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Advancing sustainable development by facilitating sustainable FDI, promoting CSR, designating Recognized Sustainable Investors, and giving home countries a role^{*}

by

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Abstract

Foreign direct investment (“FDI”) can be an important vehicle for development. However, in recent years, the focus has not just been on development generally, but sustainable development specifically. Thus, this paper focuses on how countries can increase levels of FDI geared toward projects likely to contribute as much as possible to their sustainable development—in other words, how countries can increase flows of sustainable FDI. To that end, and in light of the World Trade Organization’s ongoing Structured Discussions on a multilateral framework for Investment Facilitation for Development, this paper outlines four issues and related proposals whose implementation through an investment facilitation framework *for development* would help to ensure that FDI makes a maximum contribution to sustainable development: (1) How can one identify, *ex ante*, sustainable FDI, to assist countries in facilitating and targeting inflows of sustainable FDI? (2) How can one promote corporate social responsibility (“CSR”)? (3) How could one create the special category of “Recognized Sustainable Investor” to incentivize international investors to implement their CSR commitments and engage in sustainable FDI? (4) What role can home countries play in promoting CSR standards and in facilitating outward FDI flows, especially the flow of sustainable FDI? Looking at the question of a multilateral framework from the perspective of its objective—namely “for development”—is particularly important as this objective should guide the negotiations of such a framework.

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Introduction

Foreign direct investment (“FDI”) can be an important vehicle for development. Its contribution to sustainable development is determined by the actual operation and impact of individual investment projects. Hence, investment projects need to be shaped as much as possible in a manner that these projects, while being commercially viable, make “a maximum contribution to the economic, social and environmental development of host countries and take place in the context of fair governance mechanisms”.¹ Such investment can be described as “sustainable FDI”.

This paper outlines four issues, and makes related proposals whose implementation would help to ensure that FDI makes a maximum contribution to sustainable development—and, thus, the Sustainable Development Goals: (1) How can one identify, *ex ante*, sustainable FDI, to assist countries (be it in the national or the multilateral context) in facilitating and targeting inflows of sustainable FDI? (2) How can one promote corporate social responsibility (“CSR”)? (3) How could one create the special category of “Recognized Sustainable Investor”² to incentivize international investors to implement their CSR commitments and engage in sustainable FDI? (4) What role can home countries play in promoting CSR standards and in facilitating outward FDI flows, especially the flow of sustainable FDI?³

The discussion in the present paper is of immediate relevance to individual countries that seek to facilitate the sort of FDI that is more likely to make a maximum contribution to sustainable development. But the discussion is conducted here with a view toward a multilateral framework on Investment Facilitation for Development as it is sought in the World Trade Organization (“WTO”) by a sizable group of countries, including by proposing the language for a possible article in such a framework.⁴ Looking at the question of a multilateral framework from the perspective of its objective—namely “for development”—is particularly important as this objective should guide the negotiations of such a framework.

There are also a number of other issues related to the question of an investment facilitation framework, such as what concrete measures could be taken to facilitate FDI inflows in general⁵ and what is needed to support developing country capacity building to negotiate and implement such a framework and enhanced domestic and international cooperation in this regard,⁶ but these issues are not discussed here in any detail.

1. Identifying, *ex ante*, sustainable FDI

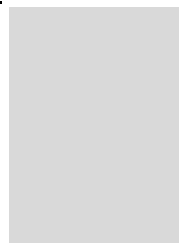
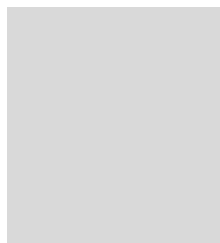
Every country most likely has a different perception of what it means for FDI to be most beneficial for its sustainable development, although many countries most likely identify a number of the same characteristics of what constitutes sustainable FDI. Arguably, any investment that creates jobs and does no discernable harm to the economy, environment, or social development of a country is beneficial. However, rather than be satisfied with these basic benefits, the purpose of this paper is to show how countries can attract FDI that is more purposefully aligned with each individual country’s development goals and how home countries can help in this respect. Or, to put it differently, how does a country determine what sorts of FDI ought to be considered

sustainable FDI?⁷ One way is for countries to specify characteristics, “FDI sustainability characteristics”, that countries and investors consider in relation to FDI.⁸

The challenge is—especially when the context is multilateral—to take a *systematic* approach to identifying FDI sustainability characteristics. One such systematic approach is to analyze, on the one hand, what governments say they expect FDI to contribute to the sustainable development of their countries and, on the other hand, to analyze what investors say they contribute to the sustainable development of their host countries. The underlying assumption of this approach is that the principal actors in the FDI relationship know best what is required for the economic development of host countries, in the case of governments, and what they can contribute to this development, in the case of investors.

A systematic approach can be pursued by analyzing a range of instruments adopted by eight key stakeholder groups. These instruments consist of international investment agreements; non-binding intergovernmental instruments; criteria used by host countries that seek to attract FDI; criteria used by home countries that support their firms investing abroad and making such support dependent on firms seeking such support meeting certain conditions (such as the impact of FDI projects on the environment in host countries); standards of intergovernmental organizations; global business codes of international business organizations; standards of private institutional investors; industry codes; and CSR statements of multinational enterprises (“MNEs”).⁹ This approach yields an indicative list of “FDI sustainability characteristics”, as set forth in Table 1.

Table 1.		The Dimensions of Sustainable FDI and Their Sustainability Characteristics	
	Characteristic		Characteristic
Economic dimension	<ul style="list-style-type: none"> - <i>Employment</i> - <i>Local linkages</i> - Technology transfer - Infrastructure - <i>Community development</i> - <i>Equitable distribution of wealth</i> - Tax accountability - Promote research & development 	Social dimension	<ul style="list-style-type: none"> - Labor rights - <i>Skills enhancements</i> - <i>Public health</i> - Workplace safety - Non-discrimination - <i>Fair wages</i> - <i>Benefits</i> - Human rights - <i>Indigenous rights</i> - <i>Gender</i> - Resettlement - <i>Cultural heritage protection / diversity</i>
Environmental dimension	<ul style="list-style-type: none"> - <i>Resource management</i> - <i>Pollution controls</i> - Low carbon / greenhouse gases footprint - <i>Waste reduction</i> - <i>Biodiversity protection</i> - Climate change - <i>Water</i> - Renewable energy 	Governance dimension	<ul style="list-style-type: none"> - Transparency - Local management - Supply chain standards - Consumer protection - Stakeholder engagement - <i>Anti-corruption</i> - Legal compliance - <i>Risk management systems</i>



- Environmental management systems
- *Environmental impact assessment / social impact assessment*
- Human rights due diligence
- Corporate governance

Source: Karl P. Sauvant & Howard Mann, *Towards an Indicative List of FDI Sustainability Characteristics*, THE E15 INITIATIVE, at v (Int'l Ctr. Trade & Sustainable Dev., Geneva, Switz.), Oct. 2017, available at: <https://ssrn.com/abstract=3055961>.

Note: **bold** = common FDI sustainability characteristics, i.e., those sustainability characteristics that appear in 50% or more of the instruments surveyed; *italic* = emerging common FDI sustainability characteristics, i.e., those characteristics that are present in at least one-third of the instruments.

From this list of FDI sustainability characteristics, one can identify a list of “common FDI sustainability characteristics”, namely characteristics that are mentioned by a number of (public and private) stakeholder groups in a number of their instruments (listed in bold in Table 1): low carbon footprint, labor rights, workplace safety, non-discrimination, human rights, resettlement, transparency, supply chain standards, stakeholder engagement, and legal compliance. These “common FDI characteristics” are defined as characteristics that have 50 percent or more coverage in at least four out of the eight categories of stakeholder groups. For example, the characteristic “low carbon footprint” is mentioned in at least half of the instruments related to home countries, intergovernmental organizations, private institutional investors, and international investors. It should be noted, moreover, that each characteristic can represent a cluster of characteristics. Thus, for example, the FDI sustainability characteristic “labor rights” includes freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; and the effective abolition of child labor.

