup>

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<sup>6</sup> John Gara, *Scope and definition of investment*, CUTS Centre for Int. Trade, Economics & Environment, Putting our fears on the table: Analyzes of the proposals on investment and competition agreements at the WTO, 75-78 (2003).

<sup>7</sup> Ana Novik, Alexandre de Crombrughe, *Towards an International Framework for Investment Facilitation*, 2 (2018), <https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf> (last visited Jul. 15, 2020).

<sup>8</sup> Investment promotion means to bring investment opportunities to the attention of potential investors, provides capital, jobs, skills, technology and exports, and increases productivity, innovation and wages in a state.

several times because of the Investment Promotion Agencies (IPAs).<sup>9</sup> IPAs were created in nearly all states for facilitation and promotion of investment.<sup>10</sup> Their activities can be classified via five principal functions:

- *Image building*<sup>11</sup> – It includes the promotion and embracement of the host state's positive image that shows such a state as a beneficial investment direction;
- *Investment generation*<sup>12</sup> – It interacts the direct marketing techniques and aims the special markets, entities, businesses, and sectors;
- *Investor servicing*<sup>13</sup> – This one ensures the potential investors with the support for the promotion of their creation period;
- *Aftercare*<sup>14</sup> – It targets the maintenance of existing entities and promotion of re-investments with support to the investors for facing their obstacles;
- *Policy advocacy*<sup>15</sup> – Lastly, this one defines blockages at the investment environment and provides policy suggestions for the salvation of them.

That is why the OECD differentiates investment promotion and investment facilitation as the following:

*“... The investment promotion concerns the marketing of a state or a territory as an investment destination. On the other hand, the investment facilitation focuses on making the creation, operation, and growth of existing investment simple for investors. Therefore, functions such as image building and investment generation belong to the investment promotion, while others relate to the investment facilitation. The approach of OECD is while the promotion is rather about the attraction of possible investors, which have not selected an investment location yet, the investment facilitation launches before the establishment phase when an investor begins being interested in the location and touches upon the policy framework. Under OECD's approach, investment facilitation also involves investment retention, as retaining satisfied current investors is just as essential as encouraging new investors and relies equally on the investment policy system's efficiency, clarity, continuity, and predictability”.*<sup>16</sup>

The second international organization, which clarified investment facilitation, is the World Bank. According to the approach of the World Bank, investment facilitation is a sub-function under investment promotion.<sup>17</sup> It

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<sup>9</sup> *Supra* note 7, 3.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Id.*, 3.

<sup>17</sup> Investment Policy and Promotion: Attracting, Retaining, Growing Foreign Investment, and Maximizing Impact for the Local Economy, 1,

<http://pubdocs.worldbank.org/en/333181496748288324/pdf/Investment-Policy-and-Promotion.pdf> (last visited Jul. 14, 2019).

identifies investment facilitation as the simplest and budget-effective activity, which promotes foreign investment.<sup>18</sup> Under the investment policy of the World Bank, states have to define their value proposition as an attractive investment destination and attracting Foreign Direct Investment (FDI) helps to link a state's local economy to international value chains in main fields.<sup>19</sup> Therefore, it means that the World Bank accepts investment facilitation as a specific tool to make progress on the effective policies and to promote good practices for attraction and facilitation of FDI.

The other intergovernmental body, which clarified investment facilitation hugely, is the United Nations Conference on Trade and Development (UNCTAD). Concerning the UNCTAD's approach to investment facilitation, there are two distinct activities on investment that are facilitation and promotion. The latter promotes a special location for investment, which is so beneficial for an investor.<sup>20</sup> The former ease investor's establishing business and improving it in host states.<sup>21</sup> So, UNCTAD declares that the promotion and facilitation of investment are side by side.

When it comes to the status of investment facilitation, UNCTAD defines it as the following:

*“... a structural gap between domestic and international investment policies. Therefore, UNCTAD accepted the Global Action Menu for Investment Facilitation, which targeted to fill this structural gap. This Menu is planned to support current investment policies. Thus, it does not include investment security policy initiatives that are well and clearly defined in current national regulatory frameworks and IIAs”.*<sup>22</sup>

As it is mentioned above to fill in the gap, ten sections of action with a range of choices are suggested by the Menu. The Menu is founded on the Investment Policy Framework of UNCTAD which in its 1<sup>st</sup> edition of 2012 already introduced action on investment facilitation and valuable insights and strategies of investment facilitation and promotion attempts around the globe over the past years.<sup>23</sup> The Action Menu includes:

- Promoting transparency and accountability of investor-relevant investment policies and regulation and procedures;
- Boosting predictability and continuity during the implementation of investment policies;
- Improving the quality of administrative processes for the investment;
- Constructing productive relationships between shareholders in the practice of investment policies;

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.*, 1-2.

<sup>20</sup> Global Action Menu for Investment Facilitation, 1 (2016), [https://unctad.org/system/files/official-document/tdb63crp2\\_en.pdf](https://unctad.org/system/files/official-document/tdb63crp2_en.pdf) (last visited Jul. 17, 2019).

<sup>21</sup> *Ibid.*

<sup>22</sup> *Id.*, 2.

<sup>23</sup> *Id.*, 3.

