



TPSA | CANADA-INDONESIA TRADE AND
PRIVATE SECTOR ASSISTANCE PROJECT

SESSION 6

DOMESTIC COORDINATION AND OTHER IF MEASURES

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UNCTAD's Global Action Menu for Investment Facilitation

Action line 4

Build constructive stakeholder relationships in investment policy practice

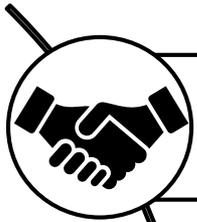
Action line 6

Establish monitoring and review mechanisms for investment facilitation

Domestic coordination and other IF measures



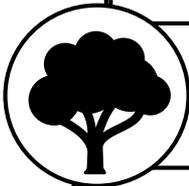
Domestic coordination and other IF measures



Inter-agency cooperation and exchange of information among competent authorities



Investor/state dispute prevention mechanism



Investor's obligations and corporate social responsibility



Public-private consultation for investment facilitation reforms



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INTER-AGENCY COOPERATION

Measure 7



vii Inter-agency cooperation

Background

- Investment facilitation is a broad issue and therefore involves a wide range of national and international stakeholders.
- Typically, some agencies are more familiar with facilitating investment than others.
- Differences in standards between state parties are natural barriers to investment.

Rationale

- Where possible, cooperation between agencies can promote investment facilitation by spreading best practices.
- This can happen between two agencies at the domestic level.
- But in the context of IF we are discussing cooperation at the international level, such as when two equivalent ministries in different countries exchange data and share best practices.



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vii Inter-agency cooperation

Brazil's proposal for an IFA (circulated on 31 January 2018)

Article 7 (Cooperation among
National Focal Points)

1. National Focal Points shall cooperate with each other in matters related to investment facilitation.
2. Areas for cooperation include exchange of information on procedural requirements and documentation associated with investment decisions, sharing of experiences regarding implementation of this Agreement, best practices regarding collection and compilation of data relating to investment and technical assistance and capacity building for micro, small and medium enterprises.

Source: <https://bit.ly/2HNJyAj>



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Analysis

Objective: Enhance both countries' implementation of the agreement through inter-agency cooperation.

Nature of measures: Establishing a dialogue between ministries in both countries to allow the sharing of information and practices.

Relationship with other measures: Provides the key point of contact for state-state consultation. (Note: state-investor consultation is provided for in measure 10)

vii Inter-agency cooperation

Implementation considerations

Things to consider about this measure:

- ❑ Cooperation can occur on a variety of fronts: standardizing documentation, sharing data, sharing best practices.
- ❑ Cooperation can be informal or formal, but for long-term success it is better to be formal.
- ❑ Establishing committees including both/all IIA parties will help institutionalize cooperation.

Situation in Indonesia

Discussion with workshop participants



INVESTOR-STATE DISPUTE PREVENTION

Measure 8



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viii Investor-state dispute prevention

Background

- Investor-state dispute settlement (ISDS) allows investors to sue host states for violating their rights.
- ISDS has been a major element of the traditional IIA regime, but it is rapidly falling out of favour.
- A new approach is required for dealing with conflicts between investors and host states.

Rationale

- IF emphasizes cooperation, so focus on prevention instead of arbitration.
- It is in all parties' interests to establish mechanisms for addressing conflicts when they are still minor.
- Moving away from ISDS does not necessarily mean the state is immune to legal action (the investor can still sue the host state in local courts).



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viii Investor-state dispute prevention

Indonesia-Australia CEPA (2019)

Analysis

Article 14.22: Consultations

1. In the event of an investment dispute referred to in Article 14.20, the disputing parties shall as far as possible resolve the dispute through consultation, with a view towards reaching an amicable settlement. Such consultations shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Party.

Article 14.23: Conciliation

1. If the dispute cannot be resolved within 180 days from the date of receipt by the disputing Party of the written request for consultations, the disputing Party may initiate a conciliation process, which shall be mandatory for the disputing investor, with a view towards reaching an amicable settlement. Such a conciliation process shall be initiated by a written request delivered by the disputing Party to the disputing investor.

Objective: To require the investor to seek cooperative resolution of a dispute.

Facility provided: Two elements:

1. Direct consultations between the parties to attempt to resolve the dispute amicably.
2. Mandatory alternative dispute resolution process (conciliation).

