

Report on “Key elements of responsible business conduct in a WTO Investment Facilitation for Development Agreement”

13th Commentary Group meeting (16 September 2022) &
12th public webinar (30 September 2022)

This report is a summary of the main issues discussed during the 13th meeting of the Commentary Group which took place virtually on 16 September 2022, from 15:00 to 16:15 Geneva time, and during the 12th public webinar which took place on 30 September 2022, from 15:00 to 16:00 Geneva time. Both events focused on the topic of “Key elements of responsible business conduct in a WTO Investment Facilitation for Development Agreement”. The events were held in the framework of the [Investment Facilitation for Development project](#), jointly implemented by the International Trade Centre (ITC) and the German Institute of Development and Sustainability (IDOS).

The events included the following speakers: Karl P. Sauvant, Resident Senior Fellow, Columbia University, CCSI; Catherine Titi, Professor of Law, University of Paris; Allan Jorgensen, Head, RBC Centre, OECD; Colette van der Ven, international trade lawyer, founder and director of consulting firm TULIP; Matthew Stephenson, Head, Investment Policy and Practice, World Economic Forum; Sofia Boza, Ambassador, Permanent Representative of Chile to the WTO, co-Coordinator of the Structured Discussions on Investment Facilitation for Development; Federico Ortino, Professor of International Economic Law, King’s College London; Andrea Shemberg, Chair Global Business Initiative on Human Rights; Louise Vytopil, Vice Chair, International Chamber of Commerce, Commission on Corporate Responsibility and Anti-corruption.

The programmes for both events are attached to this report. The views summarized in this report are those of the individual speakers and do not necessarily reflect those of the organizers or the institutions with which the speakers are affiliated.

Discussion highlights

- There is a clear trend in international investment agreements (IIAs) to contain a reference to responsible business conduct (RBC). Most recent IIAs, whether between and among developed countries or between and among developing countries, include such a reference. Additionally, inclusion of specific elements such as references to international instruments like the OECD Guidelines and to a broad set of subject matter such as labour, environment and local communities is increasingly commonplace.
- Governments play a key role in ensuring the implementation of RBC obligations. The current state of affairs requires governments to enforce, respect and protect RBC. In light of this, virtually all home countries have endorsed international instruments and expect international investors to observe them. Therefore, host countries should not fear to expect or even require foreign investors to observe international standards regarding RBC.
- An Investment Facilitation for Development (IFD) Agreement should contain a strong provision on RBC that should explicitly refer to specific elements such as references to international standards addressing areas such as labour, environment, gender equality,

community relations, and the rights of Indigenous peoples, supply-chain commitments, due diligence, stakeholder consultations, and exchange of information on best practices. The inclusion of an RBC provision encouraging foreign investors to comply with international standards on RBC is particularly important to increase the development impact of FDI.

I. There is a clear trend in IIAs to contain a reference to RBC

Two-thirds of the IIAs concluded between June 2019 and June 2022 (which are in the public domain) contain some reference to RBC, with the overwhelming majority including standing provisions on the subject (in some, generally older, international investment agreements, the term “corporate social responsibility” CSR) is used to represent the concept of RBC). Such provisions focus on imposing—mostly voluntary—obligations either on the parties to the agreement to implement RBC (60%) or directly on the investors (40%). Concerning the language, the majority of the RBC provisions opt for using a relatively strict language marked by the verb ‘shall’, whereas one-third of the IIAs adopt softer language such as ‘should’ and ‘recognising the importance of’.

All (with one exception) IIAs concluded in the past three years with an RBC provision make reference to “internationally recognised standards, guidelines and principles of corporate social responsibility” “endorsed”, “supported”, and/or “recognised” by the Parties”. Half of all these IIAs include a reference to a specific RBC/CSR instrument. Among the international instruments referred to in these IIAs, the OECD Guidelines is the most referred instrument (7), followed by the UN Guiding Principles (5), the ILO Declaration (3) and the UN Global Compact (1). Interestingly, most of the IIAs that refer to one or more specific instrument do so in an illustrative or open-ended list. Such a choice leaves room for all recognised RBC instruments to come into play.

IIAs increasingly include express mention of specific elements of RBC. The 2019 India-Kyrgyzstan BIT, for example, states that CSR principles address issues such as “labour, the environment, human rights, community relations and anti-corruption”. Likewise, the IIAs concluded based on the Brazilian model BIT include investors’ obligation to comply with voluntary principles and standards for responsible business conduct that encompass sustainable development, human rights and good governance.