- Appointing a lead department, pivotal point or facilitator of investment with a mandate to do so;
- Creating frameworks for tracking and evaluating facilitation of investment;
- Strengthening foreign collaboration on facilitation of investment;
- Enhancing investment facilitation activities in partners of the developing country, through funding and technical support;
- Supplementing investment facilitation by improving global cooperation to encourage the development of investment, including through clauses in IIAs.
- Strengthening investment policy and encourage proactive investment in developing country partners, through building capacity.<sup>24</sup>

As a result of this Action Menu, it should be highlighted that the Action Menu provides significant steps to encourage investment facilitation in minimum-income states. It is so critical since any facilitation activity can never be viewed in distinction from the larger investment for development strategy. Such successful investment facilitation activities will promote the development and redirecting of investment into sustainable growth, including the build-up of efficient capacity and vital infrastructure.<sup>25</sup>

Last but not least, as an inter-governmental forum – Asia Pacific Economic Cooperation (APEC) made some critical points about investment facilitation, such as to promote foreign investment and enhance the administration's effectiveness and productivity during the investment cycle phases.<sup>26</sup> In 2015, the first time the APEC reported Investment Facilitation Action Plan in which it mentioned the exact principles, scope, and definition of investment facilitation.<sup>27</sup> According to the IFAP, investment facilitation applies to steps taken by governments to encourage international investment and to optimize the efficacy and productivity of their operation across all phases of the investment process.<sup>28</sup>

## **B. The principles of Investment Facilitation**

Each topic, obviously, has certain principles that are considered in this regard as norms. In line with the scope and concept of investment facilitation, its concepts are very varied due to the approaches of the international organizations that have launched the IFA.

There was no exact list of principles until APEC reported IFAP in 2015. When the member states of APEC agreed on IFAP, there was a special clause where 8 principles were listed.<sup>29</sup> After the agreement by the member states,

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<sup>24</sup> *Id.*, 3-5.

<sup>25</sup> *Id.*, 5.

<sup>26</sup> Investment Facilitation Action Plan by APEC, 5 (2015), [http://mddb.apec.org/Documents/2019/CTI/WKSP4/19\\_cti\\_wksp4\\_014.pdf](http://mddb.apec.org/Documents/2019/CTI/WKSP4/19_cti_wksp4_014.pdf) (last visited Jul. 17, 2019).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.*, 7

<sup>29</sup> *Id.*, 5.

the IEG was assisted by PSU on analysis of IFAP and mainly IFAP principles. At the end of the analysis, the PSU provided the below-mentioned list of principles:<sup>30</sup>

- 1<sup>st</sup> Principle – The investors have the right to opt the type of establishment;
- 2<sup>nd</sup> Principle – There are dispute resolution mechanisms among investors, host governments and private entities;
- 3<sup>rd</sup> Principle – All investors have the right to fair treatment during the implementation of local laws and investment principles;
- 4<sup>th</sup> Principle – The law of “*silence is an agreement*” are being enforced;
- 5<sup>th</sup> Principle – There is encouragement for the function of political advocacy in IPAs;
- 6<sup>th</sup> Principle – Members should support and implement global legal standards because of defending intellectual property rights;
- 7<sup>th</sup> Principle – Several activities which are documented to promote regular feedback of investment processes provide that strategies are basic, transparent, and at the lowest probable expenditure;
- 8<sup>th</sup> Principle – Positive participation in global and local projects should be focused on promoting investment facilitation and making skills.

These eight IFAP principles are part of several policies and initiatives to tackle issues of non-discrimination, transparency, and dispute resolution for supporting a better investment climate. It means that according to the approach of APEC to investment facilitation, its key principles are transparency, non-discrimination, and dispute resolution.

When it comes to the approach by UNCTAD, its approach is mainly based on the idea of investment facilitation's scope. According to UNCTAD's approach, investment facilitation includes a broad variety of fields and targets the attraction of investments, allowing investment to move easily and assistance for the benefit of host states.<sup>31</sup> Such an approach makes a strong impact on the accepted principles by UNCTAD. In 2016, UNCTAD declares in the report that the several key principles of investment facilitation are:

- Transparency;
- The efficiency of operations;
- Practicality;
- Cooperation and;
- Coordination.<sup>32</sup>

The UNCTAD also mentioned in the report that starting from the pre-establishment step till the completion of the investment, but also during the entire life of the investment project, investment facilitation operates.<sup>33</sup> For

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<sup>30</sup> *Ibid.*

<sup>31</sup> United Nations Conferences on Trade and Development, World Investment Report, 117 (2016), [https://unctad.org/en/PublicationsLibrary/wir2016\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2016_en.pdf) (last visited Jul. 18, 2020).

<sup>32</sup> *Id.*, 117.

<sup>33</sup> *Ibid.*



establishing such an environment for investment, investment facilitation has a huge role and that is why the member states should take into consideration the principles declared by UNCTAD.<sup>34</sup>

The other international forum is G20 under which the 19 states and the EU adopted the G20 Guiding Principles for Global Investment Policymaking in 2016. The approach of G20 was mostly focused on the efficient environment for investment. In this regard, the G20's target was to promote transparency, availability, and guiding foreign investment policy climate, to enhance economic and sustainable development.<sup>35</sup> As a conclusion of these targets, G20 declared non-binding principles below:

- Investment policies should be based on transparency, clarity, non-discrimination, and predictability;
- Investment policies should ensure effective safeguards and legal clarity for investors and investments;
- Investment policies and the other investment-affected measures should be logical and consistent;
- The right to control the investment for valid public policy reasons are reconfirmed by Policymakers;
- Investment policies should encourage and enable cooperation by investors with foreign best practices.<sup>36</sup>

The above-mentioned principles are taken into account by OECD as well. In accordance with the approach of OECD to the definition of investment facilitation, it suggested the same principles as transparency, predictability, efficiency and additionally, OECD mentioned several specific points of these principles. According to the OECD, these principles are not contentious under the liability of the host state and can be adopted one-sidedly by all states, but there should be assets and political intent.<sup>37</sup> In conclusion, with the suggestion of OECD about principles of investment facilitation in 2018, this issue was clarified once at all.