Furthermore, as can be seen from Table 1, other characteristics are becoming more frequent, including employment, local linkages, resource management, skills enhancement, fair wages, gender, and environmental/social assessments. These are characteristics that could be described as “emerging common FDI sustainability characteristics” (in the sense of being increasingly widely accepted). They are characteristics that are present in at least one-third of the instruments examined in at least three of the eight categories of stakeholder instruments. For example, 33 percent or more of the voluntary intergovernmental instruments, home country instruments and company codes identify “local linkages” as a desirable FDI characteristic.

In other words, there is a substantial overlap between the contributions that governments seek in FDI and the contributions that investors say they bring to host countries to advance sustainable development. Together, the common and emerging common sustainability characteristics can be seen to constitute an “indicative list of FDI sustainability characteristics”. One could even go so far as to speak about an emerging consensus between governments and investors as to key FDI sustainability characteristics.¹⁰

However, because individual countries have different priorities in terms of promoting sustainable development and, hence, of facilitating sustainable FDI, it is difficult to establish a

closed—one-size-fits-all—list of FDI sustainability characteristics. Rather, it is necessary to take an approach that allows countries the flexibility to focus on what they consider to be particularly desirable FDI characteristics, in light of their own priorities. Hence, an indicative list of FDI sustainability characteristics provides broad guidance to governments—and, for that matter, investors interested in seeking to increase the contribution of FDI to sustainable development.

To build an explicit development angle into an investment facilitation framework by way of fostering sustainable FDI and to have national governments implement it, is, no doubt, a difficult task. And to do so, two challenges, in particular, need to be addressed.

The first one is that the performance of investment promotion agencies (“IPAs”) and investment authorities is typically assessed on the basis of the amount of FDI that is being attracted, and not on the basis of the quality of the investment that has been attracted. Changing this approach is in the hands of individual governments and requires directives from high political levels.

Bringing about such change would be helped if an investment facilitation framework itself contained provisions that directly encourage governments to facilitate sustainable FDI—the second challenge. Such provisions would not only create a mandate for investment authorities/IPAs to do so, but also shift the basis for their performance evaluation.

One way of doing this is to incorporate an indicative list of FDI sustainability characteristics into an investment facilitation framework. But this is just the beginning: the issue remains of how to encourage investors to undertake sustainable FDI while, of course, ensuring their investment projects remain commercially viable. After all, ultimately it is MNEs that make the decision of where, when, what, and how to invest. And, thus, it is unclear why investors would unilaterally choose to invest in a manner that would be particularly beneficial for host countries if doing so requires a special effort. Hence, it would be desirable—if not necessary—to incentivize investors to do so.

One possibility could be for an investment facilitation framework to permit governments to grant certain special additional benefits to those international investors that maximize the contribution of their commercially viable investments to the economic, social and environmental development of host countries and that take place in the context of fair governance mechanisms. At the WTO, the granting of special benefits to companies that satisfy country specific qualifications related to best practices in trade and customs has already been endorsed through the “Authorized Operator” article of the Trade Facilitation Agreement (“TFA”), a provision that is further elaborated in the annex of this note. As in the TFA, these additional special benefits would have to go beyond the facilitation measures available to all investors for all investments, as granted in an investment facilitation framework. By way of examples, Box 1 list a number of such benefits (which would have to be aligned with an eventual investment facilitation framework text).

Box 1.	Illustrative List of Additional Investment Facilitation Measures
Additional investment facilitation benefits that could be made available to qualifying investors beyond those available to all investors could include the following:	

- Assign individual case officers to qualifying investors who would assist them in all matters related to the establishment and operation of their projects throughout their investment life-cycles, to help them resolve any difficulties they might experience.¹
- Assist qualifying investors, on a priority basis (and at reduced fees and/or charges), in obtaining licenses, meeting other requirements and procedures (including the processing of applications), and by granting simplified investment document approval and shortened timeframes for approvals.
- Provide lower regulatory oversight or lighter regulatory requirements, such as frequency of tax audits or inspections.
- Establish a “green channel” that would allow a qualifying investor’s employees expedited entry into the host country.
- Help qualifying investors in establishing local backward and forward linkages through, for example, linkage programs that upgrade local suppliers.
- Aid with efforts to secure land for production purposes.
- Create specialized employee training programs geared specifically toward investments by qualifying investors.²
- Offer targeted fiscal, financial or other incentives to qualifying investors,³ including, for example, access to lower interest loans, special grants,⁴ or subsidized infrastructure and services.

Source: the authors.

¹ A qualifying investor case officer would presumably be more responsive than regular IPA staff because of the limited group of investors he/she would be assigned to.

² Costa Rica, for example, provides training programs for the certain investor’s labor forces. Christian Kollinsky & Nerys Coleman, *Incentives for Sustainable Development*, WAVTEQ (May 2019).

³ Countries have already implemented various tax incentives for investors that meet specific sustainability targets. *See generally, id.* Some incentives include Argentina’s reduction in employer contribution requirements for companies that hire new personnel; the Republic of Korea’s tax credit available to promote re-employment of female employees who left the labor force for pregnancy, childcare or other personal reasons; Colombia’s exemption for the sale of renewable energy in accordance with the Kyoto Protocol; and Egypt’s tax deduction for projects related to the recycling of agricultural waste. *See id.*

⁴ In Malaysia, the government introduced a “Green Technology Financing Scheme” to support Green Technology in the country. *Id.* Bulgaria and the Republic of Korea provide grants for investment in education. *Id.*

Accordingly, an investment facilitation framework should not foreclose the possibility for governments to give better treatment to certain investors, if they choose to do so to further their sustainable development goals. In fact, an investment facilitation framework could stipulate that, notwithstanding any other provision of the agreement, governments should be free to promote sustainable FDI through national laws and regulations, subject to making these transparent.¹¹

2. Promoting corporate social responsibility

As discussed, the FDI sustainability characteristics are based on a wide range of public and private instruments bearing on the relationship between host countries and international investors, instruments that in many cases also deal with other issues related to responsible business conduct.

Hence, a more general approach aimed at increasing the contribution of FDI to sustainable development—and, for that matter, address broader responsible business conduct issues—would be for a WTO investment facilitation framework to require governments to encourage investors undertaking FDI from their jurisdictions to adopt and observe CSR commitments. Many firms, especially larger firms, have adopted their own CSR statements. The commitments contained in

them can include a declaration that the firms involved observe international standards of responsible business conduct adopted by governments (and adopted by others, e.g., industry associations). The best known and most important among these standards—backed by a broad consensus of governments—are the United Nations Guiding Principles on Business and Human Rights,¹² the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,¹³ and the OECD Guidelines for Multinational Enterprises.¹⁴ Beyond that (and as previously mentioned), various private sector institutions have developed their own guidelines, such as the International Chamber of Commerce’s Guidelines for International Investment¹⁵ and guidelines formulated by various industry groups. While some of these instruments have government backing, virtually all of them are non-binding, although the OECD Guidelines, in particular, require governments to establish National Contact Points, which have a mandate to promote corporate social responsibility.¹⁶

Importantly, although the CSR instruments themselves may be non-binding, binding international investment agreements are beginning to incorporate references to international CSR instruments such as the OECD Guidelines. Such agreements have begun to do so in the preambles and/or texts of treaties. For example:

- The Comprehensive Economic and Trade Agreement between the European Union and Canada states in its Preamble: “ENCOURAGING enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct. . . .”¹⁷
- The bilateral investment treaty between the Netherlands and the United Arab Emirates provides, in Art. 2 (3), that “[e]ach Contracting Party shall promote as far as possible and in accordance with their domestic laws the application of the OECD Guidelines for Multinational Enterprises to the extent that is not contrary to their domestic laws.”¹⁸
- The investment agreement for the Common Market for Eastern and Southern Africa (“COMESA”) stipulates that “[i]nvestors and their investments shall observe the United Nations Principles on Business and Human Rights with modifications for local circumstances.”¹⁹
- The Morocco-Nigeria bilateral investment treaty includes a full article on CSR and stipulates, under the heading “Corporate Social Responsibility”:

1) In addition to the obligation to comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investments, and taking into account the development plans and priorities of the Host State and the Sustainable Development Goals of the United Nations, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices.