There is a fifty-fifty split regarding the types of obligation included in recent IIAs. While half of these IIAs focus on the obligation to encourage the implementation of principles and standards of RBC/CSR, the other half encompasses additional, more specific obligations, referring, for example, to ‘responsible management of supply chains’ (2019 EU-UK FTA), ‘exchange of information and cooperation’ (2021 Chile-Paraguay FTA) or ‘environmental, social, human rights impact assessments’ requirements imposed on investors prior to their establishment (2021 Rwanda-Democratic Republic of the Congo BIT). Thus, recent IIAs including various specific RBC provisions are concluded both among developed and developing countries.

II. **Governments play a key role in ensuring the implementation of RBC provisions.** Since the adoption of the UN Guiding Principles on Business and Human Rights in 2011, states have had a key role in promoting and implementing RBC. This instrument has changed the relationship between governments and international investors by encouraging national legislatures to discuss national plans on RBC. As a result, since 2011, 60 countries have discussed national implementation plans, and 32 have enacted legislation to implement the UN Guiding Principles.

Likewise, about 50 countries have or are in the process of developing national action plans on business and human rights or RBC. Such efforts provide an effective channel to develop a national conversation about the investment climate and discuss how policies and regulations in a country can create and enable an environment for investors to conduct business responsibly. Governments play a key role in encouraging, incentivising and promoting RBC through different instruments, such as issuing recommendations to investors and developing promotion initiatives. Governments should not only enable a favourable legal environment, aligning domestic interests with expectations placed upon international investors, but also comply with RBC on their own activities as economic operators, such as in public procurement.

Bringing governments to the centre of the discussion highlights the global governance gap as the cause of continued non-responsible business conduct. Such a gap is a by-product of globalisation and enables a permissive environment for wrongful acts by international investors. Bridging the global governance gap requires a ‘smart mix’ of measures at the national, regional and multilateral levels, as well as covering both mandatory and voluntary obligations. The question is, hence, not whether to require RBC, but how to do it. This means that states should enact regulation and not only encourage the voluntary observation of international standards. In this sense, if the concept of CSR first emerged to reflect multinational enterprises’ initiative to take on voluntary commitments, it evolved to gain a broader meaning. CSR and RBC are increasingly used interchangeably, stressing the key role played by governments in supporting international standards. Implementing RBC requires governments to enforce, respect and protect such standards.

In line with this governmental shift, international investors and stakeholders expect legislation to be put in place. For instance, the US passed regulation to prevent forced labour, and the UK’s Modern Slavery Act binds not only multinational enterprises headquartered in the UK, but also those carrying out business in the UK above a certain threshold. Moreover, most international investors accept that they must take obligations, for example, on due diligence to mitigate risks. It was suggested that there is a positive correlation between profitability and observing RBC. In an FDI context, virtually all developed home economies have endorsed international instruments and assume that investors will observe them. Germany, for instance, expects their investors to follow international standards such as the OECD Guidelines for Multinational Enterprises, and has passed legislation on supply chains. Accordingly, host countries should embrace and even require investors to observe international standards on RBC.

III. An IFD Agreement should contain a strong provision on RBC that should explicitly refer to specific elements

The negotiations of an IFD Agreement in the WTO include discussions on the need for an RBC provision. Participating Members have highlighted the key role of RBC, alongside anti-corruption measures, to promote sustainable development. However, further discussion is urgently needed as negotiations are heading to a conclusion by the end of 2022. Members should discuss not only good practices and such internationally recognised principles and standards as the UN Guiding Principles and the ILO MNE Declaration, but adopt a strong provision to reflect the changing landscape concerning RBC. As IIAs are increasingly referring to specific elements such as labour, human rights, environment, and Indigenous peoples, a strong provision in the WTO would follow the current trend and contribute to bridging the gap in global governance, which requires a smart mix of measures at the domestic, regional and multilateral levels. Likewise, RBC is no longer limited to improving transparency and securing voluntary commitments. Rather, an RBC provision should require countries to create commitments for international investors, for example, undertake due diligence and establish sustainable supply chains.

A strong provision on RBC is essential for developing countries, especially African countries, to increase the development impact of FDI and secure higher levels of beneficial FDI. RBC is the single most effective way to ensure quality investment and thus contribute to sustainable development.