### **C. The Investment Facilitation strategy and its sound at WTO**

As it's discussed above, each international body has its own approach to investment facilitation which makes each of these intergovernmental organizations create its own investment facilitation strategy. Investment facilitation strategy is a package of all ideas and approaches by international

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<sup>34</sup> *Ibid.*

<sup>35</sup> G20 Trade Ministers Meeting Statement, 1-2 (2016), <https://www.oecd.org/daf/inv/investment-policy/G20-Trade-Ministers-Statement-July-2016.pdf> (last visited Jul. 18, 2020).

<sup>36</sup> G20 Guiding Principles for Global Investment Policymaking, 1-2 (2016), <https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf> (last visited Jul. 18, 2020).

<sup>37</sup> Towards An International Framework For Investment Facilitation, 7 (2018), <https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf> (last visited Jul. 16, 2019).

bodies which is not binding.<sup>38</sup> Starting from 2015, international bodies such as UNCTAD and the World Bank clarified basic ideas such as the scope, definition, principles of investment facilitation.<sup>39</sup> As the result, they constructed the whole various investment facilitation strategy which impacted lots of developed states and such member states carried it to the WTO.<sup>40</sup>

While it was affecting states' views upon investment facilitation, several developed countries launched the drafts for investment facilitation agreement where those whole ideas and approaches by international bodies were mentioned. These attempts sounded in a well-prepared four structured discussions at the WTO.<sup>41</sup> These discussions focused on four key matters in four linked conferences:<sup>42</sup>

- 1st Conference on 28 June 2018 about Improving the transparency and predictability of investment measures;
- 2<sup>nd</sup> Conference on 23 July 2018 about Streamlining and speeding up administrative procedures and requirements (APRs);
- 3<sup>rd</sup> Conference on 21 September 2018 about Enhancing international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention;
- 4<sup>th</sup> Conference on 26 October 2018 about Facilitating greater developing and least-developed Member participation in global investment flows.

Consequently, these four structured debates and the member states' suggestions at the WTO made the foundation of today's IFA.

## II. What Investment Facilitation Agreement contains?

The numerous methods and ideas have clearly made the control of IFA an issue. That's because of the numerous final conclusions that have been generated by international institutions and, as a consequence, there are plenty IFA versions that distinguish from one another. While multiple revisions of the IFA exist, there are also several similar points, such as main elements, goals, and the relationship with sustainable development.

### A. The key features of the Investment Facilitation Agreement

When each piece of knowledge was evaluated by international institutions, the IFA was constructed, which describes a combination of different processes and declares the main features of investment facilitation. As it is mentioned

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<sup>38</sup> Policy Framework for Investment User's Toolkit: Chapter 2. Investment Promotion and Facilitation, 4 (2011),

<http://www.oecd.org/investment/toolkit/policyareas/investmentpromotionfacilitation/41246119.pdf> (last visited Jun. 29, 2019).

<sup>39</sup> *Id.*, 2.

<sup>40</sup> *Ibid.*

<sup>41</sup> Pradeep S. Mehta and Sanjay Kumar Mangla, *Investment Facilitation at the World Trade Organization: Progress and Road Ahead*, CUTS International 3, 10 (2019).

<sup>42</sup> *Id.*, 13-16.

above, these major components were accepted by international bodies that were up to make a clarification of investment facilitation. The well-prepared key components of IFA were introduced by OECD in 2016. These key features are:<sup>43</sup>

- “... Tools and services provided by the host government to help investors navigate through the various regulations and procedures when investing;
- Policies to improve the transparency, predictability, and effectiveness of the regulatory framework for investment, and ensure sustainable and responsible business practices; and;
- Processes to make these tools and policies useful and impactful.”

Encouraging liable and sustainable investment, IFA includes a statewide approach by presenting a transparent, predictable, and effective governmental and administrative investment framework for new and current investors. That’s why IFA combines the above-mentioned key features, which the host states should follow to reduce or remove probable and current barriers against the investors when they agreed to invest and actually increase the significant assistance to the economy.

The IFA’s first element concerns unique frameworks and services which may be offered by the host government to assist investors in overcoming current legislation and other barriers. Such frameworks and services may involve:<sup>44</sup>

“... (a) one-stop-shop (if appropriate) or single window for incoming investors; (b) online business registration system; (c) information portal on legal and administrative procedures to start and operate a business; (d) client service charters for all authorities dealing with investors; and (e) systematic aftercare services to existing investors, with a focus on those with strong RBC records.”

On the other hand, facilitation programs should never be restricted to upcoming investors. As it was declared by OECD:<sup>45</sup>

“... Encouraging the growth of current investors by assisting them to resolve the obstacles they face in the management of their companies is as critical as encouraging upcoming investments. Investor aftercare functions are critical, particularly in the retention of investors, just as after-sales activities within a private entity seeking to retain client faith. Aftercare steps are numerous but a valuable step is to build an ombudsman or negotiator as a centerpiece within the state to avoid and settle any future conflicts and to promote contact with other relevant parties.”

Going beyond these specific tools;<sup>46</sup>

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<sup>43</sup> *Supra* note 37, 5.

