TPSA | CANADA–INDONESIA TRADE AND PRIVATE SECTOR ASSISTANCE PROJECT

TPSA Project Delivers a Training Workshop to Prepare Indonesian Officials for Investment Facilitation Negotiations

The Indonesian Ministry of Trade and Investment Coordinating Board need to be equipped with technical knowledge and recommendations on investment facilitation negotiations in order to successfully renegotiate Indonesia's bilateral investment treaties.

Introduction

In 2014, Indonesia announced that it would seek to terminate all 67 of its bilateral invetment treaties (BITs) and negotiate better replacements for them. So far, more than 20 BITs have been terminated and one replacement treaty has been signed (with Singapore), but much more negotiating work remains.

At the same time, there is ongoing discussion of a possible multilateral investment facilitation agreement under the World Trade Organization (WTO).

In this context, Indonesia's Ministry of Trade (MoT) and Investment Coordinating Board (BKPM), particularly their negotiating team, need to be equipped with technical knowledge and recommendations on how to negotiate investment facilitation agreements. For this reason, the TPSA project was asked to organize a training workshop on investment facilitation negotiations.

Two days of training were delivered in Jakarta on April 1 and 2, 2019, to 43 participants (21 women and 22 men) from the MoT, BKPM, the Coordinating Ministry for Economic Affairs, the Ministry of Industry, and the private sector, including the Indonesia Chamber of Commerce and Industry (KADIN) and the Employers' Association of Indonesia (APINDO).

Participants at the investment facilitation workshop.

Welcome and Keynote Presentations

The workshop began with opening remarks by Greg Elms, Field Director of the TPSA Project.

Participants were then welcomed by Hari Basuki, representative of the Canadian Embassy in Jakarta.

Canada

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Deny Wachyudi Kurnia, Director of Multilateral Negotiations at the Ministry of Trade, gave a keynote presentation.

He noted that the TPSA project had provided many excellent training workshops over the previous four years, thanks to the support of the Government of Canada, and that this would be the final training workshop delivered by the project.

Three speakers then delivered keynote presentations: Deny Wachyudi Kurnia, Director of Multilateral Negotiations at the MoT; Fajar Usman, Director of Foreign Investment Cooperation at BKPM; and Shanti Shamdasani, Vice-Chair of the International Cooperation (Free Trade Area) committee at KADIN.

Mr. Kurnia thanked the Government of Canada and TPSA for organizing the training workshop. He noted that investment facilitation will continue to be an important negotiating issue going forward, particularly given the signing by 70 WTO members of a joint ministerial statement on investment facilitation for development at the Buenos Aires WTO ministerial conference in December 2017.

Mr. Usman discussed the investment facilitation measures being undertaken by the Government of Indonesia, including the creation of an integrated application process and the introduction of an electronic submission system. He expressed his hope that the workshop would be beneficial for all participants.

Ms. Shamdasani emphasized that both the government and the private sector need to focus on long-term policy goals. She pointed to the experience of Singapore, which has been implementing investment facilitation measures step by step in partnership with other countries over the past 20 years. She also took a moment to thank Canada for its help for Indonesia through the TPSA project and noted that it has been one of the most robust training and capacity-building programs she has witnessed.

Background and Context on Investment Facilitation

Day 1 of the workshop focused on providing participants with some context on investment facilitation. The first session was presented by Wenguo Cai, a director in the International Programs division at The Conference Board of Canada. He offered background information about investment facilitation within the multilateral WTO context, citing the UNCTAD working definition of investment facilitation that would be used to guide future discussions:

"Investment facilitation is a set of policies and actions that seek to make it easier for investors to establish and expand their operations, as well as to conduct their day-to-day business in host countries."[1]

Mr. Cai presented a history of discussions around investment facilitation that have taken place at WTO ministerial conferences since 1996 and discussed investment facilitation proposals. He then provided participants with the key elements that have been present in various investment facilitation proposals to date, and ended by offering a few recommendations to Indonesia for consideration.

