

# The Meaning of Investment Facilitation in International Investment Laws and China's Future Path

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**Abstract:** The investment facilitation issue has attracted extensive global attention. In recent years, increasingly more international investment treaties (IITs) have mentioned investment facilitation rules, additional domestic investment policies and laws have stipulated investment facilitation measures, and the World Trade Organization (WTO) has started negotiations on the investment facilitation agreement. However, as a result of the wide range of investment facilitation measures, the international community still does not fully understand the basic nature of this concept. Considering this, based on the changes and development of complex international contexts including law, economics, and politics, as well as the text of investment facilitation rules included in IITs, research on the meaning and value of investment facilitation will contribute to the development of its concepts and norms. Investment facilitation is a series of measures that states take to initiate foreign direct investment in order to promote domestic development. In terms of values, investment facilitation rules not only focus on instrumental value as their extrinsic value, but also emphasize intrinsic value such as ability value and purpose value. Guidance related to this concept is a basic research topic. China still lacks innovative reforms regarding international investment facilitation rules. Its feasible path is to promote normalization and cross-border cooperation related to regional investment facilitation while seeking to innovate rules that embody its ability value and purpose value.

**Keywords:** International Investment Treaties (IITs), Investment Facilitation, Institutional Governance, Sustainable Development

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In recent years, the issue of investment facilitation has attracted additional international attention. Since 2015, when the Special Expert Group of the E15 Initiative published a review on the International Support Programme for Sustainable Investment Facilitation,<sup>1</sup> some developing countries have promoted this issue as a part of international law. At the 2017 WTO Ministerial Conference, 70 Member Countries adopted a joint ministerial statement that involved a pledge to establish a multilateral framework on development-oriented investment

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<sup>1</sup> Sauvart K. P. and Hamdani K., An International Support Programme for Sustainable Investment Facilitation, International Centre for Trade and Sustainable Development (ICTSD), 2015, <https://ssrn.com/abstract=3143372> (Last Visited on March 13, 2023).

facilitation, while other Member Countries adopted its reaffirmation statement in 2019 and 2021.<sup>2</sup> In September 2020, the WTO launched negotiations on the Investment Facilitation for Development Agreement. It is generally believed that investment facilitation aims to reduce administrative barriers that investors encounter during investment. It also contributes to investors' tasks, including measures that enhance transparency and predictability, simplify administrative procedures, and promote international collaboration. In the international investment legal system, investment facilitation is embodied in treaty rules. However, this view only emphasizes a general outline of investment facilitation, and does not offer basic assessments of this concept. Studies by the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) also show that there is a limited amount of conceptual research on investment facilitation.<sup>3</sup> The existing literature discussing investment facilitation either analyzes the existing interpretations and definitions of how international organizations implement this concept,<sup>4</sup> or discusses the scope of this concept and the application of its rules mainly based on scholarly sources,<sup>5</sup> with a lack of empirical studies. Therefore, in the context of increased practical investment facilitation, the research and interpretation of this concept's meaning and value will direct its development within the international investment legal system.

## I. INTERNATIONAL BACKGROUNDS AND LEGAL EMPIRICAL BASIS OF INVESTMENT FACILITATION

### A. Complex International Backgrounds of Investment Facilitation

The increasing attention focused on the issue of investment facilitation as well

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2 See WTO, Joint Ministerial Statement on Investment Facilitation for Development, WT/MIN(17)/59 (2017); WTO, Joint Ministerial Statement on Investment Facilitation for Development, WT/L/1072 (2019); WTO, Joint Ministerial Statement on Investment Facilitation for Development, WT/L/1130.

3 Mann H., Brauch M. D., Investment Facilitation for Sustainable Development: Getting It Right for Developing Countries, *Columbia FDI Perspectives*, No. 259, 2019.

4 Rodrigo Polanco Lazo, Towards a Multilateral Investment Facilitation Framework: Elements in International Investment Agreements, <https://e15initiative.org/blogs/towards-a-multilateral-investment-facilitation-framework-elements-in-international-investment-agreements/> (Last Visited on March 13, 2023).

5 Bao Yijie, Clarification on Investment Facilitation. *Journal of International Economic Law*, No. 4, 2018; Codeço R. R. and Freitas A. R., Multilateral Framework of Investment Facilitation at the WTO: Initiatives and Perspectives from the Global South, *Contexto Internacional*, Vol. 43, 2021.

as the introduction and development of its rules have unique international backgrounds. In the international investment legal system, international investment treaties (IITs), including bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment provisions, have changed their focus on investment issues. From IITs' initial provision on investment protection, IITs have shifted their focus to investment freedom, and then to the discussion of investment promotion and facilitation. This reflects the changes and development of specific international politics and economics. Therefore, research on investment facilitation also must be based on a specific international background.

On the basis of the United Nations Sustainable Development Goals (SDGs), developing countries need a large amount of funding to sustainably develop their domestic economy and society. Many developing countries regard foreign direct investment (FDI) as an important means of achieving the SDGs. Therefore, IITs need to reform their rules framework and contribute to investment flows combined with sustainable development. The World Investment Report 2012 also acknowledges that the reorientation of IIT rule-making is a response to the sustainable development paradigm of international and domestic policymaking.<sup>6</sup> Therefore, investment facilitation, which aims to reduce transaction costs for all aspects of investment and attract foreign investment inflows, has gradually become an important aspect of the IIT system. For example, in 2015, Brazil introduced the Cooperation and Facilitation Investment Agreement (CFIA) that it has signed with African and South American countries to promote investment facilitation, which includes innovations of risk prevention mechanisms and investment facilitation agenda procedures, and provisions for an alternative investment agreement model that differs from traditional BITs.<sup>7</sup> Regional economic communities in Africa and the treaty practices of some countries also reflect the change in awareness regarding investment attraction tools and national development modes that involves a shift from investment protection to investment facilitation.<sup>8</sup> Meanwhile, after the 2008 financial

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6 UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies*, [https://unctad.org/system/files/official-document/wir2012\\_embargoed\\_en.pdf](https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf) (Last Visited on March 13, 2023).

7 Monebhurrin N., Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model, *Journal of International Dispute Settlement*, Vol. 8, No. 1, 2017, p. 92. Moraes H. C. and Hees F., Breaking the Bit Mold: Brazil's Pioneering Approach to Investment Agreements, *American Journal International Law*, Vol. 112, No. 1, 2018, p. 199.

8 Baruti R., Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC, *Journal of World Investment & Trade*, Vol. 18, No. 3, 2017, pp. 494-495.

crisis, government regulation of foreign investment has gradually strengthened, with traditional industrial countries and a growing number of developing countries adopting new comprehensive investment security review mechanisms,<sup>9</sup> but the abuse of these mechanisms has created many administrative barriers to global investment. Therefore, some countries have begun to seek procedural constraints on these measures to facilitate overseas investment by ensuring transparency of investment review procedures, multi-party evaluation mechanisms for review procedures, as well as complaint or relief mechanisms for investment reviews.

In short, the development of investment facilitation rules involves institutionalizing national practices amidst the changing international context, which includes simultaneously occurring legal, economic, and political aspects. Legally, the generalization and development of investment facilitation rules must be aligned with the objectives and directions of the IIT system's reforms as well as integrate sustainable and inclusive development. Otherwise, this will weaken the reform efforts of countries and international organizations. Economically, rational foreign investors wish to further reduce the excess transaction costs that domestic regulations cause as well as maximize their benefits within their system. Politically, the state hopes to absorb and maintain foreign investment that matches its development. Therefore, the state formulates investment facilitation policies and measures domestically, and promotes rule-making and cross-border cooperation related to investment facilitation at the bilateral, regional and multilateral levels internationally. Therefore, when studying and explaining the meaning and values of investment facilitation, we should consider the existing international context and respond to its needs, which can contribute towards the healthy development of the formulation of investment facilitation rules.

## B. Legal Empirical Basis of Investment Facilitation

The empirical basis of investment facilitation is the existing IIT texts. Currently, in the IIT system, effective IITs include 2,229 BITs and 334 Treaties with Investment Provisions (TIPs).<sup>10</sup> These have formed a network of investment

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<sup>9</sup> OECD, *Transparency, Predictability and Accountability for Investment Screening Mechanisms*, <https://www.oecd.org/daf/inv/investment-policy/2009-Guidelines-webinar-May-2021-background-note.pdf> (Last Visited on March 10, 2023).

<sup>10</sup> Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements> (Last Visited on March 8, 2023).

rules including investment facilitation rules at bilateral, regional, and multilateral levels. At the multilateral level, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Agreement on Trade-Related Investment Measures (TRIMs) all contain investment provisions. For example, commercial presence, the third service model under GATS, is an important form of FDI. Therefore, Article 3 of GATS, the Transparency rule, is an investment facilitation rule when it is applied to investment regulatory measures. At the bilateral and regional levels, the early BITs simply stipulated the rules of visa facilitation for foreigners or the transparency rules. Recently, increasingly more FTAs or BITs have introduced specific transparency rules, simplified administrative procedures, and cross-border cooperation for investment facilitation. The emergence of these new IIT texts provides a legal empirical basis for research on the meaning and extension of this concept.