<sup>44</sup> *Id.*, 5-6.

<sup>45</sup> *Id.*, 6.

<sup>46</sup> *Id.* 6-7.

*“... investment facilitation involves the improvement of the business environment through policy reform. Such policies must ensure a supportive atmosphere for investors to behave properly and efficiently and equate the playing field for many other investors to encourage investment in developing industries, such as green factories. On the other hand, political reform may also increase the effectiveness of the current investment system, streamlining new legislation and legislated regulation, strengthen structural frameworks, and make investment less burdensome by implementing fewer deadlines, removing needless processes, and modifying the remaining ones.”*

Lastly, institutional frameworks assist investment facilitation tools and policies. OECD highlights that,<sup>47</sup>

*“... institutional state-private interaction is an example of a key process for host governments to receive feedback from the private sector on existing legal and administrative bottlenecks faced by investors when investing or reinvesting. It will enable governments to include the most effective frameworks and policies to respond to the issues posed by the private market. In addition, a successful state-private dialogue will also permit the authority to clarify policies to companies, which will undoubtedly also encourage upcoming investment.”*

## **B. The aims of Investment Facilitation Agreement**

The whole approaches and ideas by intergovernmental bodies, which were discussed above appear because of the targets, main aims of such intergovernmental bodies. Since such targets are placed in the centre of these ideas and approaches. Although there are lots of different approaches, the four key aims were discussed at the WTO. They encompass:<sup>48</sup>

- Develop the transparency and predictability of investment initiatives;
- Streamlining and improving administrative processes and requirements;
- Improve global cooperation, sharing of knowledge, interchange of best practices and ties with relevant shareholders, including the avoidance of conflicts;
- Promote attendance of bigger developing and less developed Member States in international investment trends.

The implementation of investment facilitation agreement can promote transparent and reliable investment schemes for both international and local investors. IFA`s transparency and predictability aspects are:<sup>49</sup>

- *“... Timely publication of relevant legislation;*
- *Notification obligations;*
- *Enquiry points/single windows;*

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<sup>47</sup> *Ibid.*

<sup>48</sup> Investment Facilitation at the World Trade Organization, 10 (2019), [http://www.cuts-geneva.org/pdf/KP2018-Study-Investment\\_Facilitation\\_at\\_the\\_WTO.pdf](http://www.cuts-geneva.org/pdf/KP2018-Study-Investment_Facilitation_at_the_WTO.pdf) (last visited Jun. 29, 2020).

<sup>49</sup> *Id.*, 13.

- *Advance publication of draft laws and regulations, opportunity to comment (and consideration of comments), and explanation of their purpose and rationale; as well as reasonable time frames between their publication and entry into force; and*
- *Administrative procedures to ensure the consistent and impartial application of investment-related laws and regulations to domestic and foreign investments alike.”*

When the discussion is about the release of data related to investment, the starting point is to make accessible information on investment initiatives in a transparent and timely manner. There is a list of data under which the information can be made accessible to the public.<sup>50</sup>

*“... Firstly, the releasing information can be legislation, rules, processes, and judicial or administrative decisions. Secondly, the international agreements, which are related to FDI, can be press released. Thirdly, if permission is needed to invest in a state, the data related to such an issue can be published. Lastly, the other sets of data, which are easily available to the public, can be released.”*

So, after the first sub-target that we discussed above, there is the second sub-target of transparency which includes the methods of taking action to make the information accessible to the public:

*“... Two ways exist for making the data available to the public. The first one is authorized newspaper or online means to make information publicly available, including widely available and consumer-friendly online platforms and official websites. This method is quite useful to publish any data that is needed. The second method is releasing language. The information can be easily published via using different languages. As a result, the data will be known at the international level.”<sup>51</sup>*

The period between the release date and entrance into force of legislation is the third sub-target of transparency. This period is required to give a chance to investors and other related parties, such as shareholders, some amount of time to coordinate their strategies about current legislation. The other sub-target is also related to the release date of the legislation. It is to make the suggested legislation available to the public and give a chance to comment on it. It means that the suggested legislation is published and the investors are allowed to comment on the legislation within some period and in some extraordinary situations, the time frame is excepted.<sup>52</sup>

The other target of transparency is the responsibilities of notifying. Under this target, there are forms of information to be noticed:

- *“... Notification of laws, regulations, and administrative procedures of general application;*

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Id.*, 13-14.

<sup>52</sup> *Ibid.*

- Notification of places and URL of websites where relevant information concerning investment is made publicly available;
- Notification of enquiry/ focal/ contact points;
- Notification of other relevant information (e.g. competent authorities); and
- Notification of inventory of investment measures."<sup>53</sup>

While the first point of notifying is about the forms of information, the second point is the methods of alerts:

*"... Such alerts' methods include mainly digital devices, which are cellphones, personal computers, laptops, notebooks and others. The notification through digital devices has a significant place in this mechanism because, in a couple of minutes, the investor can easily be notified about the investment-related data."*<sup>54</sup>

When it comes to the role of the connection spots above mentioned they have an essential role in the IFA:

*"... The role of connection spots is mostly related to being connected with the authority, current and potential investors. The very first action of them is to reply to the data request about released legislation. If there is any need for explanation on released legislation, the connection spots will have the obligation to explain. The second one is to reply to any requisition of authorities, current and potential investors. The other activity is to make the legislation and the other related data accessible to the public via newspaper and/or digital devices. As it is obvious, the role of connection spots in releasing the data to the public is undoubtedly significant. The last but not least activity of connection spots is to suggest and ensure help to investors."*<sup>55</sup>

While the targets of transparency are being discussed, the exceptions to such criteria should also be taken into account.<sup>56</sup> There are certain situations in which the demand for transparency can not be the issue. One of the situations is relating to "know-how", which includes confidential data and it means the confidential data is excepted from transparency requirement.<sup>57</sup> The second one is relating to force majeure, which means unforeseeable extraordinary situations.