2) Investors should apply the LO [sic] Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectorial standards of responsible practice where these exist.

3) Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards.²⁰

- And the Colombia model bilateral investment treaty provides, in an Article on “Investors’ Social Responsibility”:

1) Each Contracting Party shall endeavour to ensure that Covered Investors and Investments operating in their Territory, and all investors constituted or organised under their laws, incorporate and practice the OECD Guidelines for Multinational Enterprises on a voluntary basis.²¹

While such references are far from ubiquitous, a trend seems to be emerging to include references of this kind in international investment agreements.²²

An investment facilitation framework that required governments to encourage investors undertaking FDI from their territories to observe CSR instruments would therefore follow an established trend. One approach of doing that is to import especially government-formulated instruments, such as the United Nations Guiding Principles on Business and Human Rights, the ILO MNE Declaration, or the OECD Guidelines, by way of cross-reference into such a framework.

Another approach would be to enumerate specific CSR commitments and (indicative) FDI sustainability characteristics in an investment facilitation framework. A growing number of binding international investment agreements contain specific references to what has been described here as FDI sustainability characteristics and, for that matter, broader responsible business conduct issues. These include various of the sustainability characteristics listed in Table 1. An example largely following this approach is an article in the bilateral investment treaty between Brazil and Malawi (Box 2). Brazil submitted a draft text of an Investment Facilitation Agreement for discussion purposes to the WTO Structured Discussions which largely tracks the language used in this signed Brazil-Malawi agreement.²³

Box 2.

An Example of a CSR Article in a Bilateral Investment Agreement

Article 9

Corporate Social Responsibility

1. Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party 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.
2. The investors and their investment shall develop their best efforts to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host Party receiving the investment:

- a. Stimulate the economic, social and environmental progress, aiming at achieving sustainable development;
- b. Respect the human rights of those involved in the companies' activities, consistent with the international obligations and commitments of the Host Party;
- c. Encourage the strengthening of local capacities building through close cooperation with the local community;
- d. Encourage the development of human capital, especially by creating employment opportunities and facilitating access of workers to professional training;
- e. Refrain from seeking or accepting exemptions that are not established in the legislation of the f) [sic] Host Party, relating to environment, health, security, work or financial incentives, or other issues;
- f. Support and maintain good corporate governance principles, and develop and apply good practices of corporate governance;
- g. Develop and apply effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the society in which the operations are conducted;
- h. Promote the knowledge of workers about the corporate policy, through appropriate dissemination of this policy, including programs for professional training;
- i. Refrain from discriminatory or disciplinary action against the employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or violate the standards of corporate governance that the company is subject to
- j. Encourage, whenever possible, the business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided in this Article; and
- k. Respect local political activities and processes.

Source: Investment Cooperation and Facilitation Agreement, Braz.-Malawi, art. 9, June 25, 2015 (signed but not in force), *available at:* <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4715/download>.

And, of course, a combination of both approaches is also possible, emphasizing (in the context of CSR) considerations of particular importance for the facilitation of sustainable FDI flows. In any event, including a CSR provision in an investment facilitation framework would both re-assert the focus of a framework on sustainable investment and could have a positive effect on making investors act more in support of sustainable development.

Regardless of the approach a framework takes, it will be important to encourage transparency regarding CSR commitments. Such transparency is desirable because it allows individual governments to assess whether the commitments investors make align with the sustainable FDI they seek to attract.

Accordingly, an investment facilitation framework should require governments to encourage investors undertaking FDI from their jurisdictions to adopt and observe CSR commitments and widely publicize these commitments. Such a requirement could extend to the provision of information on the extent to which these investors have pledged to observe international instruments dealing with responsible business conduct. Making such information available would provide host countries with information about the sustainable FDI aspirations of these investors.²⁴ In any event, showcasing such information should be in the interest of the investors involved, especially those sensitive to the need of having a social license to operate.

3. Creating a special category of “Recognized Sustainable Investor”

Reference was made earlier to the need to incentivize international investors to make special efforts to undertake sustainable FDI; the same applies to encouraging the full observance of CSR and international standards of responsible business conduct. Creating the special category of “Recognized Sustainable Investor” (“RSI”) could help governments to influence investors’ decisions to invest in a manner that is in line with sustainable FDI and to observe CSR guidelines and international standards of responsible business conduct.

Creating an RSI category as an incentive can learn from the approach taken in the WTO’s Trade Facilitation Agreement. The TFA creates the special category of “Authorized Operator”, which provides a precedent and model for developing an incentives structure that motivates best-practice (in that case, in trade and customs). (As of 2019, the Authorized Operator provision has been fully implemented by 45% of a sample of WTO Members, and has either been partially implemented or is in the planning stages of implementation in an additional 41% of the sampled WTO Members.²⁵) Given the close interrelationship between trade and FDI, the categories of “Authorized Operator” and “Recognized Sustainable Investor” would also usefully complement each other.

Following the TFA’s precedent (see the annex to this note for an elaboration), creating the category of “Recognized Sustainable Investor” would incentivize the observance of CSR standards and, especially, facilitate inflows of sustainable FDI from qualifying investors in the interest of advancing sustainable development. An RSI provision would do so by providing qualifying investors special benefits in addition to the facilitation benefits that will flow to all investors from the more general provisions of an investment facilitation framework.²⁶ An RSI category could consist of three main parts:

- First, it would establish **basic criteria** that all investors must meet to qualify as an RSI.
- Second, it would allow for **country specific FDI sustainability characteristics**, established by each host country, which investors would commit themselves to use reasonable best efforts to ensure that their investments fulfill.

- Third, it would grant **special benefits** beyond those generally available to foreign investors to those investors qualifying as RSIs.

The first part would set **basic criteria**, that ought to be met for any investor to qualify as an RSI. The first basic criterion would require that investors commit to observe certain recognized and widely accepted intergovernmental guidelines, especially the UN Guiding Principles on Business and Human Rights, the ILO MNE Declaration, the OECD Guidelines for Multinational Enterprises and, if applicable, certain industry specific codes.²⁷ In addition to this criterion, investors would need to meet any two or three of the following additional requirements: (i) make their CSR statements and progress reports widely available; (ii) have a record of compliance with local laws and regulations; (iii) maintain a system of managing records to allow for necessary internal controls; (iv) have a history of access to loans based on environmental, social and governance performance;²⁸ or (v) maintain appropriate supply chain management. The purpose of setting these basic requirements is partly to increase investment with sustainability characteristics, but also to ensure that the investors who receive RSI benefits accept internationally recognized norms on responsible business conduct directly relevant to sustainable FDI and sustainable development and show a history of responsible behavior in their operations.