IV. Online poll

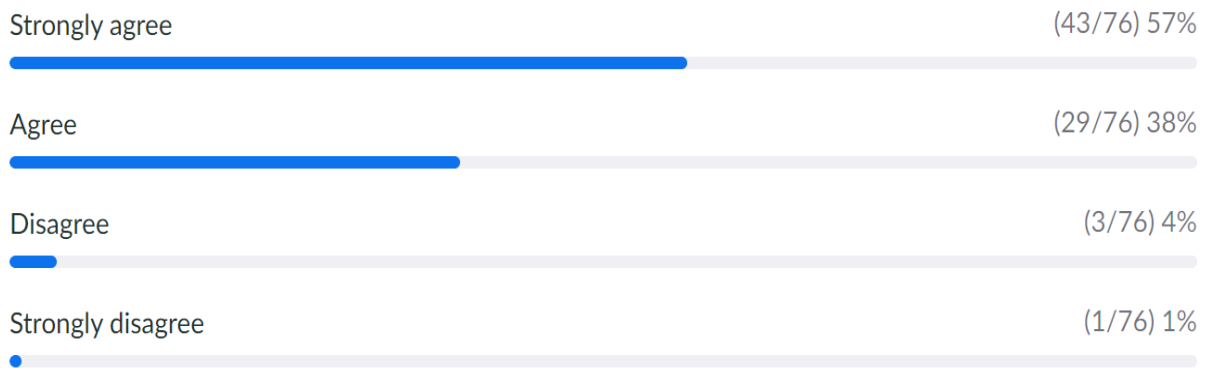
During the public webinar on RBC, an online poll was conducted towards the end of the session. The poll included four questions, and 76 attendees answered those questions. The results below indicate that the great majority of participants in the meeting would like the WTO IFD Agreement to contain a strong provision on RBC that should explicitly refer to specific elements.

4 questions|76 participated

1. How important is it to include a responsible business conduct provision in a WTO Investment

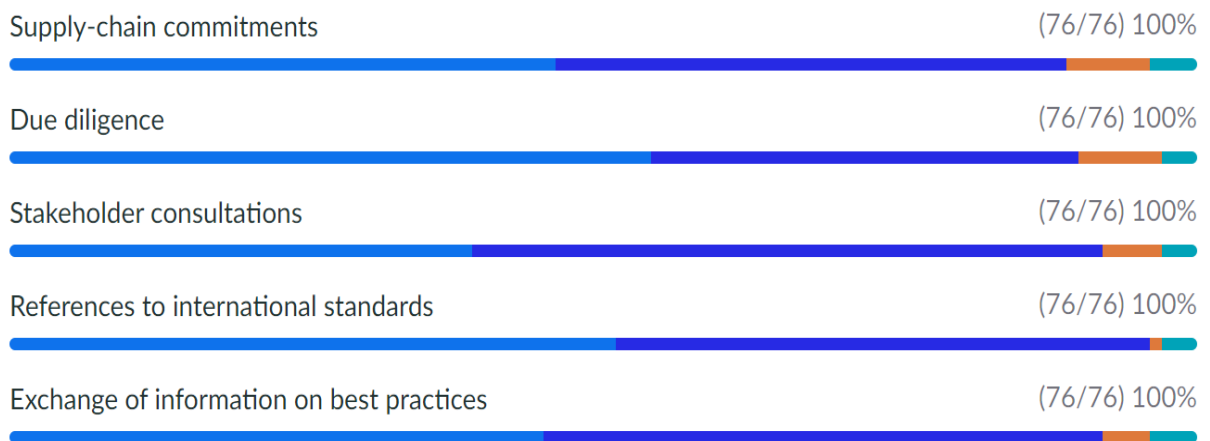
Facilitation for Development Agreement (Single Choice) *

76/76 (100%) answered



2. How important is it to explicitly refer to the following specific aspects in such a provision (please indicate the degree of importance for each one listed here): (Rank Order) *