Streamlining and improving administrative processes and requirements are the second targets of IFA. The target APR, which occurs almost in all states, can be in different types. It concerns the submission and review of the application and contains questions in respect of which the documentation is required. Because of certain reasons such as inadequate legislation, dysfunctional legislative system, absence of administrative capability and unproductive administrative behaviour, APRs limit the investment. On the

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<sup>53</sup> *Id.*, 14.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

other hand, limited data sharing and little communication that made between the different organizations creates another level of complication, which limits the investment too. The objective of IFA in that regard is to ignore such issues for fastening the processes. It involves:<sup>58</sup>

*“(1) reduction in the number of administrative procedures, formalities or approval requirements; (2) simplifying documentation and procedural requirements as much as possible; (3) review of application forms to make them simple and clear; (4) and publication online of a checklist and a set of guidelines on application requirements to assist applications.”*

The other targets of IFA related to APRs are:<sup>59</sup>

- To transfer the whole application process related to an investment to the electronic platforms;
- To reduce the time duration of the administrative process and notify investors;
- To notify investors about the dismissal of their submission and give them a chance to correct and re-apply again;
- To ensure non-discrimination on the availability of public services.

When it comes to improving global cooperation, sharing of knowledge, interchange of best practices and ties with relevant shareholders, including the avoidance of conflicts through IFA, it should be noted that global cooperation is an essential factor in promoting foreign investment.<sup>60</sup> In accordance with the discussions at the WTO:<sup>61</sup>

*“... This is a multidimensional mechanism for foreign relations at regional, international and intergovernmental levels. The main tasks of global cooperation include data sharing, supervision, multilateral discussion and negotiation; interorganizational collaboration, conflict avoidance, and technical support. The cooperation under IFA eases the whole procedure for investors because the authorities, agencies, and investors keep in touch with one another and make useful data sharing. While the cooperation is going on, the connection spots may also assist the investors and promote them to share the practices between states and strengthen the ties between them.”*

On the other hand, conflict avoidance is defined as a focal point of IFA. Creating a supreme body for assisting investors with the administrative processes is an essential point in front of IFA.<sup>62</sup>

The last target of IFA is to promote attendance of bigger developing and less developed Member States in international investment trends.<sup>63</sup> To promote investment facilitation, integration by developing and less developed member states in international investment trends is the main

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<sup>58</sup> *Id.* 14-15.

<sup>59</sup> *Id.*, p. 15.

<sup>60</sup> *Ibid.*, p. 15-16.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* p. 16.

<sup>63</sup> *Ibid.*

target.<sup>64</sup> There are several barriers in front of this aim, which are lack or inadequacy of organizational capability, economic capital, and the cohesion of policies, global collaboration, and economic prosperity. In this way, the member states, which drafted the IFA, are going to improve:

- *“sharing and promoting best practices;*
- *inter-agency consultations and coordination among domestic authorities (e.g. taxation authorities, international finance experts) on government measures;*
- *consideration of challenges faced by developing and least-developed members in implementing the multilateral framework’s provisions (e.g. lack of institutional capacity, infrastructure, human resource); and provide them technical assistance and build their capacity;*
- *strengthen the institutional mechanism, non-discrimination, address challenges faced by micro, small and medium-sized enterprises (MSMEs), institutional issues (e.g. creation of a WTO Investment Facilitation Committee), and the relationship between proposed investment facilitation framework and governance issues;*
- *special and differential treatment.”*<sup>65</sup>

### **C. Investment Facilitation Agreement for sustainable development**

According to the JMSIF at WTO, the implementation of provisions in IFA would foster progress in all dimensions of investment facilitation such as investment climate, finance, and social side of it. Although investment facilitation is separated from investment promotion, they are also essential parts of investment policy.<sup>66</sup> As it is mentioned above that, the OECD presented the connection among laws and policy through its PFI in which the scope of investment policy was described widely and from the aspect of sustainable development. Seemingly, the investment policy touches upon not just the rules, laws, regulations related to the acceptance of investors, the laws created and the security of their properties, as well as to the targets and prospects of the addition of investment to the sustainable development, such as ones set out in the local development strategies.<sup>67</sup>

The goal of PFI stimulated foreign investment for integrated and sustainable development and as a result, it led to social and economic prosperity. At this point, the IFA comes to help and aims for sustainable

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<sup>64</sup> Joint Ministerial Statement on Investment Facilitation for Development, 1 (2017) [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=240870](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240870) (last visited Jul. 18, 2020).

<sup>65</sup> *Supra* note 37, 16.

<sup>66</sup> Pradeep S. Mehta and Sanjay Kumar Mangla, *Investment Facilitation at the World Trade Organization: Progress and Road Ahead*, CUTS International 3, 10 (2019).