In addition to meeting the basic criteria, to qualify as an RSI, investors would also have to make reasonable best efforts to ensure that their investments contribute as much as possible to certain **country specific FDI sustainability characteristics**. Each country would provide its own list of sustainability characteristics, helped (if it wishes) by the indicative list of FDI sustainability characteristics identified earlier in Table 1. For example, a country could specify that investors would qualify as an RSI if they made commitments to use reasonable best efforts to do any three or four of the following: (i) create a certain number of jobs; (ii) create backward linkages; (iii) engage in community development; (iv) reduce their carbon footprint; (v) follow proper resource-management practices; (vi) use non-discriminatory hiring practices; (vii) provide specific skill-based training; (viii) maintain a high level of supply-chain standards; or (ix) engage with stakeholders. Each of these commitments are contributions to host country development that many governments seek, and many investors say they make. The choice will depend on a number of factors, including the economic context, the development stage, and the development strategy of the host economy. For instance, a relatively less developed economy with high population growth might focus on jobs, even if lower skilled, while other economies may focus on upgrading.

Allowing countries to indicate the characteristics that qualify investors as “sustainable” ensures that the RSI benefits target those investors whose investments directly support each specific country’s development goals. Additionally, providing a list of sustainability characteristics rather than specific ones gives investors the flexibility to choose those characteristics most appropriate for their projects.

Why would an investor commit to potential costs associated with complying with the basic and country specific criteria? The answer lies in the incentive structure that creates a business case for becoming an RSI by providing **special benefits**. An investor that meets the criteria would (1) qualify for additional special RSI benefits beyond those generally available to all investors and (2) benefit from the positive publicity of the RSI label. As in the Trade Facilitation Agreement, the additional RSI benefits would be chosen (and publicized) by each country.²⁹

Special benefits could focus on those mentioned in Box 1. They could also include various “soft” recognitions. To begin with, the label “Recognized Sustainable Investor” would constitute, in and of itself, a valuable recognition for any firm. Beyond that, for example, recognition could be given to RSIs through award ceremonies or special events attended by high-ranking officials.³⁰

Since receiving any of these additional benefits would be advantageous to firms, there is a potential for obtaining them in an undeserved manner. To mitigate this risk, an ability to monitor the basic and country specific criteria is important for the success of an RSI category. The basic requirements would be fairly easy to monitor: adherence to both sets of basic criteria would be in the public domain and could be monitored in coordination with the complaint mechanism associated with the OECD’s Guidelines for Multinational Enterprises.³¹ For the country specific commitments, the reasonable best efforts standard focuses on investors’ best efforts to fulfill commitments, rather than whether those commitments are fully met. Under such a standard, countries would not necessarily be required to create baselines and monitor metrics for each characteristic, although they would be free to do so if they so choose. Instead, whether an investor can maintain its RSI status would be linked to its efforts to implement its commitments. In other words, is it implementing proper and reasonable corporate policies that align with the commitments made?³² Monitoring such a standard could include, like in the case of the Authorized Economic Operator monitoring in the EU, ad hoc visits to foreign affiliates to ensure policies have been implemented and followed. Also, as the list of RSIs should be made public, the cost of monitoring investors’ efforts could be mitigated through naming-and-shaming, which could result from NGOs or competitors publicly announcing RSIs found derelict in their commitments.

In addition to monitoring concerns, implementing an RSI category, or, for that matter, any other substantive provisions of an investment facilitation framework, will also raise issues about how WTO members, especially developing country members, can fund the implementation of such provisions. International cooperation, technical assistance and capacity building will be necessary for the success of an RSI category specifically, and an investment facilitation framework more broadly. In the context of an RSI category, international cooperation will be important as members develop their RSI provisions and identify FDI sustainability characteristics to be promoted through the benefits granted, and as members monitor their programs through the exchange of best-practices. As such, the formulation of an RSI category presented below, building on the TFA precedent, proffers a Committee to exchange relevant information and best practices about members’ RSI schemes.

Exchange of information, however, is unlikely to be enough. As already mentioned, technical assistance and capacity building will also be necessary to ensure that developing country WTO members can implement RSI schemes and, therefore, benefit from the increased sustainable FDI this may bring. Just as the RSI scheme builds on the TFA precedent, technical assistance and capacity building provisions built into an investment facilitation framework can also learn from the TFA. After the TFA entered into force in early 2014, the WTO launched the Trade Facilitation Agreement Facility (“TFAF”) to assist in the TFA implementation process. The TFAF both acts as a distributor of grants to developing country members to fulfill their implementation goals, and as a focal point to support members in partnering with other agencies. An investment facilitation framework could create a similar facility to distribute grants and link members with international,

regional and industry-specific organizations, with the goal to enhance investment facilitation.³³ Though establishing an RSI category would be voluntary, if an investment facilitation framework were to create such a facility, special grants could be envisaged that specifically apply to helping developing country members establish RSI categories. This could help ensure that such a provision, whose main focus would be to increase sustainable FDI to advance sustainable development, may still be implemented by developing country members despite the potential costs of implementation and monitoring.

Accordingly, an investment facilitation framework should create the special category of “Recognized Sustainable Investor”. Following the TFA precedent for designating economic actors that fulfill certain criteria to receive special advantages,³⁴ a possible formulation closely patterned on the TFA model is contained in Box 3.

Box 3.	A Possible Text of an Investment Facilitation Provision Concerning Recognized Sustainable Investors
<p>X. Investment Facilitation Measures for Recognized Sustainable Investors</p> <p>X.1 Each Member shall provide additional investment facilitation measures related to the establishment, acquisition, expansion, management, conduct, operation, and expansion of investments in its territory, pursuant to paragraph X.3, to international investors who meet specified criteria, hereinafter called Recognized Sustainable Investors.¹ Alternatively, a Member may offer such investment facilitation measures through procedures generally available to all investors and is not required to establish a separate scheme.</p> <p>X.2 The specified criteria to qualify as a Recognized Sustainable Investor shall be the following:</p> <p>(a) Such criteria, which shall be published, shall include:</p> <ul style="list-style-type: none">(i) a pledge to observe certain internationally recognized guidelines [namely, e.g., the UN Guiding Principles on Business and Human Rights, the ILO MNE Declaration, the OECD Guidelines for Multinational Enterprises and, if applicable, certain industry specific codes]; and(ii) any [e.g., two or three] of the following requirements:<ul style="list-style-type: none">(A) the publication and wide distribution of CSR statements and progress reports;(B) an appropriate record of compliance with local laws and regulations;(C) a system of managing records to allow for necessary internal controls;(D) a history of access to loans based on environmental, social and governance performance; or(E) appropriate supply chain management. <p>(b) Such criteria, which shall be published, shall also include a number [e.g., two or three] specific FDI sustainability characteristics chosen by the Recognized Sustainable Investor from a list of such characteristics identified by each host country, and which the Investor makes reasonable best efforts to reach:</p> <ul style="list-style-type: none">(i) create a certain number of jobs;	

- (ii) create backward linkages;
- (iii) engage in community developments;
- (iv) reduce the Investor's carbon footprint;
- (v) follow commercially responsible resource management practices;
- (vi) use non-discriminatory hiring-practices;
- (vii) provide specific skill-based training for local workers;
- (viii) maintain a high-level of supply chain standards; or
- (ix) engage with stakeholders.

(c) Such criteria shall not:

- (i) be designed or applied so as to afford or create arbitrary or unjustifiable discrimination between investors where the same conditions prevail; and
- (ii) to the extent possible, restrict the participation of small and medium-sized enterprises and domestic firms.

X.3 The additional investment facilitation measures, which shall be published, provided pursuant to paragraph X.1 shall include at least [e.g., three or four] of the following measures:²

- (a) access to a specific Recognized Sustainable Investor focal point;
- (b) priority assistance (at reduced fees and/or charges) in obtaining licenses, meeting other requirements and procedures (including the processing of applications), and granting simplified investment documents approval and shortened timeframes for approvals;
- (c) lower regulatory oversight or lighter regulatory requirements, such as frequency of tax audits or inspections;
- (d) establishment of a "green channel" for a Recognized Sustainable Investor's employees for expedited entry into the host country;
- (e) help in establishing local backward and forward linkages through, for example, linkage programs that upgrade local suppliers;
- (f) aid with efforts to secure land for production purposes;
- (g) specialized employee training programs geared specifically toward RSI investments;
- (h) privileged access to markets that are otherwise closed to foreign investors; and
- (i) targeted fiscal, financial or other incentives, including, e. g., access to lower interest loans, special grants, or subsidized infrastructure and services.