At the same time, enrichments of IIT texts result in the fragmentation of investment facilitation rules, leading to different or contradictory interpretations. As mentioned above, IITs in each period contain varying levels of investment facilitation rules. In the early period of IITs, these rules were limited to transparency and visa facilitation matters for foreigners, while others were introduced into IITs within the past ten years. In addition, there may be different rules between two IITs from the same period. The problem with these differences is that they may have concurrent relationships. That is to say, provisions on the same matters between IITs in force in a specific country will result in overlapping and concurrent relationships of the rules. According to Alschner, 24% of countries are related to each other through multiple investment treaties.<sup>11</sup> For example, ASEAN countries are bound by their BITs between one another as well as regional investment agreements such as the ASEAN Comprehensive Investment Agreement. Furthermore, some African countries have BIT relationships along with regional investment treaty-based legal relationships between each other. The “transparency” rule under GATS and the “transparency of law” rule under BITs jointly constrain the government’s investment supervision, which may create the potential risk of parallel litigation between

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11 Alschner W., Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction? *Journal of International Economic Law*, Vol. 17, No. 2, 2014, p. 276.

WTO and investment dispute settlement.<sup>12</sup> In addition, the concurrent rules may result in unpredictable interpretations of disputes. For example, investors apply the treaty shopping mechanism or treaty-bridge provisions to complicate the implementation of rules, which creates uncertain arbitration interpretations regarding investment facilitation rules. Therefore, to a certain extent, the research on the meaning and values of investment facilitation helps to provide a basic and comprehensive understanding of this concept and reduce the differences in the interpretation of its rules during disputes.

To sum up, the complex legal, economic, and political factors provide the context for considering the existing research on the meaning and values of investment facilitation. IIT texts tend to provide the legal empirical basis for this research and propose potential needs for legal practice.

## II. THE CONNOTATION AND EXTENSION OF INVESTMENT FACILITATION BASED ON LEGAL POSITIVISM

### A. Connotation of Investment Facilitation

Generally speaking, the connotation of investment facilitation has transformed from abstract to concrete, and from dependence on trade to juxtaposition with trade. Early investment facilitation mostly appeared in discussions on trade and investment facilitation. These discussions focused more on analyzing specific facilitation systems and were more inclined towards studying trade facilitation. However, the WTO Ministerial Conference 2013 reached the Agreement on Trade Facilitation in a separate trade field, indicating that investment facilitation and trade facilitation are somewhat different, especially since investment issues are more sensitive than trade issues, while their rules are more difficult to coordinate and negotiations are more gamified. Therefore, the research object of this paper is the separate investment facilitation which differs from trade and investment facilitation.

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12 A well-known case of parallel litigation is the investor-state arbitration proceedings and the WTO dispute settlement proceedings concurrently arising from the Australian Tobacco Plain Packaging Act. On one hand, investors initiated investment dispute settlement proceedings, namely *Philip Morris v. Australia*, and on the other, Ukraine, Honduras, Dominican Republic, Cuba and Indonesia initiated dispute settlement proceedings with the WTO.

At present, there is no uniform definition of investment facilitation. International organizations have proposed some definitions for this concept that have a certain degree of consensus. For example, in 2008, the Asia-Pacific Economic Cooperation (APEC) pointed out in its Investment Facilitation Action Plan that “investment facilitation” is “a series of actions taken by governments to attract foreign investment and maximize efficiency at all stages of the investment cycle”.<sup>13</sup> A UNCTAD report stated that “investment facilitation” refers to “a series of policies and actions aimed at making it easier for investors to establish and expand their investments and conduct their daily business in host countries”.<sup>14</sup> In my opinion, “investment facilitation” is a complex and interdisciplinary concept, and its meaning must be discussed from a specific perspective. From the perspective of international investment law, investment facilitation refers to a series of measures that a country takes towards attaining FDI within a specific scope in order to promote its domestic development. The specific scope and these measures need further practical and theoretical explanation and analysis.

The specific scope can be divided into horizontal and vertical dimensions. The vertical dimension refers to the application of investment facilitation measures in different investment stages, while the horizontal dimension focuses on the application scope of investment facilitation measures in different investment fields or sectors. Specifically, vertically, whether investment facilitation measures should cover the investment admission stage is not yet coordinated. Since investment admission is related to fair and just treatment, non-discriminatory treatment, negative list or inconsistent measures, transfer, and other controversial investment issues, a country is hesitant to provide investment facilitation during this stage. For example, if the investment facilitation rules are applicable to the approval procedures of foreign investments on the negative list at the investment admission stage, some developing and least developed countries may worry about their lack of ability to fulfill the new obligations under international law and the reduction of their regulatory power due to these obligations. In contrast, the consolidated text suggests that investment facilitation should apply throughout the life cycle of an investment. Meanwhile, two proposals, one

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13 APEC, *Investment Facilitation Action Plan*, 2008, [https://www.apec.org/docs/default-source/press/features/2009/09\\_cti\\_ieg\\_ifap.pdf](https://www.apec.org/docs/default-source/press/features/2009/09_cti_ieg_ifap.pdf) (Last Visited on March 10, 2023).

14 UNCTAD, *Investment Facilitation: A Review of Policy Practices*, [https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%202023-05-2017\\_7pm\\_print.pdf](https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%202023-05-2017_7pm_print.pdf) (Last Visited on March 10, 2023).

of them from China, also suggest application to the admission, establishment, and operation stages.<sup>15</sup> On the other hand, the Turkish proposal suggests that investment facilitation should apply to licensing measures for investments “in the territory of the host country”, while the Moroccan proposal suggests that investment facilitation should apply only to post-establishment foreign investments.<sup>16</sup> Both of the latter proposals limit the application scope of investment facilitation to the post-establishment stage.

As to whether investment facilitation should cover the investment admission stage, we can analyze by considering two aspects: system interpretation and international context. First of all, due to the fragmented IIT system, each IIT has its own provisions on this issue, so it is impossible to answer this problem by considering the IIT text. From the system perspective, under the WTO trade agreement, GATS interprets “commercial presence” as including the “constitution”, “acquisition”, or “maintenance” of a judicial person, or the “creation” or “maintenance” of a branch or representative office of this judicial person.<sup>17</sup> Therefore, investment facilitation measures are applicable to pre-establishment and post-establishment, aligned with investment rules in the service sector under GATS, meeting the need for systemic compatibility. Secondly, in terms of the international context, the IIT system is undergoing reforms, and we need to analyze the international investment legal system from a change-based perspective. Currently, many BITs are still traditional. The application scope of entity treatment thereunder mostly excludes the pre-establishment stage, and foreign investment can benefit from investment treatment and protection such as national treatment, most-favored-nation treatment, fair and equitable treatment, and transfer treatment only after establishment occurs. However, increasingly more experience has proved that investment policies have been transformed and developed towards “promising investors a certain degree of pre-establishment treatment”.<sup>18</sup> Therefore, investment facilitation measures applicable to the

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15 Bernasconi-Osterwalder N., Campos S. L., and Ven Colette van der, *The Proposed Multilateral Framework Investment Facilitation: An Analysis of Its Relationship to International Trade and Investment Agreements*, 2020, <https://www.iisd.org/publications/report/proposed-multilateral-framework-investment-facilitation> (Last Visited on March 10, 2023).

16 Berger A., Gsell S. and Olekseyuk Z., *Investment Facilitation for Development: A New Route to Global Investment Governance*, *Briefing Paper*, No. 5, 2019.

17 Paragraph (d), Article XXVIII, GATS 1995.

18 Alschner W., *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, *Goettingen Journal of International Law*, No. 5, 2013, p. 484.



admission stage align with the development directions of IIT. Furthermore, on one hand, pre-establishment investment facilitation measures focus on improving the efficiency of establishing foreign investment without affecting the scope and degree of the host country's openness regarding investment admission, so this will not weaken the reform efforts focused on maintaining the host country's regulatory space. In other words, the investment facilitation measures are technical measures rather than restrictions on the entity's regulatory power. However, the investment facilitation measures at the admission stage have higher requirements for the efficiency of investment licensing and the host country's ability to evaluate the proposed investment.<sup>19</sup> This creates administrative pressure for developing and least developed countries. On the other hand, the approval procedures at the investment admission stage in many countries are complicated, time-consuming, and opaque. Investment facilitation measures can improve administrative efficiency and transparency at the investment admission stage, which can help them to achieve their expected goal of investment liberalization.