The second session was presented by Robyn Gibbard, an economist at The Conference Board of Canada. He provided context on investment facilitation at the bilateral and regional level, a brief history of international investment treaties, and a summary of the traditional approach to international investment rule-making, which emphasizes protections for investors. He then discussed some of the concerns that have emerged around that traditional approach, including its effectiveness at attracting investment, problems with investor-state dispute settlement, and infringements on countries' sovereignty. He wrapped up by sharing individual countries' approaches to modernizing the international investment regime and highlighted their emphasis on investment facilitation, rather than protection.

Robyn Gibbard and Wenguo Cai, TPSA experts, lead the workshop.

The third session was presented remotely from Geneva by Elisabeth Tuerk, Chief of UNCTAD's Section on International Investment Agreements. Ms. Tuerk provided a very detailed overview of UNCTAD's work on international investment agreements, discussed historical trends in international investment rule-making, highlighted the need to reform the existing treaty regime, and presented UNCTAD's proposals for reform. She emphasized that, in attracting international investment, a country must make sure that the investment provides specific benefits for development.

Investment Facilitation Measures

The next three sessions, spread over the two days of the workshop, focused on practical discussions of investment facilitation measures. The TPSA team prepared a list of 10 potential measures that could be included in a future investment facilitation agreement. The 10 measures, listed below, were discussed in detail, along with real-life treaty text examples, practical examples from Canada, and considerations for implementation.

Measures relating to regulatory transparency and predictability:

1. the online publication of current investment-related measures;
2. the notification of international organizations responsible for the agreement (possibly the WTO or APEC) regarding new investment-related measures;
3. enquiry points for foreign and domestic investors.

Measures for streamlining administrative procedures:

4. a mechanism to streamline and simplify investment applications and approvals processes;
5. a review of licensing and qualifications, formalities, and documentation requirements;
6. a one-stop-shop or single window for foreign investors.

Measures for domestic coordination and other investment facilitation measures:

7. inter-agency cooperation;
8. an investor-state dispute prevention mechanism;
9. investors' obligations and corporate social responsibility;
10. public–private consultations for investment facilitation reforms.

The final session of the workshop discussed ongoing international cooperation on investment facilitation negotiations. Mr. Cai spoke about the need for technical assistance to help developing countries implement investment facilitation measures, but noted that there is no consensus about the forum in which to discuss these issues. He highlighted the WTO Trade Facilitation Agreement as a potential model multilateral framework for future investment facilitation discussions in the WTO, and concluded by bringing the focus back to Indonesia, setting the stage for the group discussions that followed.

Group Discussions

After lunch on Day 2, participants were divided into four groups and tasked with examining each of the 10 proposed investment facilitation measures presented earlier. They were asked to classify each measure into one of the following three categories, based on how difficult it would be for Indonesia to implement:

- The measure could be implemented immediately.
- Additional time would be required for implementation.
- Both additional time and external financial and technical assistance would be required for implementation.

Group discussions.

Each group presented and justified their conclusions. This provoked lively discussions, particularly when groups had come to different conclusions about how to classify a measure.

Participant Feedback

Overall satisfaction with the training activity was high: 22 per cent of participants indicated that the training was excellent, 56 per cent reported that it was very good, and the remaining 22 per cent called it good. All participants reported that their knowledge had increased as a result of their participation in the training, including 58 per cent who reported it had increased significantly.

> "Let me express my gratitude to TPSA for holding this workshop. The workshop material and the TPSA team improved our understanding of the issue of investment facilitation negotiations, thereby building the capacity of national policy makers in Indonesian ministries and institutions, including KADIN. Workshop resource people delivered complete material on the issue of investment facilitation and provided an analysis of the issues from the Indonesian perspective. We consider this TPSA training to be helpful to our efforts to increase the capacity of national policy makers in the field of trade and investment."
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> —SULISTYO WIDAYANTO
> *Deputy Director for Multilateral Negotiation in charge of Investment, IPR, Development and Environmental Issues, Directorate General of International Trade Negotiation*

Participants said the skills learned during the workshop were directly applicable to their day-to-day duties. Seventy per cent reported that they expect to use their knowledge and skills very frequently or frequently, 24 per cent said they would use them occasionally, and just 6 per cent said rarely. Eighty-eight per cent of participants indicated that their new level of confidence in applying the skills learned was good or excellent.