X.4 Members are encouraged to develop Recognized Sustainable Investor schemes.

X.5 In order to enhance the investment facilitation measures provided to Recognized Sustainable Investors, Members shall afford to other Members the possibility of negotiating mutual recognition of Recognized Sustainable Investor schemes.

X.6 Members shall exchange relevant information within the [Committee established by an international investment facilitation framework] about Recognized Sustainable Investor schemes in

force. The Committee shall establish a publicly available database of Recognized Sustainable Investors and the countries in which they are recognized.

Source: the authors, based on Article 7.7 of the WTO Trade Facilitation Agreement.

¹ Governments could also consider designating domestic firms as Recognized Sustainable Investors and, if firms qualify, extend appropriate benefits (X.3) to them as well.

² A measure listed in subparagraphs X.3 will be deemed to be provided to Recognized Sustainable Investors if it is generally available to all investors.

A Recognized Sustainable Investor provision in a WTO investment facilitation framework for development would help to ensure that such a framework encourages CSR and the observance of widely accepted instruments of responsible business conduct and has a focus on increasing flows of sustainable investment for sustainable development.

4. Giving home countries a role

Home countries, too, have a role to play to promote the CSR commitments of their firms and international norms of responsible business conduct, as well as to facilitate investment flows and, in particular, the flow of sustainable FDI. In fact, a growing number of home countries already have various measures in place to support their outward investors, including by providing information services, financial and fiscal incentives and political risk insurance. A wide range of such measures and benefits are being deployed, as can be seen from Table 2. At the same time, it is typically not one institution in a given home country that is centrally responsible for outward FDI facilitation efforts. Rather, that responsibility is dispersed across various public institutions, including IPAs, trade promotion agencies, export credit agencies, development finance institutions, ministries or agencies of the executive branch of the government, and special purpose institutions.³⁵ Moreover, depending on the country, the same type of measure may be administered by various institutions. In brief, for outward investors—and especially small and medium-size enterprises (“SMEs”)—it is not always easily clear what support measures they may have access to.

It stands to reason that it would facilitate investment flows if these measures—and the institutions that provide them—were made transparent, in the same manner as host countries are expected to make their measures related to incoming investment transparent, as this would provide valuable information to outward investors. This is particularly important for SMEs, as these can benefit most from such transparency; in fact, a number of home countries have targeted support measures in place to help their SMEs establish themselves in international markets through FDI.³⁶

Table 2.

Illustrative List of Home Country Measures

Information and other support services

1. Information support
2. Investment missions
3. Match-making services
 - a. Organization of contacts with government officials and entrepreneurs in host countries
 - b. Maintaining business match-making databases
4. Educational services: seminars, webinars and conferences on OFDI-related topics

Financial measures

1. Grants
 - a. For feasibility studies, market research and other pre-investment activities
 - b. For costs of setting up overseas offices
 - c. For training and human capital development
2. Loans
 - a. Concessional loans
 - b. Non-concessional loans
 - c. Structured financing options
 - d. Currency options
 - e. Syndication, public-private/public-public risk-sharing arrangements
 - f. Development financing
3. Financial guarantees
4. Equity participation

Fiscal measures

1. Tax exemptions
 - a. Exemption from corporate income tax on certain incomes
 - i. Tax exemption of foreign spin-offs' income
 - ii. Tax exemption of start-up expenses of foreign operations
 - b. Tax deductions for qualifying expenditures
2. Corporate tax rate relief: Corporate tax rate relief for enterprises in particular sectors of economy
3. Tax deferral for qualifying income earned overseas
4. Tax credits for certain credits of expenditures
5. Allowances for qualifying activities

Investment insurance

Source: based on Karl P. Sauvant, Persephone Economou, Ksenia Gal, Shawn Lim & Witold P. Wilinski, *Trends in FDI, Home Country Measures and Competitive Neutrality*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2012–2013, 3, 13–15 (Andrea K. Bjorklund ed., 2014), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2814307.

Beyond providing transparency, home countries could be encouraged (to the extent that they have not yet done so) to commit themselves to cooperate with host countries in facilitating investment flows. This is being recognized in a number of international investment agreements when, for instance, they mandate the establishment of joint committees.³⁷ By way of example, the Reciprocal Investment Promotion and Protection Agreement between Morocco and Nigeria provides, under the title “Assistance and Facilitation for Foreign Investment”, in its Article 25:

1. The Home State should assist the Host State in the promotion and facilitation of foreign investment in particular by their own investors. Such assistance shall be consistent with the development goals and priorities of the Host State. Such assistance may include, *inert [sic] alia*:
 - (a) Capacity building with respect to Host State agencies and programs on investment promotion and facilitation;
 - (b) Insurance programs based on commercial principles;

- (c) Technology transfer; and
- (d) Periodic trade missions, support for joint business councils and other cooperative efforts to promote sustainable investments.
- (e) The Home State shall inform the Host State of the form and extent of available assistance as appropriate for the type and size of different Investments.³⁸

Importantly, moreover, a few countries tie the eligibility for home country support measures to requirements for the outward investors' projects having positive development effects in the host country, for example, in terms of job creation, infrastructure improvements and technology and knowledge transfer. To qualify, firms may also need to undertake environmental and social impact assessments, to avoid negative impacts in host countries.³⁹ Many developing countries, and especially the least developed countries, are often in a weak position to require international investors to contribute as much as possible to the sustainable development of their economies. Home countries, however, are typically in a position to do so, especially when they provide support measures to their outward investors.

Accordingly, an investment facilitation framework should require home countries to make their support measures for outward investors transparent. (See also the earlier proposal requiring governments to encourage their international investors to make available information about their CSR commitments, and the extent to which they have pledged to observe international instruments dealing with responsible business conduct.) This could help facilitate increased flows of sustainable FDI. It would also introduce some balance in the commitments contained in a framework—which, politically, would be important.

Conclusions

This paper has suggested four ways in which sustainable FDI for sustainable development should be encouraged in a WTO investment facilitation framework *for development*:

The first one is to permit governments to grant certain special additional benefits to those international investors that undertake projects that, while remaining commercially viable, make a maximum contribution to the economic, social and environmental development of host countries and take place in the context of fair governance mechanisms. Such projects display certain FDI sustainability characteristics.

The second way is to require governments to encourage investors undertaking FDI from their jurisdictions to adopt and observe CSR commitments and widely publicize these commitments, including commitments about the extent to which these investors have pledged to observe international instruments dealing with responsible business conduct. Many firms, especially big firms, and business organizations have made such commitments, including in the form of their own CSR statements and by declaring that they observe international standards of responsible business conduct adopted by governments.

To encourage sustainable FDI and responsible business conduct, the category of Responsible Sustainable Investor should be created. The Trade Facilitation Agreement has

designed a precedent and model for designating economic actors that fulfill certain criteria to receive special advantages; the same approach should be applied in the investment context. For countries, the RSI category would increase the likelihood that they attract more sustainable FDI and that the firms that invest in their economies observe certain CSR commitments. For investors, becoming an RSI would further reduce the costs of establishment and operations, as well as provide reputational advantages. Creating the RSI category would provide countries seeking to attract sustainable FDI with an additional tool to attract those (especially CSR-conscious) investors that particularly align with their sustainable development goals by creating a transparent set of requirements that investors must meet to receive transparent benefits that can reduce investors' costs of establishment and operation and confer various other advantages.