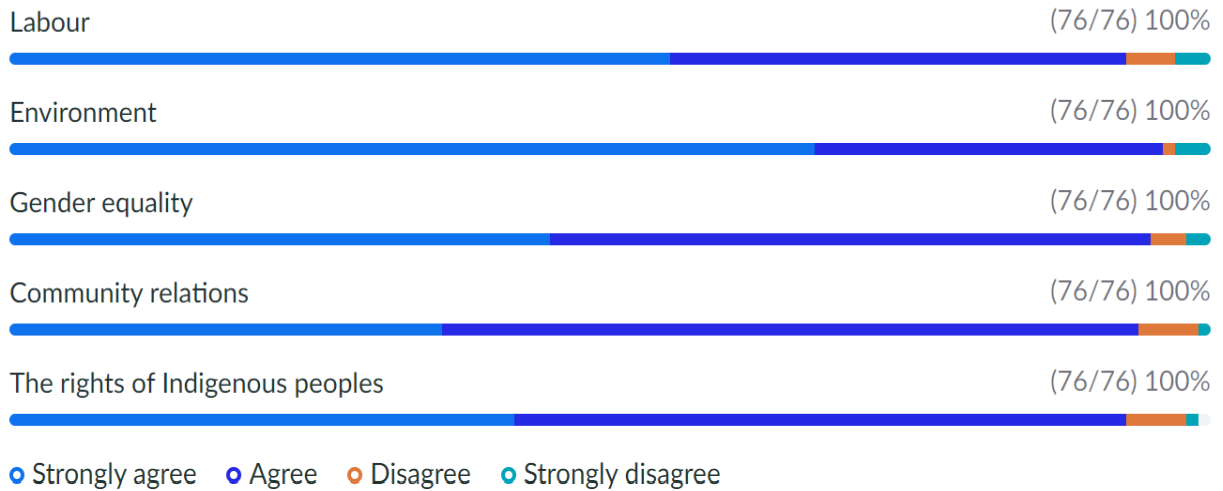
76/76 (100%) answered



● Strongly agree
 ● Agree
 ● Disagree
 ● Strongly disagree

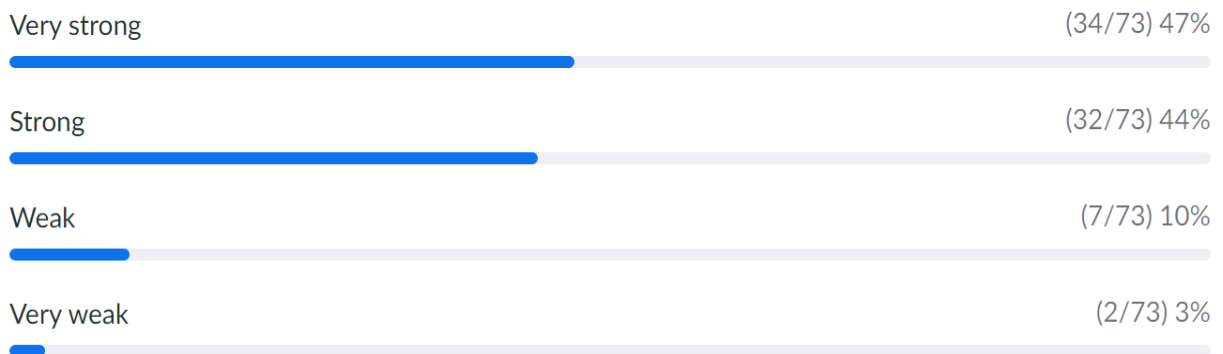
3. How important is it to explicitly refer to the following specific areas in such a provision (please indicate the degree of importance for each one listed here): (Rank Order) *

76/76 (100%) answered



4. How strongly worded should any provision on responsible business conduct in a WTO Investment Facilitation for Development Agreement be? (Multiple Choice)

73/76 (96%) answered



Annexe I: Commentary Group meeting invitation and agenda

Invitation: Key elements of responsible business conduct, with special attention to gender
3:00-4:15pm CET, 16 September 2022

Dear Madam/Sir,

On behalf of the International Trade Centre (ITC), the German Institute of Development and Sustainability (IDOS), and the World Economic Forum (WEF), we cordially invite you to the 13th meeting of the Commentary Group on:

Key elements of responsible business conduct, with special attention to gender
16 September 2022, 3:00-4:15pm Central European Time (CET)

Please click [here](#) to join the meeting.

As a reminder, the Commentary Group's mandate is to provide input on the content of a new agreement being developed at the WTO to facilitate FDI and increase its development impact, as well as to help inform national, bilateral and regional investment facilitation efforts.