<sup>67</sup> Policy Framework of Investment, 23 (2015). <https://www.oecd.org/mcm-2018/documents/Policy-Framework-for-Investment-2015-CMIN2015-5.pdf> (last visited Jul. 18, 2019).



investment facilitation. According to the ICTSD's report, sustainable investment facilitation is for establishing favorable domestic circumstances for greater sustained FDI that flows to meet long-term investment purposes.<sup>68</sup> While ICTSD's report was focusing on sustainable investment facilitation, the PFI was fostering adequate duty and obligations for authorities, entities, society.<sup>69</sup> It was also enhancing transparency and promoting investors who were into sustainable development and reducing destitution and repose on mutual ideals in a democratic society such as protection of human rights.<sup>70</sup> Although the government's duty remains to provide an effective public governance structure to promote investment movements, PFI describes the growing impact of non-state actors in influencing investment activities at a worldwide scale and as a result enhancing the influence of promoting better social and cultural relations among civil communities.<sup>71</sup>

When it comes to the intergovernmental level, the IFA does not clearly specify what it really should include. However, the IFA does not involve the provisions related to (1) market access; (2) investment security; (3) the ISDS. Because of all these activities, the OECD proposed 10 action lines for enhancing sustainable development and give a chance to developing states to become one of the developed countries under the roof of the Global Action Menu for Investment Facilitation, which was, discussed in previous chapters above.<sup>72</sup>

### III. Proposals on Investment Facilitation at the WTO

Up-to-date, at the WTO, the Russian Federation, Mexico, Australia, Turkey, Indonesia, and Korea as MIKTA, 14 member states under FIFD, Brazil, Argentina & Brazil, China have presented their portfolio of investment facilitation. Such promoters of investment facilitation stress the value of the FDI to reach SDGs, increase exports and generate opportunities throughout their claims in favor of an intergovernmental mechanism for investment facilitation.<sup>73</sup>

#### A. Proposal by FIFD and MIKTA

The Informal WTO Discussion about investment facilitation for development was initiated by FIFD, which consisted of fourteen developing and less developed member states in April 2017.

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<sup>68</sup> The Evolving International Investment Law and Policy Regime: Ways Forward, 8 (2016), [http://e15initiative.org/wp-content/uploads/2015/09/E15\\_Investment\\_Law\\_Policy\\_regime\\_report\\_2016\\_1002.pdf](http://e15initiative.org/wp-content/uploads/2015/09/E15_Investment_Law_Policy_regime_report_2016_1002.pdf) (last visited Jul. 18, 2019).

<sup>69</sup> *Id.*, 11.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Id.*, 11-13.

<sup>72</sup> *Id.*, 45.

<sup>73</sup> *Supra* note 41, 10.

*“The purpose of FIFD on launching such discussion was to analyze the stimulation of member states about investment and to encourage them, to debate the increasing connection between investment and trade and to find out the way of assistance by WTO to the member states. The members of FIFD proposed an agreement to facilitate and promote the investment as Trade Facilitation Agreement of WTO. The FIFD mentioned the targets of investment facilitation, which were transparent, secure and better business environment for investment and made a result that such an agreement would ease the establishment of the investment in host states for investors and encourage the potential investors.”<sup>74</sup>*

The members of FIFD also highlighted that the aim is not to modify or make additions to the investment policies of member states. Hence, such an agreement mainly focused on enforcement and maintenance of consistent effective predictable policies and strategies.<sup>75</sup>

When it comes to promoting better global cooperation for investment facilitation, the second aim of IFA was this one for FIFD's proposal.<sup>76</sup> In accordance with the FIFD's approach, the home and host states of investors should have deeper cooperation and communication between them.<sup>77</sup> While UNCTAD was guessing that, the developing states should have another two and half-trillion dollars for investment annually to attain the 2030 SDGs, the FIFD members supported this idea and referred to Investment Report by UNCTAD in which the FDI declared an important and consistent asset to finance developing states.<sup>78</sup> As a result of initiated informal discussion, the other seven discussions were held at the WTO. The main features of such debates were (1) to develop the predictability and transparency of investment initiatives; (2) to improve and streamline the administrative processes; (3) to strengthen global cooperation and to meet the demands of developing states; and lastly (4) to solve issues related to investment facilitation such as communication between state and investor, overcoming ombudsman of investors and social responsibility.<sup>79</sup>

On the other hand, the MIKTA had the same approach to investment facilitation and IFA as the members of FIFD. In March 2017, the investment workshop took place among the delegations from Mexico, Turkey, Korea, Australia, and Indonesia. The special connection between investment, trade, and development was recognized also by these 5 states. Under the MIKTA's approach, although the WTO has an essential role in the centre of investment debates, the WTO should take into account the relevant researches on

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<sup>74</sup> *Id.*, 12.

<sup>75</sup> Investment Facilitation (2017)

[https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/briefing\\_notes\\_e/bfinvestfac\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm) (last visited Jul. 18, 2019).

<sup>76</sup> *Supra* note 41, 9-10.

<sup>77</sup> *Id.*, 7-9.

<sup>78</sup> *Id.*, 7.