From the horizontal dimension of a specific scope, investment facilitation measures should be applied whether it is a general or special investment. We can analyze this from the perspective of the international context of industrial policy development. In its early stage, investment policies tend to provide protection and promotion for special sectors<sup>20</sup> to meet the needs of national economic development by implementing export-oriented policies. This is also reflected in some treaty practices. For example, according to the provisions of the Promotion and Protection of Investment under the China-Kuwait BIT in 1985, the two contracting parties by consensus, or any contracting party according to its legal or policy needs, may decide to provide appropriate facilitation, incentives, or other forms of encouragement to the investment areas that are most beneficial for the two contracting parties. The Promotion and Protection of Investment clause of the Sino-Arab BIT in 1993 also indicates that the contracting parties shall encourage and facilitate the formation and establishment of joint ventures to establish, develop, and implement investment plans for different economic sectors. However, with the forming of global value chain and the developing of digitization, vertical investment policies gradually

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<sup>19</sup> *Supra* n. 3.

<sup>20</sup> UNCTAD, *World Investment Report 2017: Investment and the Digital Economy*, [https://unctad.org/system/files/official-document/wir2017\\_en.pdf](https://unctad.org/system/files/official-document/wir2017_en.pdf) (Last Visited on March 8, 2023).

change to horizontal ones. Especially within the past several years, general coverage of all investment fields has become an important part of the investment policy framework.<sup>21</sup> In general, investment facilitation measures should be universally applied to all investment fields and sectors, but it is also possible to consider national and industrial policies when introducing a higher degree of investment facilitation measures for special investment sectors.

Regarding measures, since investment facilitation often emphasizes transparent and predictable investment legal policies, simplification of administrative procedures and governmental actions such as international cooperation on investment facilitation.<sup>22</sup> Therefore, the measures here should be a policy and legal norms, which include the policy framework and objectives related to investment facilitation, nationally enforceable laws and regulations, inter-state treaties and memoranda, as well as international standards. Among these, the domestic laws and regulations should broadly include laws, regulations, administrative rules and procedures, and frequently implemented judicial decisions. This is consistent with the interpretation of “measure” under the GATS as a “law, regulation, rule, procedure, decision, administrative action, or any other form”.<sup>23</sup> Clarifying a measure’s nature and scope can reduce or avoid subsequent interpretation disputes, because many existing traditional BIT texts do not clearly specify “measure” and its scope, or vaguely interpret terms such as law and policy or do not interpret them. While these vague or nonexistent arrangements may be due to realistic or policy considerations, clarity on the

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21 *Ibid*, p. 158.

22 The basic manifestation of investment facilitation can be seen from the consensus of international organizations on investment facilitation. The principles of the 2008 APEC Investment Facilitation Action Plan include formulation of investment policies and transparency of the procedures, stability and predictability of the investment environment, efficiency of investment procedures, constructive stakeholder relations, technology utilization, monitoring and review mechanisms, and international cooperation. UNCTAD’s 2016 Global Action Menu for Investment Facilitation offers recommendations for action in ten areas, i.e. transparency, predictability, efficiency of administrative procedures, constructive stakeholder relations, lead agencies and contact points, monitoring and review mechanisms, international cooperation, capacity building to attract investment and international cooperation on investment promotion. The 2016 G20 Guiding Principles for Global Investment Policymaking addresses transparency and predictability of investment policies, dispute prevention mechanisms, stakeholder engagement, responsible business practices and corporate governance, and international cooperation. In 2017, it was agreed under the WTO Joint Ministerial Statement on Investment Facilitation for Development to promote transparency, efficiency and predictability of the investment environment through international cooperation. The 2017 Outlines for BRICS Investment Facilitation proposes that investment facilitation schemes include transparency of the investment policy framework, efficiency of investment-related administrative procedures and BRICS cooperation capacity.

23 Paragraph (a), Article XXVIII of GATS 1995.

nature and scope of measures would more effectively unify the concept, content, and interpretation of investment facilitation.

## B. Relationships between Investment Facilitation and Other Investment Issues

In order to clarify the connotation of investment facilitation, we need to further clarify the relationships between investment facilitation and investment protection, investment freedom, investment promotion, and dispute settlement mechanisms. In general, from the perspective of the IIT system, investment protection, investment freedom, investment promotion, and investment facilitation reflect the process of investment policy change. They are not separated and divided from each other, but complement and supplement each other.

First, both investment protection and investment facilitation reduce investment costs. Investment protection aims to protect investors from uncertain political risks in host countries by providing substantive or procedural rights, e.g. fair and equitable treatment, non-discriminatory treatment, expropriation, transfer, subrogation, and investor-state dispute settlement. In this sense, investment facilitation also helps to protect investments from greater losses and costs by implementing specific mechanisms to prevent investment disputes. The UNCTAD report also points out that the functions of investment promotion and facilitation should complement those of investment protection to promote reforms of the IIT system.<sup>24</sup>

Second, investment facilitation tends to supplement the lack of investment freedom. Since many areas of foreign capital control are sensitive or fundamental to a country, investment freedom cannot be fully achieved, but the development of investment facilitation can improve the efficiency and transparency of investment flows within the commitment scope, and is able to reduce gray barriers in foreign capital control. The UNCTAD report shows that while countries adopt liberalized investment measures to ease foreign capital access, especially in transport, energy and manufacturing, they also implement policies that promote and facilitate investment.<sup>25</sup> A certain degree of investment

24 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, [https://unctad.org/system/files/official-document/wir2015\\_en.pdf](https://unctad.org/system/files/official-document/wir2015_en.pdf) (Last Visited on March 8, 2023).

25 UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies*, [https://unctad.org/system/files/official-document/wir2018\\_en.pdf](https://unctad.org/system/files/official-document/wir2018_en.pdf) (Last Visited on March 8, 2023); UNCTAD, *World Investment Report 2019: Special Economic Zones*, <https://unctad.org/publication/world-investment-report-2019> (Last Visited on March 8, 2023).

freedom as well as general investment promotion and facilitation are the development directions of reforms for the international investment legal system.

Third, investment facilitation and investment promotion are closely related. The IIT texts indicate that investment facilitation rules are contained under the investment promotion clause of traditional IITs, that is, they assist foreigners during admission and at work or require contracting parties to quickly disclose investment laws and policies (transparency).<sup>26</sup> Some other recent IITs have directly provided for investment promotion and facilitation.<sup>27</sup> In addition, reports by UNCTAD, OECD, and other international organizations often discuss issues of investment facilitation and investment promotion in one section,<sup>28</sup> but also clearly distinguish between these two concepts. According to these reports, investment promotion differs from investment facilitation since it often relies on incentives and other means to promote a particular geographical location as an investment destination, and is therefore country-specific and competitive.<sup>29</sup> That is to say, investment facilitation and investment promotion are both different and closely related, indicating that they are difficult to distinguish during either domestic or international experience. Therefore, investment facilitation and investment promotion overlap and complement each other based on their meaning and scope. In a sense, investment facilitation is an extension of investment promotion. In other words, the relative independence of these concepts does not prevent them from having overlapping connotations and similar properties, so it is unnecessary to focus too much on the problem of how to distinguish between them.

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26 For example, Paragraph 1 of Article 2 “Investment Promotion and Protection” of the 2000 Danish BIT Model provides for facilitating the establishment of representative offices in accordance with laws and administrative practices; Paragraph 5 of Article 2 “Promotion and Protection of Investment” of the 2014 Serbian BIT Model requires that the Parties should provide favorable conditions for investors’ visas and work permits; Paragraph 3 of Article 2 “Investment Promotion and Protection” of the 2000 Peruvian BIT Model provides for the disclosure and dissemination of investment-related laws and regulations; and Paragraph 3 of Article 3 “Investment Promotion” of the 2019 Slovak BIT Model provides for the disclosure of laws, regulations and international treaties affecting investment.

27 Article 15, the Investment Agreement of the Mainland and Hong Kong CEPA; and Article 15, the Investment Agreement of the Mainland and Macao CEPA.

28 For example, the “Investment Promotion and Facilitation” program launched in 1994 by UNCTAD, Chapter II “Investment Promotion and Facilitation” of OECD Investment Policy Framework Report 2011, and UNCTAD World Investment Report, 2015-2020.