The 13th meeting of the Investment Facilitation Commentary Group will explore key elements of responsible business conduct (RBC), including supply-chain commitments, due diligence, stakeholder consultations, references to international standards, and the exchange of information on best practices. Particular attention will be given to the gender dimension of FDI, including in reference to how non-discriminatory treatment can be ensured and how women can reap more of the benefits of FDI. We will discuss to what extent and how these elements of RBC are being advanced through international investment agreements and other actions. The focus will be on identifying concrete measures that policymakers can adopt to advance the key elements of RBC. What RBC-advancing measures are most important and effective?

The findings will be captured in a summary report, to inform the adoption of policies and measures by governments and help delegates currently negotiating an Agreement on Investment Facilitation for Development at the WTO.

Chair

Karl P. Sauvant, Resident Senior Fellow, Columbia Center on Sustainable Investment (CCSI)

Speakers

- **Catharine Titi**, Research Associate Professor, University Paris II Panthéon-Assas, *"Implementing key elements of responsible business conduct: trends, challenges and the way forward"*.
- **Allan Jorgensen**, Head, RBC Centre, OECD, *"How to promote the uptake of key elements of responsible business conduct"*.
- **Colette van der Ven**, International Trade Lawyer, *"RBC and the promotion of sustainable FDI"*.

Concluding remarks

Matthew Stephenson, Head, Investment Policy and Practice, World Economic Forum.

We look forward to welcoming you to the Commentary Group meeting!

With kind regards,

Rajesh Aggarwal, Director (oic), Division for Market Development, ITC
Axel Berger, Senior Researcher, IDOS
Karl P. Sauvant, Resident Senior Fellow, CCSI, Columbia University
Matthew Stephenson, Head, Investment Policy and Practice, World Economic Forum.

Background materials

ITC-DIE project on [Investment Facilitation for Development](#)

OECD, “Due diligence guidance for responsible business conduct”,
<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

OECD, “FDI qualities policy toolkit: Policies for improving the sustainable development impacts of investment”, <https://www.oecd.org/investment/investment-policy/FDI-Qualities-Policy-Toolkit-Consultation-Paper-2021.pdf>.

WEF, [Global Investment Policy and Practice](#) initiative, including workstream on investment facilitation.

Karl P. Sauvant and Federico Ortino, “[The WTO Investment Facilitation for Development Agreement needs a strong provision on responsible business conduct](#)”, *Columbia FDI Perspective*, no. 335 (11 July 2022).

Karl P. Sauvant, “[How would a future WTO Agreement on Investment Facilitation for Development encourage sustainable FDI flows, and how could it be further strengthened?](#)”, in Kabir Duggal, Gustavo Vaughn, Elora Farias, Mateo Verdías, and Gino Rivas, *What Does It Mean to be “Pro Arbitration”? Reflections on George Bermann’s Legacy by Columbia Law School Community* (forthcoming 2022).

Karl P. Sauvant and Evan Gabor, “[Facilitating sustainable FDI for sustainable development in a WTO Investment Facilitation Framework: Four concrete proposals](#)”, *Journal of World Trade*, vol. 55 (2021), pp. 261-286.

Bios:

Allan Jorgensen

Allan Jorgensen is Head of the OECD Centre for Responsible Business Conduct and leads the work of the OECD to develop and promote global standards for responsible business through international cooperation, public policy development and global supply chains. He has two decades of experience working on sustainable business and finance in both the private and public sectors. He holds degrees in Political Science from the University of Copenhagen (Denmark) and in International Conflict Analysis from the University of Kent at Canterbury (UK).

Karl P. Sauvant

Karl P. Sauvant introduced the idea of an International Support Program for Sustainable Investment Facilitation in the E15 Task Force on Investment Policy in 2015. From there, the proposal was taken forward in the WTO. He has written extensively on this subject (see <https://ssrn.com/author=2461782>), participated in various events relating to it and currently assists the ITC and DIE on a project on Investment Facilitation for Development. He retired in 2005 as Director of UNCTAD's Investment Division and established, in 2006, what is now the Columbia Center on Sustainable Investment (CCSI). He stepped down as the Center's Executive Director in 2012, to focus his work, as a CCSI Resident Senior Fellow, on teaching, research and writing.

Matthew Stephenson

Matthew Stephenson is Policy and Community Lead for International Trade and Investment at the World Economic Forum, where he manages the Global Investment Policy and Practice initiative. Previously, he worked at the IFC, where he led the workstream on outward FDI. He has also worked at the OECD on Africa and investment and served as a diplomat for the U.S. Department of State, leading the economic team in Afghanistan and managing economic programs in the Middle East. He is a member of the T20 Task Force on Trade and Investment. He has a PhD from the Graduate Institute in Geneva, a master's from the Harvard Kennedy School and a bachelor's from Oxford University.