<sup>79</sup> *Supra* note 75.

investment facilitation by the other intergovernmental bodies such as G20, UNCTAD, OECD, and APEC. As a result of its debates, the MIKTA mentioned the elements of IFA, which are (1) MFN; (2) transparency and predictability; (3) easy and effective administrative processes; and lastly (4) global cooperation and coordination. In general, according to the proposals of MIKTA and FIFD, serious matters such as investment security, market access, ISDS should be avoided from the content of IFA.<sup>80</sup>

## B. Proposals of Russia and China

After the discussion of simple ideas and approaches of FIFD and MIKTA, the proposals of Russia and China were much better and detailed than the former ones. Starting from the proposal by Russia, made on 30 March 2017, which was so structured and well explained. According to Russia's proposal, the goals of possible agreement related to the investment were to establish an open, consistent and transparent administrative strategy for the favor of investors without non-discrimination to any rights of the other investors and their investments.<sup>81</sup>

The first main component of Russia's proposal is transparency.<sup>82</sup> According to the approach of Russia, the provisions of the regulations should be transparent and the regulations should ensure a safe and predictable investment environment.<sup>83</sup> The second one is about domestic regulation.<sup>84</sup> This component mainly focused on easing the administrative processes in the state. The administrative processes include getting required permits, paying fees, periods of administrative activities, and the others. Dispute settlement is also considered the necessary one.<sup>85</sup> Owing to Russia's proposal, the regulations should have a clause for the settlement of conflicts related to investment and the investor should have access without any discrimination to the arbitral or judicial tribunals. The other key component is feedback. According to this element, the investor should ensure the state with the feedback related to its actions on investment in the state. Finally, yet importantly, the IFA should contain the clause about market access, which provides the investor to apply for the control of the market access for sustainable development.<sup>86</sup> Thus, unlike FIFD and MIKTA, Russia proposed

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<sup>80</sup> MIKTA Investment Workshop Reflections, 1 (2017), [https://www.wto.org/english/forums\\_e/business\\_e/mikta\\_investment\\_workshop\\_reflections.pdf](https://www.wto.org/english/forums_e/business_e/mikta_investment_workshop_reflections.pdf) (last visited Jul. 18, 2020).

<sup>81</sup> Communication from the Russian Federation (2017), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=236414,236189,236149,235996,235960,235961,235962,235526,235438&CurrentCatalogueIdIndex=8&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=236414,236189,236149,235996,235960,235961,235962,235526,235438&CurrentCatalogueIdIndex=8&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) (last visited Jul. 18 2020).

<sup>82</sup> *Id.*

<sup>83</sup> *Supra* note 41, 11.

<sup>84</sup> *Supra* note 81.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

the IFA with the market access clause and touched upon dispute settlement a bit.

On the other hand, on April 21, 2017, the Republic of China made a proposal regarding IFA, which was the second well-structured proposal for future IFA. China gave three lists of option units for the promotion of investment facilitation and IFA.<sup>87</sup> According to the proposal, the first main component for China was to improve the transparent investment policy.<sup>88</sup> Thus, China mentioned the publication and notification methods, as well as, accepted investors' right to comment drafts of legislation related to investment, which was discussed in the previous chapters. The second key component was to enhance the effective investment-related administrative process. Under the roof of this component, China aimed to promote and make deeper communication between states and investors and to encourage foreign investments to decrease the fees and charges of investors.<sup>89</sup> The last main component was focused on developing and less developed states by announcing a special approach to these states because of their status. According to China's proposal, unlike developed member states, these developing and less developed states should get various treatment during some reasonable period.<sup>90</sup> Hence, it is clear that agreeing upon the transparency and simplified administrative processes by both states' proposals was for the attraction of investors.

### C. The Proposals by Brazil and Argentina

After the discussion of the proposals by FIFD, MIKTA, Russia, and China, the other draft and approaches related to IFA belong to the proposal by Brazil & Argentina on 24 April 2017. According to the proposal, the delegations of Brazil and Argentina declared that the investment is about not only service or good, but both of them should also be taken into account for clarity. That is why careful consideration should be taken for creating a specific system of investment facilitation in general and IFA both for services and goods. Therefore, Brazil and Argentina proposed context, transparency, formalities and paperwork standards, admission of copies, application procedure, single electronic portal, local arrangements, multilateral arrangements, special treatment, technical assistance as the key components of IFA.<sup>91</sup> According to the proposal, the scope of the IFA is limited to the goods and services. On the

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<sup>87</sup> *Supra* Note 41, 7.

<sup>88</sup> Possible Elements of IFA–Communication from China (2017).

<sup>89</sup> *Id.*, 1.

<sup>90</sup> *Id.*, 3.

<sup>91</sup> Possible Elements of A WTO Instrument on Investment Facilitation, Communication from Argentina and Brazil (2017),

[https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=236414,236189,236149,235996,235960,235961,235962,235526,235438&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=236414,236189,236149,235996,235960,235961,235962,235526,235438&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) (last visited Jul. 18, 2020).

other hand, these states also take into account, use the methods of notification, and accept investors' right to comment on the draft law and regulations. Brazil and Argentina propose a special list of principles for application procedure for making it easy and clear for investors such as;<sup>92</sup>

*"... Most-favored nation treatment; right to regulate; electronic documents; transparency; national focal point; cooperation among national focal points; notification; single electronic window; processing of applications; appeals and review; prior commitment; publication; corporate social responsibility; and WTO Committee on investment facilitation."*

As China's proposal, these states accept the different treatment for developing and less developed states in some amount of time.<sup>93</sup> It is obvious from the key components, Brazil and Argentina mixed all ideas by organizations and states and created a new approach to investment facilitation. The main point here was the excluded clauses by Brazil and Argentina, which encompass the market access, investment security, and ISDS as the FIFD, MIKTA, and China.

As a result of all these proposals by FIFD, MIKTA, Russia, China, Argentina & Brazil, Brazil prepared the first draft of IFA and proposed it in the structured discussions on investment facilitation on 31 January 2018. The draft agreement describes all the discussed issues in previous chapters. The agreement's preamble starts declaring the aim of investment facilitation and IFA. The Agreement consisted of 9 sections and 20 articles in which the scope of the agreement, the MFN principle, transparency clause, notification method, application process exception to MFN principle, and the other key components mentioned.<sup>94</sup> In conclusion, Brazil mentioned that the aim of IFA was to encourage investors to invest and to achieve SDGs. That is why the common clauses such as market access, investment protection, and ISDS were not highlighted in the agreement.