Finally, home country governments should facilitate outward FDI flows by making their various measures aimed at supporting such flows transparent, helping in this manner their firms (and especially SMEs) to expand internationally. Furthermore, they should tie such support to their outward investors to these investors observing CSR commitments and enhancing the sustainable FDI characteristics of their projects, for example, by undertaking environmental impact studies in the case of big investments.

A multilateral framework on investment facilitation for development faces the crucial challenge of finding ways and means to increase the sustainable development impact of individual investment projects, as it is at this level that the direct interaction between international investors and host countries takes place—and hence development is advanced. This is not only a task for host country governments, but also for international investors and home countries.

Annex: The trade facilitation precedent and model

Article 7.7 of the Trade Facilitation Agreement provides for “Trade Facilitation Measures for Authorized Operators.” Under this section, WTO Members “shall provide additional trade facilitation measures related to import, export, or transit formalities and procedures . . . to operators who meet specified criteria.”⁴⁰ It continues: “The specified criteria to qualify as an authorized operator shall be related to compliance, or the risk of non-compliance, with requirements specified in a Member’s laws, regulations or procedures.”⁴¹

Operators that meet the criteria are designated as “Authorized Operators”. The criteria may include “(i) an appropriate record of compliance with customs and other related laws and regulations; (ii) a system of managing records to allow for necessary internal controls; (iii) financial solvency; and (iv) supply chain security.”⁴² The provision explicitly states that the criteria adopted to qualify as an Authorized Operator cannot be applied arbitrarily or restrict participation by SMEs.⁴³ While qualifying operators receive additional benefits, it is important to note that operators that do not qualify as “Authorized Operators” still benefit from the general provisions of the TFA.

The TFA does not provide for a specific mechanism to monitor whether operators remain in compliance with the criteria set forth to become an Authorized Operator. However, customs areas that have adopted the World Customs Organization’s scheme for Authorized Economic

Operators (“AEOs”) have developed monitoring mechanisms. The EU AEO scheme calls for continual oversight by customs officials who can monitor AEO activity on a day-to-day basis and through visits to their premises.⁴⁴ Moreover, regular monitoring is the primary responsibility of the AEO, which are required to inform customs authorities if there has been a change that may influence the continuation of the authorization.⁴⁵

Under the WTO provisions, once designated as an Authorized Operator, Members may offer “additional facilitation measures.”⁴⁶ The offer:

shall include at least three of the following measures:

- (a) low documentary and data requirements, as appropriate;
- (b) low rate of physical inspection and examination, as appropriate;
- (c) rapid release time, as appropriate;
- (d) deferred payment of duties, taxes, fees, and charges;
- (e) use of comprehensive guarantees or reduced guarantees;
- (f) a single customs declaration for all imports or exports in a given period; and
- (g) clearance of goods at the premises of the authorized operator or another place authorized by customs.⁴⁷

While each Member is able to adopt its own criteria to designate an Authorized Operator, Members are encouraged to develop the schemes “on the basis of international standards,”⁴⁸ allow for possible mutual recognition among Members of Authorized Operator schemes,⁴⁹ and exchange information about the schemes with other Members once in force.⁵⁰ Though it is not the most widely implemented provision of the TFA, the Authorized Operator does provide a framework that has been accepted in the WTO. According to a 2019 data, 45% of a sample of WTO Members have fully implemented the Authorized Operator provision, and 86% of the Members that were sampled have fully or partially implemented it, or are in the planning stages of doing so.⁵¹

¹ Karl P. Sauvant & Howard Mann, *Towards an Indicative List of FDI Sustainability Characteristics*, THE E15 INITIATIVE, at 2 (Int’l Ctr. Trade & Sustainable Dev., Geneva, Switz.), Oct. 2017, available at: <https://ssrn.com/abstract=3055961>.

² In previous articles, the authors have titled the provision the “Authorized Sustainable Investor”. See Evan Gabor & Karl P. Sauvant, *Incentivizing Sustainable FDI: The Authorized Sustainable Investor*, 256 COLUM. FDI PERSPECTIVES (July 15, 2019), available at: <https://ssrn.com/abstract=3420573>.

³ The discussion here focusses on international investors in the context of FDI. This raises the question of whether such an approach involves an unwarranted distinction between international and domestic investors. Suffice it to say that the approach taken here is the same as that taken by the 2017 updated ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policies. As in the case of that Declaration, the intention here is not to introduce a distinction between multinational and domestic enterprises. See ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, at 3 (5th ed. 2017), available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (“5. These principles do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises. They reflect good practice for all. Multinational and national enterprises, wherever the principles of the MNE Declaration are relevant to both, should be subject to the same expectations in respect of their conduct in general and their social practices in particular.”).

⁴ As of late November 2019, 98 WTO members had signed the Joint Ministerial Statement on Investment Facilitation for Development. WTO, Joint Ministerial Statement on Investment Facilitation for Development, WTO Doc. WT/L/1072/Rev.1 (Nov. 22, 2019), available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-

[DP.aspx?language=E&CatalogueIdList=259087,259077,258975,258974,258977,258525,258531,257788,257794,255878&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRec.](http://www.ictsd.org/Default.aspx?language=E&CatalogueIdList=259087,259077,258975,258974,258977,258525,258531,257788,257794,255878&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRec.) For background on the WTO effort, see ICTSD, *Crafting a Framework on Investment Facilitation*, WTO: PATHS FORWARD (Int'l Ctr. Trade & Sustainable Dev., Geneva, Switz.) June 2018, available at: https://www.ictsd.org/sites/default/files/research/crafting_a_framework_on_investment_facilitation-ictsd-policy_brief.pdf, as well as Gabor, *supra* star footnote, and a number of the *Columbia FDI Perspectives*, available at: <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.

⁵ See Ahmed Omic & Matthew Stephenson, “What can Governments Do to Facilitate Investment? A Menu of the Most Important Measures Identified through Surveys”, prepared for the Expert Workshop on Opportunities and challenges of establishing an international framework on investment facilitation for development in the WTO, Geneva, Dec. 11, 2019, available at: <https://weforum.ent.box.com/s/v5ripuqy7ypwpd2uy5qnr25sz8igd6>, and Henry Loewendahl and Judith Walker, “Enhancing FDI Performance: Practical Measures for FDI Success”, prepared for the Expert Workshop on Opportunities and challenges of establishing an international framework on investment facilitation for development in the WTO, Geneva, Dec. 11, 2019, available at: <https://www.wavteq.com/publications/special-reports/#>.

⁶ See Axel Berger & Ali Dadkhah, “Challenges of Negotiating and Implementing an International Investment Facilitation Framework”, prepared for the Expert Workshop on Opportunities and challenges of establishing an international framework on investment facilitation for development in the WTO, Geneva, Dec. 11, 2019, available at: https://www.die-gdi.de/fileadmin/user_upload/pdfs/Sonstige/Challenges_of_negotiating_and_implementing_an_international_investment_facilitation_framework_5.12.2019.pdf.

⁷ Distinguishing FDI based on certain characteristics is nothing new. More specifically, through IPAs and domestic policy, many countries distinguish between different types of investment based on various considerations, and target such investment in their promotion efforts.

⁸ Sauvant & Mann, *supra* note 1, at 6.

⁹ See Sauvant & Mann, *supra* note 1, at 4–5. The research focused on 150, mostly recent, instruments. For a listing of the instruments analyzed and a more detailed description of the methodology used, see *id.* at Annexes II and III. Naturally, this research could be extended to cover more instruments, and this may lead to a modified indicative list of FDI sustainability characteristics.

¹⁰ *Id.* at 13.