29 *Supra* n. 14, p. 3; OECD, *Policy Framework for Investment, 2015 Edition*, <https://www.oecd.org/investment/pfi.htm> (Last Visited on March 8, 2023);

Finally, both investment facilitation and dispute settlement can be implemented to resolve disputes. Investment facilitation includes a mechanism for resolving complaints and providing suggestions for investors. It is regarded as a domestic dispute resolution method on investment conflict management, which complements the international investment dispute settlement method and creates ways for reforming the international investment dispute system. However, the difference is that the complaint handling mechanism is conceptually an interest-based dispute resolution technique, while the dispute settlement mechanism is a final judgment or ruling.<sup>30</sup>

### C. Manifestation of Investment Facilitation Rules

Currently, under the vast majority of IITs, investment facilitation rules are not provided separately, but are expressed or contained in different clauses, such as the Investment Protection and Promotion clause, the Transparency of the Law clause, and the Consultation and Information Exchange clause. With the development of investment facilitation rules, more abundant and detailed investment facilitation rules have been introduced in IITs, some of which also provide for separate Investment Promotion and Facilitation clauses and Investment Facilitation clauses. Therefore, we chose the time of the scale appearance of specific rules as the axis to investigate the manifestation of these rules.

In general, we can divide it into three phases: before the 1990s, from the 1990s to 2007, and from 2008 to the present.<sup>31</sup> For the first two stages, we mainly analyzed BIT texts, and for the last stage, we focused more attention on comprehensive FTAs while emphasizing new BIT texts. It is worth noting that the typical investment facilitation rules during each stage are not a phenomenon unique to that stage. For example, the rules of a previous stage may be retained or refined in those of a later stage.

Before the 1990s, European BITs<sup>32</sup> that focused on investment protection did not emphasize investment facilitation rules and were simple. At this stage,

30 Echandi R., *Towards a New Approach to Address Investor-state Conflict: Developing a Conceptual Framework for Dispute Prevention*, NCCR Trade Regulation Working Paper No. 46/2011, 2011.

31 *Supra* n. 24, p. 121.

32 Currently, the traditional forms of BITs are categorized into European and American. BITs based on those of core European countries such as Germany are European BITs, which are characterized by fewer and more concise provisions and focus on the provisions on investment protection. BITs based on the United States' BITs are the American BITs, which are comprehensive and complex, have wider application scopes, as well as emphasize the entity core provisions and the concretization of investor-state dispute settlement mechanisms.

the investment facilitation rules under IITs were mainly in two categories: one for facilitating individual visas and work permits; the other for the contracting parties to exchange investment legal information and meet or negotiate regarding specific investment information. The main manifestation of these rules from the 1990s to 2007 is the transparency clause (transparency requirement), which specifies the publication of investment laws, regulations, and procedures. As BITs proliferated in the 1990s within the context of economic globalization, the transparency requirement began to gain increasing attention.<sup>33</sup> According to the UNCTAD report, the transparency requirement has been widely applied since 2000.<sup>34</sup> The transparency requirement provides that states parties should promptly publish all laws and policies related to or affecting investment, including laws, regulations, administrative practices and procedures, judicial decisions, and international agreements.

After the 2008 financial crisis, due to changes in international economic and trade as well as the international community's need to attain economic recovery, some countries have begun to seek more efficient investment policies to promote the flow of cross-border investment. At this stage, the investment facilitation rules are embodied in three aspects: refinement, strengthening, and introduction of developmental characteristics of the existing rules. First, the IITs at this stage refine the existing rules. The first adds the electronic disclosure method to the transparency requirement; the second refines the provisions on administrative procedures and standards, that is, to promote reasonable, simplified, and efficient procedures as well as clear, consistent, and open standards. For example, the Investment chapter of the EU-Canada Comprehensive Economic and Trade Agreement, the EU-Japan Economic Partnership Agreement, and the EU-Vietnam Economic Partnership Agreement provides for the Licensing and Qualification clause, which requires contracting parties to reasonably accelerate as well as simplify licensing and qualification procedures.<sup>35</sup>

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33 Based on the Center for Investment Policy website, I examined 127 IITs that include the transparency requirement featuring disclosure of laws and regulations from 1990 to 2000, 237 ones from 1990 to 2007, and 113 ones from 2008 to 2017. This indicated that the transparency rules have begun to attract attention since the 1990s.

34 *Supra* n. 20, p. 124.

35 See Article 3, Chapter 12, the EU-Canada CETA; Articles 30 and 31, Chapter 8, the EU-Japan EPA; Article 19 Chapter 8, the EU-Vietnam EPA. These regulations require that the time for the application's hearing should be reasonably limited, that relevant procedures should be carried out promptly before the application, at the beginning of the application and after it is approved, and that these procedures and requirements should be simplified as much as possible; it is also required that application fees should be rationalized so they do not constitute restrictions or barriers.

A one-stop mechanism or center has been established under Chinese and ASEAN IITs.<sup>36</sup>

Second, treaty practices have strengthened the original rules as well as highlighted institutional governance and international cooperation. Specifically, the function setting of original contact points can no longer meet the needs of investment facilitation development and cooperation. Therefore, some countries have actively promoted the establishment of upgraded investment facilitation institutions. For example, CFIA signed by and between Brazil and other countries after 2015 have set up multifunctional national contact points or ombudsman organizations. National contact points, or ombudsmen, are domestic institutions whose ultimate purpose is “to establish specific forums and technical pathways and to act as facilitators between the government and the private sector”.<sup>37</sup> In addition, the contracting parties have strived to further strengthen the international cooperation mechanism regarding investment facilitation, including the refinement of information exchange and sharing between these parties, the establishment of regulatory cooperation mechanisms between these parties, as well as cooperation mechanisms for technical assistance and capacity building.

Third, since 2012, the introduction of developmental investment facilitation rules has been an important feature of these rules at this stage, which mainly includes corporate social responsibility (CSR), anti-corruption, SME investment facilitation, stakeholder participation, and home country obligations. Currently, CSR under IITs is a non-binding obligation that investors can fulfill voluntarily. It aims to encourage investors to invest in accordance with internationally recognized principles and standards, covering areas such as labor, environment, gender equality, human rights, community relations, and anti-corruption.<sup>38</sup> The anti-corruption clause under IITs is more mandatorily binding than CSR. For example, the BIT Template of the Southern African Development Community

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<sup>36</sup> Article 15, the Investment Agreement of the Mainland and Hong Kong CEPA; Article 21, the China-ASEAN Investment Agreement; and Article 18, the ASEAN-India Investment Agreement.

<sup>37</sup> Article 14, the Brazil-Malawi BIT.

<sup>38</sup> For example, Article 5, Chapter 16, the EU-Japan EPA; Article 12, the Brazil-India CFIA; Article 9, the Brazil-Malawi CFIA; Article 15, the Brazil-Arab CFIA; Article 14, the Brazil-Ethiopia CFIA; Article 14, Chapter G, Annex 1, the Canada-Chile FTA; Article 17, Chapter 9, CPTPP; Article 17, Chapter 14, USMCA.

(SADC) stipulates the “general obligation of anti-corruption”<sup>39</sup> while providing for the legal consequences and impacts of breaching these obligations.<sup>40</sup> Investment facilitation measures concerning small and medium enterprises (SMEs) are formulated because compared with transnational corporations, SMEs are disadvantaged in terms of investment decision-making ability, such as information acquisition ability as well as rule-making and participation ability. Investment facilitation measures are intended to focus especially on SMEs during information sharing as well as policy formulation and implementation. For example, the EU-Japan Economic Partnership Agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the United States-Mexico-Canada Agreement (USMCA), and the Regional Comprehensive Economic Partnership (RCEP) all emphasize SME transparency issues.<sup>41</sup> Stakeholder participation is mainly embodied in stakeholder participation, dialogue, and cooperation during the formulation and implementation of investment facilitation measures. For example, the SME Tripartite Dialogue mechanism under the USMCA provides that the dialogue can invite multiple stakeholders to participate. The stakeholders include the private sector, employees, non-governmental organizations, academic experts, SMEs owned by diverse but underrepresented groups, and those from all parties.<sup>42</sup> Increasingly more attention has been paid to the role of the investor’s home country in promoting overseas investment that enhances its sustainable development by adopting investment facilitation measures or providing investment facilitation services. In current treaties, home country obligation rules are still rare, which is reflected

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39 See Article 10 of the SADC BIT Template, which states that investors shall not offer, promise or offer any unnecessary monetary or other advantage to officials of the host country or their families, etc., before or after the admission of the investment in order to obtain any preference in respect of the proposed investment or any licence, permit, contract or other right in connection with the investment. Similar provisions can be found under Article 72 of the UK-Caribbean Forum Economic Partnership Agreement. For another example, Article 15 of the Brazilian CFIA Model, “Investment Measures and Combating Corruption Violations”, provides that the Contracting Countries shall take measures to prevent and combat corruption, money laundering and terrorist financing related to the matters under this Agreement.

40 See Article 33, the revised Investment Treaty text of the COMESA Co-investment Area; Article 19, the SADC BIT Template; and Article 18, the ECOWAS Supplementary Act on Investments. It is provided that if a breach of investor obligations under the treaty occurs, it will affect the judgment of the investment tribunal on the outcome of the case and may provide grounds for counterclaims by the host country, as well as trigger corresponding domestic procedures.