#### **IV. Is the Republic of India against Investment Facilitation Agreement at WTO?**

In spite of the proposals by the members about IFA, there are also some other member states which are against a MAI. One of these member states is The Republic of India that does not run counter to IFA per se, but it is against a MAI under the auspices of WTO.

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<sup>92</sup> WTO, Structured Discussions on Investment Facilitation, Communication from Brazil (2018), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDdocuments/241891/q/Jobs/GC/169.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDdocuments/241891/q/Jobs/GC/169.pdf) (last visited Jun. 30 2020).

<sup>93</sup> *Supra* note 88.

<sup>94</sup> *Supra* note 92, 2-9.

## A. The arguments on demotivation of Investment Facilitation Agreement

In September 2017, the BRICS summit was held in China and during this summit, some of the BRICS countries including India agreed on the key elements of investment facilitation among them. Increasing transparency, boosting productivity, and promoting cooperation were the goals of investment facilitation.<sup>95</sup> For such promotion and facilitation of investment by EU in India, India and EU mounted investment facilitation mechanism that involves the identification and implementation of solutions for procedural impediments experienced by EU companies and investors in the establishment or activity of their operations in India.<sup>96</sup>

Nevertheless, India had severe concerns about the potential structured IFA as soon as the WTO allowed for systematic negotiations. Therefore, a settlement with obligatory guarantees on (a) market access; and (b) ISDS would lead to an agreement on FDI standards and arbitration provisions by granting policy area. In this regard, India made it clear that the discussions on the BRICS forum would not be used for a parallel WTO agreement although it agreed to participate in the BRICS investment facilitation mechanism. At the same time, India rejected the proposal when the EU and Canada started an informal discussion on the potential multilateral investment agreement in the WTO with ISDS. The assistance of the leading developed countries to the IFA at the meeting of the WTO General Council gives credibility to India's hesitations. India resisted the appearance of the IFA on the agenda of the forthcoming ministerial meeting of the WTO General Council held on 10 May 2017.<sup>97</sup>

The key ground for supporting this view is that India has evolved as a capital-exporting country. While proposing that India should join the initiatives of the EU and Canada to create an MIA, it points out that India's OFDI has risen enormously over the last one and a half decades, already than a billion dollars in 2000-01 to more than 26 billion dollars in 2019-20.<sup>98</sup> The developing acknowledgment of India as an exporter of capital is also reflected in the UNCTAD journal - Transnational Corporations' decision to have a specific matter on external investment from the Republic of India. Such counterview may mean that, as a capital exporter and a home state, India has

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<sup>95</sup> Outlines for BRICS Investment Facilitation (2017), <http://www.brics.utoronto.ca/docs/170831-investment.html> (last visited Jul. 17, 2020).

<sup>96</sup> *Id.*, 1.

<sup>97</sup> Centre William Rappard Meeting (2017), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009DP.aspx?language=E&CatalogueIdList=237843,236414,236189,236149,236159,236015,235996,235960,235961,235962&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=False&HasS](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=237843,236414,236189,236149,236159,236015,235996,235960,235961,235962&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=False&HasS) (last visited Jul. 16, 2020).

<sup>98</sup> Direct Investment for March (2020) <https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR221767A9AE9A7391487AA685190AC477B937.PDF> (last visited Jul. 18, 2020).

to do what is essential to promote the initiatives of its investors to gain access to international markets, which, in effect, will stimulate the growth of India. A brief review of India's ODFI data shows that India will expect to have a prudent approach to the IFA. While India's addition to the international ODFI has risen over the last decade, its portion of investment inflows is rising at a higher rate. The latter suggests that India is still dependent on capital imports rather than capital exports to fulfill its growth requirements. The difference between the Indian ODFI portfolio and FDI portfolio in 2020 is 49 billion dollars. It may however not be in India's desire to become a member to the agreement, the prospect of which is highly unpredictable at this point.<sup>99</sup>

## Conclusion

In this study, the analysis of investment facilitation, its principles and strategy at the WTO, the IFA, and the member states' proposals for IFA and last but not least the member states against IFA and the possible effects of this agreement on the WTO's activities were analyzed.

The active discussion of investment facilitation and IFA is laudable in the WTO, with a theory to set up an intergovernmental approach. The aspect of the "mapping exercise" taking place in the formal debate of the WTO should consider the full scope to which home countries and foreign investors can make a contribution to the facilitation of investment growth. Even though the IFA was suggested in the sense of the positive influence of foreign investment on development, it still does not comprise anything noticeable that would provide the policy space required for the development. The statement that it aims to preserve the legislative autonomy of sovereign states does not make sense, given that a significant number of IIAs have already drastically decreased the policy area of host countries, and IFA does not aim to resolve it. India will take very deliberate steps to deal with the suggestion. The opinion is that India will become a party to this agreement as India emerges as an essential source of ODFI. Nevertheless, the simple fact is that India relies far more on FDI than on ODFI to fulfill its requirements. As once Benjamin Franklin said, "*The best investment is in the tools of one's own trade*".

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<sup>99</sup> Reji. K. Joseph, *Investment Facilitation Agreement in WTO: What It Contains and Why India Should Be Cautious?*, 20 (2017).