¹¹ The Investment Agreement for the COMESA Common Investment Area seeks to achieve this through a combination of wider and narrower provisions, as well as the absence of certain provisions. Thus, the Preamble states: “**UNDERSTANDING** that this Agreement is designed to recognise the right of Member States to regulate and to introduce new measures relating to investments in their territories in order to meet national public policy objectives; Article 1, “Definitions”, states: “**investment**” means an enterprise or a company, which is established, acquired or expanded by an investor, including through the constitution, maintenance or acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise or company is established or acquired in accordance with the laws of the Member State. In order to qualify as an investment under this Agreement the investment must have the following characteristics: the substantial business activity, commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, **and significance for the host State’s development...**” (emphasis added); Article 2, “Objective”, includes the provision “(a) promote investments that support sustainable development in Member States;...”; Article 13, “**Support to domestic investors**” reads: “Notwithstanding any other provision of this Agreement, Member States may support the development of local and regional industries that provide, *inter alia*, up-stream and down-stream linkages and have a favourable effect on attracting investments and generating increased employment in Member States. The support covered by this paragraph include: (a) measures to grant preferential treatment to any qualifying enterprise under the domestic law of a Member State in order to achieve national or regional development goals; (b) measures to support the development of local entrepreneurs; (c) measures to enhance productive capacity, increase employment, increase human resource capacity, research and development including, new technology, technology transfer, innovation and other benefits of investment through the use of specified requirements on investors; or (d) measures to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups”. See COMESA, *Investment Agreement for the COMESA Common Investment Area*, 21 OFFICIAL GAZETTE, no.1, Jan. 2018, at 95, 97, 98, 102–03 available at: https://www.comesa.int/wp-content/uploads/2019/04/COMESA-Gazette-Volume-21-Final_upload_web.pdf [hereinafter, COMESA].

¹² U.N., *Guiding Principles on Business and Human Rights*, UN Doc. HR/PUB/11/04, (2011), available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹³ ILO, *supra* note 3.

¹⁴ OECD, *Guidelines for Multinational Enterprises* (2008), available at: <http://www.oecd.org/investment/mne/1922428.pdf>.

¹⁵ International Chamber of Commerce, *Guidelines for International Investment* (2016), available at: <https://iccwbo.org/publication/icc-guidelines-international-investment-2016/>.

¹⁶ Roel Nieuwenkamp, at that time Chair of the OECD Working Group on Responsible Business Conduct, has argued that, while the OECD Guidelines for Multinational Enterprises are not legally binding, “the obligations of governments adhering to the Guidelines to set up functioning [National Contact Points] . . . is hard law,” and these contact points “have the mandate to promote corporate responsibility.” See Roel Nieuwenkamp, *Responsible FDI is No Longer Optional*, 220 COLUM. FDI PERSPECTIVES (Feb. 26, 2018), at 1, available at: <http://ccsi.columbia.edu/files/2016/10/No-220-Nieuwenkamp-FINAL.pdf>.

¹⁷ Comprehensive Economic and Trade Agreements (CETA), Can.-E.U., Oct. 30, 2018 (signed but not in force), <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> (last visited Nov. 21, 2019).

¹⁸ See Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-U.A.E., art. 2 (3), Nov. 11, 2013 (signed but not in force), available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4774/download>.

¹⁹ See COMESA, *supra* note 11, at art. 29(1). This Part of the Investment Agreement also contains a number of other provisions concerning investors’ conduct.

²⁰ Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, art. 24, Mar. 12, 2016 (signed but not in force), available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>. The treaty also contains Articles dealing with, among other things, impact assessments, labor and human rights protection, corporate governance, and post-establishment obligations.

²¹ Colombia Model BIT (2017), Ministry of Trade, Industry and Tourism of Colombia, “Investors’ Social Responsibility,” available at: <http://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx>.

²² The UNCTAD Mapping of IIA Content indicates that, out of 2,577 mapped investment agreements, 40 include clauses that refer to CSR (37 of which were signed after 2010), and the preamble of 223 include a reference to social investment aspects, e.g., human rights, labor, health, CSR, or poverty reduction (158 of which were signed after 2000). See Investment Policy Hub, *Mapping of IIA Content*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/iiia-mapping#iiaInnerMenu> (last visited Nov. 25, 2019).

²³ Although the text of the CSR article in the Brazil-Malawi investment agreement is substantially similar to the text that Brazil proposed in the WTO, there is one important difference. In addition to the substance of the text in Box 2, Brazil’s draft text in the WTO also includes an invitation for investors to keep National Focal Points “informed about their internal [CSR] policies and practices.” WTO, Structured Discussions on Investment Facilitation, Communication from Brazil, WTO Doc. JOB/GC/169 (2018), at § 7, art. 18, available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=241891&Current.

²⁴ See Ana Novik & Alexandre de Crombrughe, *Towards an International Framework for Investment Facilitation*, OECD: INVESTMENT INSIGHTS (April 2018), available at: <https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf>.

²⁵ The data are from *Most & Least Implemented Measures*, UN GLOBAL SURVEY ON DIGITAL AND SUSTAINABLE TRADE FACILITATION (2019), <https://untfsurvey.org/compare-measures> (last visited Nov. 20, 2019). Note, however, that only 128 Members responded to the 2019 Survey. Furthermore, the Global Alliance for Trade Facilitation will be supporting the implementation of a regional initiative in Latin America and the Caribbean that was launched in 2018 to support mutual recognition of Authorized Economic Operators among the following economies: Argentina, Bolivia, Brazil, Colombia, Chile, Dominican Republic, Guatemala, Paraguay, Peru, and Uruguay. See *Regional Mutual Recognition Agreement (MRA) on AEO for the Americas*, ASOCIACIÓN INTERNACIONAL DE OPERADORES ECONÓMICOS AUTORIZADOS, ADUANEROS Y LOGÍSTICOS, <https://www.oeaaduaneroslogisticos.com/en/regional-mutual-recognition-agreement-mra-on-aeo-for-the-americas/> (last visited Nov. 20, 2019). It should be noted that the regional initiative is to support the mutual recognition of schemes promulgated under the World Custom’s Organization’s (“WCO”) Authorized Economic Operator (“AEO”) provisions, not the WTO’s Authorized Operator provision under Article 7.7 of the TFA. However, the WCO scheme provides for a higher standard than the WTO’s provision. Thus, as the WCO explains, “[t]he WTO TFA Article 7.7 and the SAFE AEO Programme are different in their nature, objectives/focus, and scope. However, as the trade facilitation objectives and specific trade facilitation actions mentioned in Article 7.7 of the TFA are reflected in the WCO SAFE FoS, and the qualifying criteria in Article 7.7.2 of the TFA correspond to the AEO criteria in the WCO SAFE FoS, a Customs administration which implements the SAFE AEO Programme can be confident that it is fulfilling the obligations of Article 7.7 of the TFA.” World

Customs Organization, Linkages (Similarities and Differences) Between the SAFE Authorized Economic Operators (AEO) Programme and Article 7.7 of the WTO Trade Facilitation Agreement (TFA), June 2018, at 3 *available at*: <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/instruments-and-tools/tools/safe-package/faq-on-linkages-between-the-safe-aeo-programme-and-article-7-7-of-the-wto-tfa-en.pdf?la=en>.

²⁶ This approach could also be adopted unilaterally, within an individual country's ongoing investment promotion and facilitation efforts.