Catharine Titi

Catharine Titi is a tenured Research Associate Professor at CNRS–CERSA, University Paris-Panthéon-Assas. She is a member of the ESIL Board and she serves as Deputy Chair of the Academic Forum on ISDS. She sits on CAfA's panel of arbitrators and was appointed to the roster of the USMCA's Annex 31-B panelists. In 2016, she was awarded the Smit-Lowenfeld Prize by the International Arbitration Club of New York. Her latest monograph, [The Function of Equity in International Law](#), was published by Oxford University Press in 2021.

Colette van der Ven

Colette van der Ven is the Founding Director of TULIP Consulting, a Geneva-based consulting firm, where she advises governments and international organisations on how to design trade policy to promote inclusive and sustainable development. She is also a visiting lecturer in international economic law at the Graduate Institute, where she teaches the TradeLab clinic. She holds a Juris Doctor from the Harvard Law School and a Master's in public policy from the Harvard Kennedy School of Government.

Annexe II: Public webinar invitation and agenda

Invitation: Key elements of responsible business conduct in a WTO Investment Facilitation for Development Agreement

3:00-4:00pm CET, 30 September 2022

Dear Colleagues,

On behalf of the International Trade Centre (ITC) and the German Institute of Development and Sustainability (IDOS), we cordially invite you to a webinar on:

Key elements of responsible business conduct in a WTO Investment Facilitation for Development Agreement

30 September 2022, 3:00-4:00pm Central European Time (CET)

This is the 12th of a webinar series on investment facilitation for development, held in the framework of a joint ITC/IDOS [project](#) on Investment Facilitation for Development.

Like all ITC/IDOS events, participation in the webinar is free of charge. However, it is necessary to register for the event (please [click here](#)), to receive the meeting link details.

The long-term objective of facilitating FDI flows is to foster sustainable development. In the context of the negotiations on an Investment Facilitation for Development (IFD) Agreement in the World Trade Organisation (WTO), one of the key components of promoting sustainable investment is responsible business conduct (RBC).

This public webinar—after an opening presentation on the status of negotiations of the IFD Agreement—will explore in greater detail key elements of responsible business conduct and how they are being advanced through international investment agreements and other actions. Particular attention will be given to supply-chain commitments, due diligence, stakeholder consultations, references to international standards, and the exchange of information on best practices. Attention will also be given to issues related to the degree of bindingness of obligations and the question of how the uptake of RBC can be promoted.

As usual, the results of the discussion will be communicated to the negotiators of the IFD Agreement.

The webinar will have the following agenda and speakers:

Opening remarks

Quan Zhao, Trade Policy Advisor, Division of Market Development, ITC

Moderator

Karl P. Sauvant, Resident Senior Fellow, Columbia University, Columbia Center on Sustainable Investment (CCSI)

Speakers

- **Sofia Boza**, Ambassador, Permanent Representative of Chile to the WTO, co-Coordinator of the Structured Discussions on Investment Facilitation for Development, *“The status of the WTO investment facilitation negotiations”*.

- **Federico Ortino**, Professor of International Economic Law, King’s College London, “**Key elements of responsible business conduct in international investment agreements: trends**”.
- **Andrea Shemberg**, GBI Chair, “*Implementing key elements of responsible business conduct: trends, challenges and the way forward*”.
- **Louise Vytopil**, Vice Chair, International Chamber of Commerce, Commission on Corporate Responsibility and Anti-corruption, “*Implementing the responsible business conduct provision under the IFD Agreement*”.

Concluding remarks

Karl P. Sauvant, Resident Senior Fellow, Columbia University, Columbia Center on Sustainable Investment (CCSI)

To join the meeting, kindly click on the link that will be sent to you shortly before **3:00 pm CET on 30 September** and follow the instructions.

We look forward to welcoming you to the webinar!

With kind regards,

Rajesh Aggarwal, Director (oic), Division for Market Development, ITC

Axel Berger, Deputy Director (interim), IDOS

Karl P. Sauvant, Resident Senior Fellow, Columbia University, CCSI

Background materials

ITC-IDOS project on [Investment Facilitation for Development](#).