Relationship with other measures: The investor must use these mechanisms first before accessing the treaty's ISDS tribunal.

Source: <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5820>



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Example from Canada

Canada-EU CETA (2016)

Analysis

Article 8.19 - Consultations

1. A dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the claim has been submitted pursuant to Article 8.23. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 4.

...

Article 8.20 - Mediation

1. The disputing parties may at any time agree to have recourse to mediation.

2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and is governed by the rules agreed to by the disputing parties including, if available, the rules for mediation adopted by the Committee on Services and Investment pursuant to Article 8.44.3(c).

Source: <https://www.international.gc.ca/trade-commerce/assets/pdfs/ceta-rm-01-eng.pdf>

Objective: This measure emphasizes the desire to prevent investor-state disputes from escalating to courts or arbitration.

Facility provided: The option to resolve potential disputes with consultations or alternative dispute resolution methods is provided, although it is not compulsory.

Relationship with other measures: These provisions specifically state that they do not change the investor's rights to legal remedy; rather, they are intended to complement them.



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viii Investor-state dispute prevention

Implementation considerations

Examples of mechanisms to consider include:

- ❑ Establishing standing joint committees between IIA parties.
- ❑ Creating contact points for investors who are experiencing problems.
- ❑ Requiring mediation or alternative dispute resolution before being able to access arbitration or courts.
- ❑ Including a cooling-off period between the time when the investor files the dispute and when the legal process can begin.

Situation in Indonesia

Discussion with workshop participants



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INVESTOR'S OBLIGATIONS

Measure 9



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ix Investor's Obligations

Background

- Traditional IIAs lay out all of the investor's rights and the host state's corresponding duties and obligations.
- Direct beneficiaries of IIAs have always been investors, and the benefits to the host state have been indirect effects like the increased investment they receive as a result of protecting investments.
- There is increasingly a feeling that IIAs should make clear the benefits to all parties, including the host state.

Rationale

- Treaty text should say what benefits the host state expects to receive from investors.
- Treaty text should also outline good behaviour from investors. This could help ensure that investors behave in a way that is consistent with best practices even if domestic laws are not yet up to international best standards.
- Whether/how to make these obligations mandatory is still a matter of debate.



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ix Investor's Obligations

Brazil's proposal for an IFA (circulated on 31 January 2018)

Analysis

Article 18 (Corporate Social Responsibility)

1. Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the host Member and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article and internal policies, such as statements of principle.

2. Investors and their investments shall endeavour to comply with the following voluntary principles and standards of corporate social responsibility, in accordance with the laws adopted by the host Member and with Members' international commitments on this matter:

...

3. Investors are invited to keep the National Focal Point informed about their internal corporate social responsibility policies and practices.

Source: <https://bit.ly/2HNJyAj>

Objective: In order to ensure that foreign investment is actually helping to support development goals, investors are encouraged to adopt corporate social responsibility (CSR) measures.

Content: The actual text also contains a list of 11 proposed principles and standards of CSR, covering areas such as the environment and the training of workers.

Not covered: Does not mandate CSR behaviour.



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Example from Canada

The screenshot shows the Global Affairs Canada website. At the top, there is a navigation bar with the Canadian flag, the text "Government of Canada / Gouvernement du Canada", and links for "Canada.ca", "Services", "Departments", and "Français". Below this is the "Global Affairs Canada" header with a large red maple leaf logo and the "Canada" wordmark. A search bar is located on the right. A secondary navigation bar includes "News", "Foreign Policy", "Trade", "Development", "Assistance to Travellers", "Countries and regions", "Services", and "About". The main content area has a breadcrumb trail: "Home > Trade > Opening New Markets > Trade Topics > Responsible Business Conduct Abroad > Responsible Business Conduct Abroad". On the left, a "Trade" sidebar lists various topics, with "Responsible Business Conduct Abroad" highlighted. The main article title is "Responsible Business Conduct Abroad". The text states that in January 2018, the Government of Canada announced new elements for responsible business conduct abroad, including an Ombudsperson and an Advisory Body. It provides links to a news release, background, frequently asked questions, and the advisory body web page. An image titled "RESPONSIBLE BUSINESS CONDUCT ABROAD" shows a hand holding a globe surrounded by icons for environment, social justice, and governance. Below the image is the section "What are the Expectations for Canadian Companies Doing Business Abroad?", which explains that responsible investment and business operations promote Canadian values globally and enhance business success while contributing to economic benefits for host countries. It notes that the Government of Canada expects and encourages Canadian companies to respect human rights and applicable laws, to meet or exceed international RBC guidelines and standards, and to operate transparently and sustainably.