41 See Chapter 20, EU-Japan EPA; Chapter 24, CPTPP; Chapter 25, USMCA; and Chapter 14, RCEP.

42 Article 5, Chapter 25, USMCA.



in two categories: one is to provide information and facilitation services for the home country's overseas investment, which is especially important for SMEs planning overseas investment; the other is to provide help to promote and facilitate the host country's investment.

### III. VALUES OF INVESTMENT FACILITATION RULES

Judging from the changes and development of the international community and the international treaty system, the values of investment facilitation rules are reflected as instrumental value, ability value, and purpose value ranging from extrinsic value to intrinsic value.

#### A. Instrumental Value: Saving Transaction Costs

Investment facilitation rules have instrumental value. Governments achieve specific investment policy goals by implementing policies such as promoting information access and exchange as well as providing convenient administrative services. Instrumental value indicates that something is a way and means to achieve a specific goal, which conforms to the basic argumentative structure of "when X is the means to achieve Y and Y is the goal X wants to achieve, X has instrumental value".<sup>43</sup> Therefore, instrumental value is also known as extrinsic value, and its evaluation does not depend on itself (X), but on other external criteria (Y). In other words, external goals are the criteria for determining the importance of things. Based on this theory, investment facilitation rules are essentially an investment legal norm, and law, as an instrument for adjusting social relations, is first of all a means of confirming, protecting, and developing social relations and order beneficial for the ruling class.<sup>44</sup> From this viewpoint, investment facilitation rules have instrumental value and serve specific external goals.

Therefore, the external goal and concrete manifestation of instrumental value are two dimensions for describing the instrumental value of investment facilitation rules. First, external goals must be analyzed in a certain context — the

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<sup>43</sup> Chen Jinghui, Intrinsic Value of Law and Rule of Law, *Law and Social Development*, No. 1, 2012,

<sup>44</sup> Sun Guohua and He Beibei, Some Basic Theoretical Issues in the Study of the Value of Law, *Law and Social Development*, No. 4, 2001.

current international context. Developing countries face an annual funding gap of up to USD 2.5 trillion to achieve the SDGs,<sup>45</sup> and foreign investment is decisive in filling this gap. Therefore, investment policymakers must implement policies to promote the inflow of foreign investment, including investment promotion and facilitation policies. However, although investment promotion directly attracts foreign investment based on stimulus policies, it is highly targeted and specific. On the other hand, investment facilitation rules, as a universally applicable policy, form a complementary relationship with the former. Hence, investment facilitation has instrumental value in attracting and sustaining broader foreign investment.

However, some empirical studies question the proposition that investment facilitation promotes foreign investment inflow. There are two counter-arguments. First, empirical study has limitations. The accuracy of results depends on the correlation of variable selection, data reliability, and rationality of methods, while exceptional or special circumstances affect it. The investment environment is highly complex, so the results of empirical studies often must be integrated with those of other studies. Second, this proposition as well as the relationship between investment facilitation rules and external goals as discussed in this paper are two different issues. The questioning view discusses the validity between means and goals, that is, whether a certain means can achieve a certain goal, which is a results-oriented discussion. However, the discussion in this paper aims to analyze the likelihood that investment facilitation rules will achieve the goal of attracting and maintaining foreign investment, as the economic environment is composed of multiple factors. If a policy is denied just because it fails to achieve the economic objective, the result may be that no single instrument can effectively achieve a particular economic goal. Therefore, this inference is unreasonable. The overall business environment for investment, including the stability of political environments, infrastructure, financial services, as well as investment promotion and facilitation policies, influences the inflow of foreign investment. Therefore, investment facilitation rules can achieve specific goals. Moreover, instrumental value is only the extrinsic value of things, not necessarily their only value. Just like one of the three kinds of “good” that Plato

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45 UNCTAD, *World Investment Report 2014: Investing in the SDGs: An Action Plan*, [https://unctad.org/system/files/official-document/wir2014\\_en.pdf](https://unctad.org/system/files/official-document/wir2014_en.pdf) (Last Visited on March 8, 2023).

identified, we love it both for what it is and for its consequences.<sup>46</sup> Even if we question the extrinsic value (consequence) of investment facilitation rules, we should not ignore their intrinsic value (itself), which this paper will continue to analyze later.

Second, the concrete manifestation refers to investment facilitation measures that can achieve specific goals stipulated by their rules. As mentioned above, the investment facilitation measures that the government implements are aimed at saving transaction costs, mainly in the form of the transparency requirement, simplification of administrative procedures, regulatory coordination and consistency, dispute prevention mechanisms, cross-border cooperation, and technical assistance. Specifically, the government can provide investors with comprehensive and accurate information for their decision-making by quickly disclosing and clarifying investment legal information and providing advisory services to investors, which helps to improve their decision-making efficiency, reduces the probability of trial and error during investment, and ultimately saves on investors' transaction costs. In addition, by simplifying administrative procedures as well as promoting the coordination and consistency of regulatory measures, the government reduces the administrative barriers within investment regulatory procedures, which saves investors' time and money directly. Moreover, during the early stage of disputes or controversies arising between investors and regulatory authorities, the government applies the investment dispute prevention mechanism to detect, address, and resolve these disputes in advance to prevent them from escalating as well as reduce the time and costs of subsequent disputes. The contracting parties may also establish a mutual cooperation mechanism to enable the two parties to better formulate and adjust investment laws and policies by relying on information sharing, best practice exchanges, as well as scientific, technological, and economic cooperation and assistance. This can prevent investor costs resulting from regulatory conflicts between the two parties, and prevent research cost waste resulting from redundant research.

It is worth mentioning that the application of digital technology is an

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<sup>46</sup> Plato, *The Republic*, Beijing: The Commercial Press, 1986, p. 44.

emerging feature of saving transaction costs. As this form of technology progresses, it has affected all aspects of social and economic life, which is reflected not only in reforms of trade and investment industrial structures and models, but also in adjustments and changes of investment policies. Specifically, digital technology has led to the development of multinational companies emphasizing digital content. As a result of the characteristics of light assets and cross-industry collaboration, traditional investment regulation rules do not match digital international investment. At the same time, regulatory loopholes or barriers may appear and affect the development of digital industry. Digitalization also has a general impact on the operation of a wider range of traditional industries, especially those with strict investment regulations, such as retail, media, communications, transportation, and consumer finance. Experience shows that these industries have a high degree of digitalization utilization. Therefore, investment regulatory measures should be quickly adjusted to adapt to their digital development.<sup>47</sup> Therefore, as an important and recent investment policy, investment facilitation rules should also be coordinated with the development of digitalization. The existing key digital tools in investment facilitation rules are online information portals and online single windows, which can provide investors with transparent legal information and efficient administrative procedures.<sup>48</sup> Investors can theoretically use one website to implement all of the procedures required for establishing investment. Moreover, there is no need for separate application and repeated submission of materials to different administrative departments. This greatly reduces the complexity and redundancy of the application process and reduces investors' transaction costs. As a part of E-government, these websites reduce the government's administrative costs,<sup>49</sup> and will help to dispel the concerns of some developing countries regarding investment facilitation. To sum up, investment facilitation rules reflect the international context of digital development, and digitalization itself can reduce costs.

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47 Lin Jian, Balanced Governance of Digital International Investment Law, *Journal of International Economic Law*, No. 3, 2020, p. 76-77.

48 *Supra* n. 20, p. 185.

49 Palvia S. C. J. and Sharma S. S., E-government and E-governance: Definitions/domain Framework and Status around the World, *International Conference on E-governance*, Vol. 5, No. 1, 2007, p. 5.

## B. Ability Value: Modern Governance and Institutional Capacity Building

The second value of investment facilitation rules is governance and institutional capacity building. These rules stipulate the administrative measures that the state imposes on foreign investment, aiming to constrain the government's administrative actions. On one hand, it differs from the administrative constraints under the investment freedom and protection mechanism. Namely, the review and approval of the investment admission departments, as well as the treatment that governments at all levels and their departments give to investors in accordance with laws and regulations, neither aim to optimize government institutions, nor aim to promote coordination and cooperation among government institutions. On the other hand, this is compatible with investment promotion to some extent. Some countries have practically established investment promotion departments in their governments<sup>50</sup> to provide investment promotion and limited facilitation services<sup>51</sup> with a view to optimize the functions of existing investment promotion departments. This shows that investment promotion and facilitation measures can collectively improve the capacity of administrative institutions and the governance level. However, the difference is that investment facilitation measures cover all investment fields and the whole investment duration. Therefore, in terms of the application scope of measures, investment facilitation measures have higher requirements for governance than investment promotion. In other words, investment facilitation rules are indispensable for modernization and have the ability value of constructing modern administrative institutions, which embodies constitutive intrinsic value. Different from

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50 The OECD report points out that 60% of its members' investment promotion agencies are autonomous public bodies, 31% are government agencies, and the remained 9% is composed of two public-private joint agencies and one private agency. See OECD, Mapping of Investment Promotion Agencies in OECD Countries, [www.oecd.org/investment/Mapping-of-Investment-Promotion-Agencies-in-OECD-Countries.pdf](http://www.oecd.org/investment/Mapping-of-Investment-Promotion-Agencies-in-OECD-Countries.pdf) (Last Visited on March 10, 2023).