Axel Berger, Yardenne Kagan, Karl P. Sauvant, eds., [Investment Facilitation for Development: A Toolkit for Policymakers](#) (Geneva: ITC, 2022), second edition.

Karl P. Sauvant and Federico Ortino, “[The WTO Investment Facilitation for Development Agreement needs a strong provision on responsible business conduct](#)”, *Columbia FDI Perspective*, no. 335 (11 July 2022).

Karl P. Sauvant, “[How would a future WTO Agreement on Investment Facilitation for Development encourage sustainable FDI flows, and how could it be further strengthened?](#)”, in Kabir Duggal, Gustavo Vaughn, Elora Farias, Mateo Verdías, and Gino Rivas, *What Does It Mean to be “Pro Arbitration”? Reflections on George Bermann’s Legacy by Columbia Law School Community* (forthcoming 2022).

Karl P. Sauvant and Evan Gabor, “[Facilitating sustainable FDI for sustainable development in a WTO Investment Facilitation Framework: Four concrete proposals](#)”, *Journal of World Trade*, vol. 55 (2021), pp. 261-286.

Bios:

Sofia Boza

Sofía Boza is the Ambassador of Chile to the World Trade Organization, since July 2022. She has also taken over the co-coordination of the Structured Discussions on Investment Facilitation for Development. Prior to that, she was an Associate Professor and Chief at the Department of Rural Management and Innovation at the University of Chile and Professor at the Institute of International Studies at the same University. She holds a bachelor's degree in Economics from the University of Seville and a PhD in Economics from the Autonomous University of Madrid.

Federico Ortino

Federico Ortino is Professor of International Economic Law at The Dickson Poon School of Law, King's College London. He is a member of the ILA Committee on the Rule of Law and International Investment Law; founding Committee Member (and former co-Treasurer) of the Society of International Economic Law; consultative member of the Investment Treaty Forum; general co-editor of the International Trade and Investment Law Series with Hart Publishing; editorial board member of the Journal of International Economic Law, Journal of International Dispute Settlement and Journal of World Investment and Trade. He has been involved as expert in projects with UNCTAD, ITC, OECD, IISD and WEF. He is a Consultant to Clifford Chance.

Karl P. Sauvant

Karl P. Sauvant introduced the idea of an International Support Program for Sustainable Investment Facilitation in the E15 Task Force on Investment Policy in 2015. From there, the proposal was taken forward in the WTO. He has written extensively on this subject (see <https://ssrn.com/author=2461782>) and currently assists the ITC and DIE on a project on Investment Facilitation for Development. He retired in 2005 as Director of UNCTAD's Investment Division and established, in 2006, what is now the Columbia Center on Sustainable Investment (CCSI). He stepped down as the Center's Executive Director in 2012, to focus his work, as a CCSI Resident Senior Fellow, on teaching, research and writing.

Andrea Shemberg

Andrea Shemberg is Chair of the Steering Group of the Global Business Initiative on Human Rights. She has worked on business and human rights for nearly 20 years before becoming Legal Advisor to John Ruggie, the-then UN Special Representative of the Secretary-General for Business and Human Rights (SRSG). In that capacity, she led the SRSG's work on investment contracts and treaties and participated in the drafting of the UN Guiding Principles on Business and Human Rights. She is a Visiting Fellow at the London School of Economics and a US-trained lawyer and has an MSc from the London School of Economics in Human Rights.

Louise Vytopil

Louise Vytopil, LLB MSc, has 15 years of experience in business and human rights. She acts as Vice-Chair of the International Chamber of Commerce's Commission on Corporate Responsibility and Anti-corruption and currently leads KPMG The Netherlands business and human rights service line. Previously, she worked as a corporate lawyer and was responsible for the creation, landing and roll-out of the human rights strategy and programme for a major Dutch multinational company. She published many academic papers and articles and (co-) authored books on business and human rights in the past ten years.

Quan Zhao

Quan Zhao is Trade Policy Adviser at ITC's Division for Market Development. He has almost 20 years of experience in trade policy development and trade negotiations. He worked for the Ministry of Commerce of China in the Department for WTO Affairs and spent five years as a trade negotiator on services trade, digital trade and e-commerce at the Permanent Mission of China to the WTO. He was the Chair of WTO's Committee for Trade in Financial Services. Since 2014, he has been working for ITC on the design, management, implementation, and resource mobilization for technical assistance projects on services trade, e-commerce, digital trade, investment, G20, south-south cooperation, and SME competitiveness.