²⁷ Examples of such codes are: OECD & FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (Oct. 14, 2016), *available at*: <http://dx.doi.org/10.1787/9789264251052-en>; Association of Southeast Asian Nations, *The ASEAN Guidelines on Promoting Responsible Investment in Food, Agriculture and Forestry* (Oct. 11, 2018), *available at*: <https://asean.org/storage/2012/05/ASEAN-Guidelines-on-responsible-investment-in-FAF.pdf>; OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2d ed., Mar. 20, 2013), *available at*: <https://doi.org/10.1787/9789264185050-en>; OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (Mar. 7, 2018), *available at*: <https://doi.org/10.1787/9789264290587-en>; and International Council on Mining and Metals, *Sustainable Development Framework: ICMM Principles* (2015 rev.), *available at*: https://www.icmm.com/website/publications/pdfs/commitments/reviced-2015_icmm-principles.pdf.

²⁸ There has already been at least one case where banks have agreed to lower loan rates for a company, Danone, when it agreed to increase its ESG performance. Jay Coen Gilbert, *Every CFO Should Know This: 'The Future of Banking' Ties Verified ESG Performance to Cheaper Capital*, FORBES (Feb. 20, 2018), <https://www.forbes.com/sites/jaycoengilbert/2018/02/20/every-cfo-should-know-this-the-future-of-banking-ties-verified-esg-performance-to-cheaper-capital/#78996d237e4d> (last visited Nov. 20, 2019).

²⁹ In the Trade Facilitation Agreement, the facilitation measures provided pursuant to each WTO Member's Authorized Operator must include at least three of the prescribed measures, and then allows each country to tailor its own scheme to include further measures. WTO, Annex to the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization: Agreement on Trade Facilitation, WTO Doc. WT/L/940 (Nov. 27, 2014), § 1, Art. 7 ¶ 7.4, https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm (last visited Nov. 20, 2019) [hereinafter, WTO, TFA]. If implemented regionally or multilaterally, an RSI provision could take a similar route: requiring each country's RSI provision to include some of the enumerated benefits and then allowing countries to provide additional measures as they see fit. The requirement to include enumerated benefits would ensure that there is some coherence among the RSI benefits while still allowing countries to tailor the benefits to their policy priorities.

³⁰ RSI specific events would be of special interest to small and medium-size businesses that may not otherwise be invited to such events.

³¹ The OECD Guidelines for Multinational Enterprises requires governments to establish a contact point to hear complaints from various stakeholders. See OECD Watch, *How to File a Complaint?*, <https://www.oecdwatch.org/how-to-file-a-complaint/> (last visited Nov. 20, 2019).

³² As a simplistic example, evidence that an investor is using reasonable efforts to achieve its commitment to create backward linkages could be putting in place, and adhering to, a corporate policy that require the investor to consider bids from local suppliers.

³³ The TFAF Grant Program offers grants of up to US\$200,000 funded through the Trade Facilitation Agreement Trust Fund, a fund created by WTO members on a voluntary basis. *WTO Trade Facilitation Agreement Facility: Operational Rules for the Grant Program*, WTO & TFAF (Apr. 2018), at § 3.18. The TFAF grant program officially launched in October 2018, and as of the most recent annual report, the program had received two grant applications. *Annual Report 2018*, WTO & TFAF, at 7, *available at*: <https://drive.google.com/file/d/1fHidDUB-tVp0CIV8xS3QegwgrTbNLSy/view>. As a focal point to implement the TFA's substantive provisions, the TFAF helps members access implementation assistance from agencies, donors and other stakeholders. See *About the Facility*, TFAF, <http://www.tfafacility.org/about-the-facility> (last visited Nov. 27, 2019). For a list of organizations with implementation assistance programs, see *Donors & Organizations*, TFAF, <http://www.tfafacility.org/implementation-support>. The World Bank's Trade Facilitation Support Program is one international organization that plays a role in technical assistance in the implementation of the TFA. The Trade Facilitation Support program has received commitments of over US\$32 million to provide technical assistance in reforming "trade facilitation laws, procedures, processes and systems to align with the WTO TFA." *Trade Facilitation Support Program*, WORLD BANK GROUP, *available at*: <http://pubdocs.worldbank.org/en/425551499436097201/1708846-TFSP-Brochure-Single.pdf>.

³⁴ WTO, TFA, *supra* note 29, Art. 7.7.

³⁵ In addition, private sector agencies may provide outward FDI services, including chambers of commerce, business organizations and consultancy firms.

³⁶ See Karl P. Sauvant, Persephone Economou, Ksenia Gal, Shawn Lim & Witold P. Wilinski, *Trends in FDI, Home Country Measures and Competitive Neutrality*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2012–2013, 3 (Andrea K. Bjorklund ed., 2014), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2814307.

³⁷ See, e.g., Cooperation and Facilitation Investment Agreement, Braz.-U.A.E., art. 18, Mar. 15, 2019 (signed but not in force), available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5855/download>.

³⁸ Reciprocal Investment Promotion and Projection Agreement, Morocco-Nigeria, *supra* note 20, at art. 25.

³⁹ See, e.g., the 2018 US “Better Utilization of Investments Leading to Development Act” (“BUILD”), which, among other things, stipulates that the newly created International Development Finance Corporation should be guided, in its decision to give support to FDI projects in countries that are taking steps to adopt labor rights, Section 9671(d), and that its Board cannot authorize projects if they are “likely to have significant adverse environmental or social impacts that are sensitive, diverse, or unprecedented, unless [impact assessments are carried out, etc.]” Section 9671(e). Moreover, the Act establishes a transparent and independent accountability mechanism that shall “(1) annually evaluate and report to the Board and Congress regarding compliance with environmental, social, labor, human rights, and transparency standards, consistent with Corporation statutory mandates; (2) provide a forum for resolving concerns regarding the impacts of specific Corporation-supported projects with respect to such standards; and (3) provide advice regarding Corporation projects, policies, and practices.” Section 9614(b). See *A New Era in U.S. Development Financing*, OVERSEAS PRIVATE INVESTMENT CORPORATION, <https://www.opic.gov/build-act/overview> (last visited Nov. 16, 2019); and Build Act of 2018, 22 U.S.C. §§ 9601–9689 (2018), available at: <https://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter103&edition=prelim> (last visited Nov. 27, 2019). See also, e.g., *JBIC Profile: Role and Function*, JAPAN BANK FOR INTERNATIONAL COOPERATION, at 17, available at: <https://www.jbic.go.jp/ja/about/role-function/images/jbic-brochure-english.pdf>.

⁴⁰ WTO TFA, *supra* note 29, at §1, Art. 7 ¶ 7.1.

⁴¹ *Id.* at ¶ 7.2.

⁴² *Id.*

⁴³ The TFA says that the criteria that qualifies an operator as an authorized operator shall not “(i) be designed or applied so as to afford or create arbitrary or unjustifiable discrimination between operators where the same conditions prevail; and (ii) to the extent possible, restrict the participation of [SMEs].” *Id.* at ¶ 7.2 (b).

⁴⁴ European Commission, *Authorised Economic Operators: Guidelines*, EC Doc. TAXUD/B2/047/2011 – Rev.6 (Mar. 11, 2016), at 100, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/policy_issues/customs_security/ao_guidelines_en.pdf.

⁴⁵ *Id.* at 99 (“There is . . . a legal requirement laid down in Article 23 (2) UCC that the holder of the AEO authorization shall inform the customs authorities without delay of any factor arising after the decision was taken, which may influence its continuation or content.”).

⁴⁶ WTO, TFA, *supra* note 29, § 1, Art. 7 ¶ 7.3.

⁴⁷ *Id.*

⁴⁸ *Id.* at ¶ 7.4. One international standard to which Members can look to in developing their schemes is the World Customs Organization’s SAFE Authorized Economic Operators Programme. See generally World Customs Organization, *supra* note 25.

⁴⁹ WTO, TFA, *supra* note 29, at § 1, Art. 7 ¶ 7.5.

⁵⁰ *Id.* at ¶ 7.6.

⁵¹ See *supra* note 25 and accompanying text.