<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng>



ix Investor's Obligations

Implementation considerations

Options to consider:

- ❑ Include language in national investment law and in IIAs that lists the ways investment will help the host, like promoting sustainable development.
- ❑ Include a list of corporate social responsibility behaviours, and make clear that investors are expected to follow them.

Some ways to make obligations binding could include:

- ❑ Mandate that the home state prosecute investors who violate environmental or other laws in the host country.
- ❑ Include a mechanism to remove the benefits and protections of the treaty from investors who violate host laws or do not live up to their obligations.

Situation in Indonesia

Discussion with workshop participants



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PUBLIC-PRIVATE CONSULTATION FOR IF REFORMS

Measure 10



x Public-private consultation for IF reforms

Background

- The private sector is a key source of investment funds.
- An unpredictable environment frightens investors and dampens inward FDI.
- Good policy towards businesses and investment is beneficial not just foreign firms – domestic firms also benefit.

Rationale

- There is good reason to ensure that investment reforms reflect the needs of the private sector.
- In addition to asking for the private sector's input, it is important to have good communication in general so that investors are not surprised by legal or policy changes.
- Adopting formalized structures for consultation also provides a structure within which the host state can press businesses to improve their own behaviour.



x Public-private consultation for IF reforms

Brazil-Angola BIT (2015)

Artigo 4 (Comitê Conjunto)

1. Para fins do presente Acordo, as Partes estabelecem um Comitê doravante designado "Comitê Conjunto".
2. Este Comitê Conjunto será composto por representantes governamentais de ambas as Partes designados pelos respectivos governos.
...
4. O Comitê Conjunto terá as seguintes atribuições e competências:
 - iv. Solicitar e acolher a participação do setor privado e da sociedade civil, quando for o caso, em questões pontuais relacionadas com os trabalhos do Comitê Conjunto;
...
5. As Partes poderão estabelecer grupos de trabalho ad hoc, que se reunirão conjuntamente ou separadamente do Comitê Conjunto.
6. O setor privado poderá ser convidado a integrar os grupos de trabalho ad hoc, quando assim permitido pelo Comitê Conjunto.
7. Representantes de entidades não governamentais poderão ser convidados pelo Comitê Conjunto para apresentar estudos relacionados a questões de interesse das Partes

Source: <https://bit.ly/2HNJyAj>



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Analysis

Mechanism: The treaty establishes a joint standing committee composed of representatives of both governments, and allows the formation of ad hoc working committees.

Joint committee responsibilities and options:

1. Responsible for soliciting and receiving participation from the private sector and civil society on issues relating to bilateral investment.
2. Receive presentations from NGOs at working groups.

Ad hoc committee options:

Integrate private sector representatives with working groups.

Example from Canada



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of Canada

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Public consultation:

Canada's foreign investment promotion and protection agreements



Consulting with Canadians

Diversifying trade and investment with key markets around the world is a priority for the Government of Canada.

As Canada continues to negotiate trade and investment agreements, we want to ensure that all Canadians, including women, youth, Indigenous peoples and small and medium-sized enterprise owners, can benefit from increased trade and market access around the world.

[/en/index.html](#) Government of Canada is holding a public consultation on how to make its foreign investment

Instructions

Global Affairs Canada has created a questionnaire concerning Canada's foreign investment promotion and protection agreements. You are invited to visit our [consultation page on PlaceSpeak](#) to submit your opinions and ideas.

<https://www.international.gc.ca/trade-commerce/consultations/fipa-apie/index.aspx?lang=eng>



Canada



x Public-private consultation for IF reforms

Implementation considerations

To implement this measure:

- ❑ Establish formal bodies or procedures for consulting with business, civil society, and other stakeholders about proposed new laws and policy changes before their implementation.
- ❑ Take private sector input seriously rather than treating consultations as a formality.
- ❑ Use the established forum as a bi-directional flow where the state can also encourage good corporate practices and social responsibility.

Situation in Indonesia

Discussion with workshop participants



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Many thanks for your attention!



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