51 Practices show that investment promotion agencies are undergoing functional changes. More and more investment promotion agencies begin to provide certain investment facilitation services, such as providing demand-oriented facilitation for safe and fast investment projects. See <https://unctad.org/topic/investment/investment-facilitation-and-promotion>; <https://waipa.org/waipa-content/uploads/IPA-Toolbox2020.pdf> (Last Visited on March 10, 2023); Andreas Dressler, Investment Facilitation: A Practical Perspective, <http://e15initiative.org/publications/investment-facilitation-a-practical-perspective/> (Last Visited on March 10, 2023); UNCTAD, Investment Facilitation: The Perfect Match for Investment Promotion, *The IPA Observer*, No. 6, 2017, p. 2.

instrumental extrinsic value, constitutive intrinsic value means that one thing (A) is a part of another thing (B), which usually has a greater value. For A cannot be easily separated from B, it is a type of intrinsic value.

Judging from their concrete manifestation, investment facilitation rules attain modern governance and improve institutional capacity by establishing efficient and coordinated government institutions. First of all, the need to simplify investment regulation procedures and formalities further promotes the reform of internal operation, regulation and decision-making procedures of government institutions, and can improve administrative efficiency. E-governments, as one-stop centers or single windows that provide investment legal information, approval services, and advisory services, can also accelerate the reform of government's digital governance. Second, investment facilitation rules require inter-agency coordination and consistency, which is an important aspect of governance reform. For example, the dispute prevention mechanism is an important investment facilitation measure that aims to establish a coordinated government. The purpose of the dispute prevention mechanism is to take necessary measures in each investment relationship to prevent possible investment disputes in advance, and to ensure that the host government's administrative departments can comply with the legislation and implementation obligations under IITs to prevent disputes.<sup>52</sup> Some countries set up national contact points or ombudsmen that throughout the administrative regulation process, coordinate authorities to participate in evaluating complaints or suggestions that investors propose,<sup>53</sup> review the problems and inconsistencies of administrative agencies during the establishment and implementation of investment regulatory norms, and form an effective feedback mechanism to promote the improvement of government supervision and services. Moreover, in order to coordinate investment regulation between the central and local administrative agencies, some countries establish the highest coordination body as well as a horizontal and vertical cooperation and dialogue mechanism among institutions. These measures are aimed at improving investment governance in host countries and

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52 Qi Tong, Three Components of the Investment Dispute Settlement System, *Social Science Journal*, No. 4, 2018, p. 136.

53 United Nations, *Investor-state Disputes: Prevention and Alternatives to Arbitration*, [https://unctad.org/system/files/official-document/diaeia200911\\_en.pdf](https://unctad.org/system/files/official-document/diaeia200911_en.pdf) (Last Visited on March 14).

will help to protect large-scale overseas investment.<sup>54</sup>

### C. Purpose Value: Sustainable Development of Investment

The added value of investment facilitation rules is to promote inclusive growth and sustainable development. In 1992, the United Nations Conference on Environment and Development (UNCED) reached a consensus on sustainable development. With the changing of international economic and social environment, the concept of sustainable development is constantly developing and becoming more enriched.<sup>55</sup> Within the international investment legal system, sustainable development should be seen as a process of change during which resource exploitation, investment objectives, technological development, and institutional change are in harmony, with enhanced current and future potential intended to meet human needs and aspirations.<sup>56</sup> Therefore, when reforming IITs, we can see that the fair and equitable treatment clause, exception clause, public interest clause, and dispute settlement procedures are gradually becoming sustainable. Therefore, new values must be added to investment facilitation rules. In terms of practical treaty experience, traditional investment facilitation rules formed around 2000 only consider how to improve the investment environment, and do not consider the sustainable development of the host country's social and economic environment.<sup>57</sup> However, the World Investment Report 2012 pointed out that investment promotion and facilitation were among the principles of investment policies designed to achieve sustainable development, and called for the establishment of a new generation of investment promotion and facilitation mechanisms.<sup>58</sup> The goal of WTO Investment Facilitation Framework also aims to establish the “Investment Facilitation Framework

54 Qi Tong, On the Prevention Mechanism of “Belt and Road” International Investment Disputes, *Law Review*, No. 3, 2018, p. 84.

55 In the United Nations Millennium Development Goals (MGDs) from 2000 to 2015, environmental sustainability was only one of the eight MGDs. But in 2015, the United Nations set “sustainable development” as the global development goal for 2015-2030, which was formulated and to be implemented from social, economic and environmental dimensions.

56 Chi Manjiao, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications*, London: Routledge, 2017, p. 10.

57 Brauch M., Mann H. and Bernasconi-Osterwalder N., SADC-IISD Investment Facilitation Workshop, <https://www.iisd.org/publications/report/sadc-iisd-investment-facilitation-workshop> (Last Visited on March 13, 2023).

58 *Supra* n. 6.

for Development ”.<sup>59</sup> According to Professor Sauvant, the concept of investment facilitation includes not only the promotion of investment, such as attracting foreign capital, but also maximizing the benefits of FDI as well as promoting the growth and development of the investment recipient country.<sup>60</sup> The purpose of the investment facilitation rules is not only to attract and maintain foreign investment, but more importantly, to attract and maintain sustainable foreign investment.

Therefore, these rules have the purpose value of promoting sustainable investment, which is also a constitutive intrinsic value. That is to say, on one hand, these rules cannot be excluded from the joint efforts of the international community, such as human rights, CSR, and sustainable development, but are compatible with them,<sup>61</sup> and on the other hand, an important component of sustainable investment development is investment facilitation measures that promote development. Specifically, facilitation rules for sustainable investment focus on investment issues closely related to sustainable development and provide sustainable investors with investment regulation facilitation as well as other administrative services. This is mainly manifested in the behaviors of investors, states, and stakeholders. In terms of investors, private companies involved in human development are particularly important for the increasing growth of host countries.<sup>62</sup> Therefore, IITs softly constrain foreign investment behaviors based on CSR rules, guarantee the positive impact of these investments on local development, and provide specific facilitation services to investors by implementing responsibility evaluation standards. Increasingly more IITs have established CSR mechanisms and introduced international standards, and additional multinational companies have implemented these behaviors during corporate governance.<sup>63</sup> In terms of states, the host or home country establishes mechanisms such as evaluation incentives to promote sustainable FDI and

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59 *Supra* n. 2.

60 Sauvant K. P., Investment Promotion and Facilitation in a Broader Context, 2016, <https://ssrn.com/abstract=2857129> (Last Visited on March 13, 2023).

61 Singh K. Do We Need a Multilateral Instrument on Investment Facilitation? *Madhyam Briefing Papers*, No. 19, 2017.

62 Frynas J. G., Corporate Social Responsibility and International Development: Critical Assessment, *Corporate Governance: An International Review*, Vol. 16, No. 4, 2008, p. 275.

63 Fikfa M. S., Kuhn A. L. and Stiglbauer M., “One Size Fits All”? Convergence in International Corporate Social Responsibility Communication — A Comparative Study of CSR Mission Statements in the United States and India, *Journal of Public Affairs*, Vol. 18, No. 3, 2018, p. 1670.



grants additional investment facilitation services to investors meeting the criteria, as well as provides specific investment law and policy information or other investment facilitation measures to disadvantaged investors such as SMEs, women, and young entrepreneurs.<sup>64</sup> It also establishes a cooperative mechanism between the contracting parties to promote overseas investment and create contacts between investors and local suppliers in the host country.

Finally, in terms of stakeholders, investment facilitation rules introduce an approach, partnership, or governance model. It is generally accepted that the stakeholder approach means that all persons with an interest in an event should be considered during its occurrence, decision-making, and governance. In the context of sustainable development, the Johannesburg World Summit on Sustainable Development in 2002 formally proposed stakeholder partnership as a governance relationship relative to traditional diplomatic governance.<sup>65</sup> The Sustainable Development Goals 2015 identified it as a systemic issue that evolved from a public-private relationship to a public, public-private, and civil multi-stakeholder partnership.<sup>66</sup> Accordingly, the development of investment facilitation rules also reflects the stakeholder approach. These rules cover the government's evaluation, decision-making, consultation, cooperation, dispute settlement, and other behaviors concerning investors, which may impact multiple real or potential parties. Therefore, considering these interest demands can contribute towards balancing interests and achieving harmonious development. The concrete manifestation is to institutionalize the stakeholder approach during investment regulation, such as giving stakeholders an opportunity to make comments and suggestions in the process of formulating investment measures, allowing the participation and suggestions of professional individuals and institutions during economic and technical cooperation, as well as establishing the coordination mechanism of the government, investors, and other stakeholders within the dispute prevention mechanism.