Key Takeaways and Conclusions

- **There is no consensus on a multilateral treaty on investment facilitation.** There have been repeated discussions at WTO ministerial conferences and other forums about negotiating an international investment facilitation agreement. However, pushback from some parties has prevented a consensus about where such negotiations should be housed. There have also been a number of technical proposals for a future international investment facilitation agreement, and 70 countries issued a joint ministerial statement on investment facilitation for development at the 2017 WTO ministerial conference in Buenos Aires. But so far, there are no negotiations on a multilateral treaty on international investment in general or investment facilitation in particular.
- **As a result, most investment facilitation discussions have occurred at the bilateral and regional level.** As of the end of 2018, there are more than 3,300 bilateral and regional treaties dealing with international investment. While this plethora of agreements means there is no centralized control and little coordination, many traditional investment agreements have adopted a similar approach that focuses on increasing investment by providing legal protections for investors and dispute-resolution mechanisms that allow them to recoup losses in the case of unfair or discriminatory treatment.
- **However, this traditional international investment regime is facing a legitimacy crisis and needs to be reformed.** Countries are concerned that the traditional approach has excessively restricted their rights to regulate and infringed on their sovereignty. Investor-state dispute-settlement mechanisms have been roundly criticized for allowing foreign multinationals to sue hosting governments for

Group presentation.

damages in secretive private tribunals. And empirical evidence has not shown that the traditional approach has resulted in an actual increase in foreign investment. Instead, research suggests that other variables—such as stability, the rule of law, and economic performance—are much more important to attracting foreign direct investment.

- **Going forward, focus on reducing ground-level barriers to foreign investment.** As a result of these problems with the traditional international investment regime, there is an opportunity to reform international investment rules. The new approach, investment facilitation, emphasizes removing ground-level barriers to investment and places investment within a broader context that includes other policy goals. Investment facilitation reforms have been undertaken by many countries at the domestic level and have been implemented in new bilateral investment treaties. Investment facilitation is also a natural locus around which to base future discussions about a multilateral agreement.
- **The GoI and Indonesian private sector should be prepared for future investment facilitation negotiations.** Although investment facilitation negotiations have not yet been launched at the WTO, many of its members are preparing their positions for potential future negotiations. Many countries are forming negotiating groups, which Indonesia could join and participate in. Many position papers have also been submitted to the WTO on investment facilitation negotiations. In the meantime, Indonesia is also actively negotiating multiple free trade agreements (FTAs) that include investment provisions. As a result, Indonesia should prepare for future negotiations in this important area.

About the TPSA Project

TPSA is a five-year, C$12-million project funded by the Government of Canada through Global Affairs Canada. The project is executed by The Conference Board of Canada, and the primary implementation partner is the Directorate General for National Export Development, Ministry of Trade.

TPSA is designed to provide training, research, and technical assistance to Indonesian government agencies, the private sector—particularly small and medium-sized enterprises (SMEs)—academics, and civil society organizations on trade-related information, trade policy analysis, regulatory reforms, and trade and investment promotion by Canadian, Indonesian, and other experts from public and private organizations.

The overall objective of TPSA is to support higher sustainable economic growth and reduce poverty in Indonesia through increased trade and trade-enabling investment between Indonesia and Canada. TPSA is intended to increase sustainable and gender-responsive trade and investment opportunities, particularly for Indonesian SMEs, and to increase the use of trade and investment analysis by Indonesian stakeholders for expanded trade and investment partnerships between Indonesia and Canada.

The expected immediate outcomes of TPSA are:

- improved trade and investment information flows between Indonesia and Canada, particularly for the private sector, SMEs, and women entrepreneurs, including trade-related environmental risks and opportunities;
- enhanced private sector business links between Indonesia and Canada, particularly for SMEs;
- strengthened analytical skills and knowledge of Indonesian stakeholders on how to increase trade and investment between Indonesia and Canada;
- improved understanding of regulatory rules and best practices for trade and investment.

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[1] UNCTAD, *Investment Facilitation: The Perfect Match for Investment Promotion*, The IPA Observer, Issue 6 (Geneva: UNCTAD, July 2017), accessed April 20, 2019. https://unctad.org/en/PublicationsLibrary/webdiaepcb2017d4_en.pdf.