It is worth noting that the above only summarizes the concrete embodiment of the initial sustainable development purpose value. Since the policy experience of encouraging private investment in sustainable development is in its

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64 Concrete Actions 1.3 and 4.2, the SADC Investment Policy Framework.

65 Backstrand K., Multi-stakeholder Partnerships for Sustainable Development: Rethinking Legitimacy, Accountability and Effectiveness, *European Environment*, Vol. 16, No. 5, 2006, p. 291.

66 Sustainable Development Goals, <https://www.un.org/sustainabledevelopment/zh/globalpartnerships/> (Last Visited on March 13, 2023).

infancy,<sup>67</sup> this article aims to further discover the potential convergence of investment facilitation rules and sustainable development by applying more practical or theoretical approaches while starting from this purpose value.

#### IV. CHINA'S PRACTICE, DEFICIENCY, AND FUTURE PATH REGARDING INVESTMENT FACILITATION

Clarifications of concepts can help to better guide practice. Therefore, based on the analysis of the connotation of investment facilitation, we need to pay attention to China's practice and development of investment facilitation under international investment laws. This will not only help China to further participate in global rule governance, but also enhance the coordination between domestic and international rule of law. In fact, China is promoting the development of international rules on investment facilitation. At the regional level, China dominated the Investment Agenda at the 2016 G20 Hangzhou Summit, at which the G20 Guiding Principles for Global Investment Policymaking was ultimately concluded, establishing nine principles including transparency and predictability, dispute prevention, responsible business conduct, and the pursuit of investment facilitation policies.<sup>68</sup> In 2017, China, Brazil, Argentina, Nigeria, and other developing Members formed the Friends of Investment Facilitation for Development (FIFD) and submitted a proposal entitled Informal Dialogue on Investment Facilitation. At the multilateral level, at the 11<sup>th</sup> WTO Ministerial Conference in 2017, China convened 66 WTO Members, including the EU, Japan, Canada, Brazil, Argentina, Malaysia, and Nigeria, to attend the Breakfast Meeting on Investment Facilitation, and 64 of them signed the Joint Statement on Investment Facilitation for Development.<sup>69</sup> China is also implementing investment facilitation measures at the domestic level, especially its experiment in the pilot free trade zone (FTZ). However, China's efforts at the level of IIT rules are far less impressive. Therefore, this article comprehensively analyzes the rules on investment facilitation under China's IITs (IITs with China as a contracting party), finds out their characteristics and deficiencies, and combines the intrinsic value of investment facilitation with China's situation to propose

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<sup>67</sup> *Supra* n. 1.

<sup>68</sup> See G20 Guiding Principles for Global Investment Policymaking, 2016.

<sup>69</sup> *Supra* n. 2.

its future path of investment facilitation rules.

### A. Characteristics and Deficiencies of China's IITs

China has currently signed a total of 170 IITs, 129 of which are in force.<sup>70</sup> Most of these treaties are older-generation BITs with fewer and simpler investment facilitation rules. At the same time, regional FTAs in which China participates focus more on investment facilitation rules. Specifically, the investment facilitation rules under China's IITs roughly manifest the following three characteristics.

#### *1. Single Types of Investment Facilitation Rules*

The types of investment facilitation rules under China's IITs are single and basically lack any obvious representation of reform. On one hand, before 2000, there were no provisions on the main investment facilitation rules under China's IITs. An authoritative example is that these rules did not change at all under China's first-generation model in 1984 and 1989, second-generation model in 1997, and third-generation model in 2010. The rules were only reflected as two types, i.e. "facilitation of visas and work permits for foreign investors and their employees" and "examination and cooperation between the contracting parties, including exchange of legal information, through meetings".<sup>71</sup> These two investment facilitation rules have always been retained in many China's IITs. According to my incomplete statistics, at least 67 China's BITs provide for the "facilitation of visas and work permits for foreign investors", and at least 52 stipulate the "investment legal information exchange and cooperation". Generally speaking, most of these two kinds of rules include only one or two simple expressions, so they can be regarded as principle investment facilitation rules that lack operability. On the other hand, both China's BITs and FTAs focus mainly on the transparency requirement, while there are few regulations on other investment facilitation rules, namely simplification of administrative procedures, contact points, regulatory consistency, responsible business conduct, anti-corruption, and the role of the home country of investment facilitation. These treaty texts indicate that the transparency requirement under China's

<sup>70</sup> China has signed 170 IITs, which includes 145 BITs and 25 TIPs. See <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> (Last Visited on March 13, 2023).

<sup>71</sup> Shan Wenhua and Norah Gallaghe, *Chinese Investment Treaties: Policies and Practice*, Translated by Wei Yanru, Beijing: Law Press China, 2015, pp. 35-45.

FTAs is highly universal and includes high rule standards, forming the institutional transparency requirement. However, only very few of China's BITs have introduced the transparency requirement and these BITs are signed with South Korea, Japan, Australia, and Canada, which are located around the Pacific Ocean. This means that except for the countries that have signed an FTA with China and the developed countries around the Pacific Ocean, in more than 100 investment recipient countries that have signed a BIT with China, China's overseas investors cannot propose obligation requirements under the IITs regarding the host country's transparency issue during investment regulation.

## *2. Lack of Expression on the Principles or Objectives*

China's IITs also generally include a lack of expression on the principles or objectives of investment facilitation. Only a few of these treaties mention "promoting investment facilitation" or "establishing a transparent and predictable investment environment" under the provision of objectives or purposes. For example, a small number of China's BITs set out in articles (not preambles) general requirements for contracting parties to provide investment facilitation. In addition, the preamble to the China-ASEAN Investment Treaty 2009 mentions "establishing a free, convenient, transparent and competitive investment system, promoting investment facilitation and enhancing the transparency of investment-related laws and regulations".<sup>72</sup> Some other treaties simply state "transparency and predictability" and do not use the phrase "investment facilitation". For example, the preamble of the China-Costa Rica FTA mentions that the Parties "recognize the importance of transparency in international trade". Therefore, the objectives or purposes concerning investment facilitation under China's IITs are inconsistent and range from "recognizing the importance of transparency and predictability" to "establishing a transparent and predictable investment system", then to "determined to ensure a transparent and predictable business framework", and finally to "promoting investment facilitation and establishing a convenient and transparent investment system". This manifests the varying degrees of reform attitudes under each China's IIT, and also tend to show that China's IITs do not reflect obvious transformation and reform of investment facilitation rules at the level of IITs.

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<sup>72</sup> Preamble, China-ASEAN BIT.

### 3. *Seriously Polarized Rules*

The investment facilitation rules under China's IITs are seriously polarized. On one hand, most of the traditional China's BITs do not include investment facilitation rules, and some of them only provide for visa facilitation as well as information exchange and cooperation. On the other hand, in recent years, the two regional FTAs of the RCEP and EU-China Comprehensive Agreement on Investment (CAI) in which China participates, and the two Investment Agreements in the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) and the Mainland and Macao CEPA, have embodied higher-level and larger-proportion characteristics of investment facilitation rules. The advancement of these rules in these investment treaties is mainly manifested in three aspects. First, there is a separate investment facilitation clause, which tends to integrate these rules. The RCEP and the two Investment Agreements of the Mainland and Hong Kong CEPA and the Mainland and Macao CEPA share this feature.<sup>73</sup> The emergence of a separate investment facilitation clause demonstrates the importance that contracting parties attach to these rules and is an important milestone in their development. Second, the types of these rules are diverse. For example, CAI not only provides for two kinds of these rules, namely transparency and simplification of administrative procedures, but also focuses on sustainable development. The fourth part Investment and Sustainable Development proposes the requirements for responsible business conduct, that is, emphasizing "the important contribution of responsible business conduct to strengthening investment's positive role in sustainable growth", and "promoting and encouraging enterprises to voluntarily adopt responsible business practices, while taking into account relevant internationally recognized guidelines and principles". From the text's perspective, each treaty has different investment facilitation rules, which means that each contracting party has different concerns about investment facilitation. However, their commonality lies in the enhanced importance of investment facilitation in IITs. Third, investment regulatory rules concerning investment facilitation, namely transparency and simplification of administrative procedures, demonstrate refinement. For example, on the issue of licensing procedures in domestic regulation, CAI respectively stipulated two specific provisions: License and Qualification Criteria as

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<sup>73</sup> Article 15, Investment Agreement, the Mainland and Hong Kong CEPA.

well as License and Qualification Procedures. Particularly, the latter includes nine specific types of content.<sup>74</sup> The concretization of investment facilitation rules means that there is less room for interpretations of the provisions and that the contracting parties will bear more international obligations. However, at the same time, it means that there is enhanced enforceability of these rules.

### B. China's Future Path Regarding Investment Facilitation Rules

China lacks a prominent role in formulating investment facilitation rules in IITs. Instead, it prefers to upgrade investment facilitation services in domestic FTZs and promote WTO multilateral negotiations. However, these two paths still have some deficiencies or obstacles. On one hand, although a certain consensus has been reached in WTO negotiations, some countries still oppose the conclusion of a “multilateral investment facilitation agreement”. At the same time, due to the nature of multilateral negotiations, the future agreement should necessarily balance all countries' claims on the setting of investment facilitation rules, and may end up at a lower level of international rules. Moreover, the entry into force of a multilateral or plurilateral agreement requires a certain percentage of the signatories to complete domestic ratification, which means that the entry into force of this agreement is much more difficult or requires a longer period of time. On the other hand, some of the investment facilitation measures that China has implemented in its domestic FTZs undoubtedly have innovativeness, which means that China can bring in its experience with domestic advanced rules when negotiating a new generation of IITs, which will help internationalize its experience. Thus, this section discusses how China should choose or design the middle path (the third path between the multilateral and domestic levels).

In my opinion, promoting the standardization and cross-border cooperation of investment facilitation within large regions should be China's intermediate path concerning investment facilitation rules. Multiple factors determine the importance of the formulation of investment facilitation rules in large regions. First, during regional governance and integration, regional members have a certain connection, such as the same geographical range, common cultural context, similar legal environment, and convergent values, which makes it easier

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74 Article 3 Licensing and Qualification Procedures, Sub-section 1, Section III, CAI.

to form regional trade communities and alliances along with other close international law relations. This may make it easier for regional members to determine regional priorities, reach international treaties aligned with regional and the members' development goals, follow common international standards and principles, and form inter-regional implementation cooperation.<sup>75</sup> For example, SADC held at the Developing Country Workshop on Investment Facilitation found that, by evaluating investment facilitation projects, investment facilitation measures are more appropriate at the regional, bilateral, and domestic governance levels.<sup>76</sup> Moreover, following the African Union (AU) Free Trade Agreement, the AU could draft a regional investment treaty that would include issues such as investment facilitation. From the perspective of regional organizations, they could more effectively provide services and promote regional development. They can strengthen the effects of regional governance by providing information and best practice sharing, cooperation, capacity building, and technical support. Therefore, the recent emergence of several regional organizations and some FTAs relying on large or super-large regions are an important part of regional governance development. Second, from the perspective of rational institutional choice, along with the interactive development of trade and investment, bilateral investment treaties cannot meet this international economic and trade development trend. As a result, each country's institutional choice tends to focus on regional FTAs. Thus, the emergence of mega-FTAs reflects the reshaping of international trade and investment rules along with rule-making procedures.<sup>77</sup> Third, from the perspective of policy choices, future reforms in the IIT system will result in the termination of a large number of first-generation BITs. According to the ten policy choices that UNCTAD summarized for the second stage of reforms of the international investment system,<sup>78</sup> countries can choose to abolish, revise, or replace these BITs. However, considering the low efficiency, great difficulty, and huge workload involved with re-concluding or revising international BITs, the most effective scheme for national rule governance is

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75 Fei, X., Investment Barriers, Investment Facilitation and the BRICS Countries' Investment Treaty Policies and Practice, In Cai Congyan, Chen Huiping and Wang Yifei (Eds.) *The BRICS in the New International Legal Order on Investment*, BRILL, 2020.

76 *Supra* n. 3.

77 Qi, T., Improving Global Investment Governance: China as a New Variable, *ICSID Review - Foreign Investment Law Journal*, Vol. 35, 2020, p. 174.

78 *Supra* n. 20, p. 131.

not to focus fully on renewing BITs. Furthermore, the conclusion of regional FTAs is a policy choice that can gain more effective and greater benefits within a limited capacity and time range.

Therefore, based on domestic practices and international standards, innovative systems and models exploring the governance of regional investment facilitation rules should have the following three characteristics: a combination of hard and soft law, the coexistence of general and country-specific standards, and the diversification of cooperation modes. First, investment facilitation rules have in-depth connotations. During the practice of existing IITs, some of these rules are mainly manifested as binding hard-law rules, such as the transparency requirement, simplification of administrative procedures, ombudsmen, and anti-corruption rules, while others are soft-law due to high demands on administrative capacity or the nature of these rules, such as regulatory consistency, responsible social behavior, and home country roles. Therefore, when promoting the standardization of regional investment facilitation, China needs to determine and strengthen existing hard-law rules, and also promote the appropriate development of soft-law rules towards hard-law rules as well as regional cooperation mechanisms. An important practice combining hard law and soft law is to establish a memorandum of cooperation on cross-border investment facilitation. Contracting parties may adjust the wording, instruments, and other specific content of the memorandum to form binding hard law or non-binding soft law, which makes the memorandum more flexible and targeted.<sup>79</sup>

Second, the inclusively unified framework or standard is determined based on the commonalities and characteristics of the economy, trade, society, and culture of the countries within the region. Therefore, in order to promote the coordinated development of regional economies, the establishment of a unified framework or standard of investment facilitation rules is a priority policy option, as opposed to the fragmented results of scattered amendments to existing IITs. However, considering the extensive connotation of these rules, the unified framework of regional rules can be phased. Starting from exploring a single unified framework of these rules, the regional institutionalization and standardization of other rules can be gradually achieved. For example, the complaint

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<sup>79</sup> Li Chengcheng, On the Legal Nature and Legal Effect of Memorandum of Understanding, *Journal of Honghe University*, No. 4, 2020, pp. 148-152.



mechanism in China is an important policy tool for dispute prevention that is aligned with the Eastern culture of peace. In the region, disputes between host countries have typical characteristics, and some disputes under certain types of political or legal risks are likely to recur under similar circumstances. Therefore, it is possible and highly necessary to create an effective liaison mechanism so each country's governments can understand their treaty obligations, become aware of the problems between investors and public institutions, and learn from the typical problems exposed by existing investment disputes to avoid the recurrence of similar disputes.<sup>80</sup> China can consider cooperating with the governments of countries along the Belt and Road to promote the establishment of a Cooperation Center on Investment Dispute Prevention that will act as an entity for unified administration of dispute prevention, and establish corresponding working mechanism.

In addition, countries within the region have attained different levels of development and lack identical development priorities. Therefore, while establishing a unified framework, countries need flexibility and particularity. It is advisable to refer to the innovative thematic agenda form of Brazil's CFIA to develop country-specific lists within or outside the unified framework, detailing specific types of facilitation measures that one party is willing to grant to investors of the other party. These agendas usually include very specific facilitation arrangements such as currency transfers, visa procedures, technical and environmental permits, inter-agency cooperation, and flight schedules. Special provisions can also be made as an investment facilitation cooperation memorandum. For example, China and Australia signed the Memorandum of Understanding on Investment Facilitation Arrangement, which aims to clarify visa facilitation arrangements for employees of Chinese enterprises investing in Australia.

Third, diverse regional investment facilitation cooperation models are explored to fully develop the role of stakeholders, which can promote the implementation effectiveness of investment facilitation rules. For many developing and least developed countries, the institutionalization, technicality, and standardization of investment facilitation must depend on international cooperation and capacity building. Empirical studies show that many countries strongly

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<sup>80</sup> *Supra* n. 54, p. 86.

tend to promote cross-border cooperation on investment facilitation, but there are fewer examples of sharing best practices of investment facilitation measures along with exchanging expertise, talent, and training programs. Specifically, regional cooperation content can include sharing of information, experience, and best practices, such as experience related to policies and investment facilitation measures, regulatory principles, standards, codes of conduct, technical guidelines, as well as experts and technologies. Forms of cooperation could include seminars, dialogues, forums, conferences, cooperation projects, training projects, technical assistance, capacity building, joint initiatives, proposals, and supplementary agreements or arrangements. Furthermore, the establishment of specialized regional institutions responsible for cooperation is essential for ensuring effective implementation of these mechanisms. For example, when a regional cooperation committee is established, it should recognize the importance of the private sector and establish inclusive cooperation procedures. Moreover, lessons can be drawn from the EU-Japan EPA's Regulatory Cooperation Conduct that stipulates detailed procedures for regulatory cooperation.<sup>81</sup>

## V. CONCLUSION

In the field of international investment laws, increasingly more countries are focusing on investment facilitation rules. The interdisciplinary and legal empirical methods can be applied to clearly describe the connotation and extension of investment facilitation. Based on a deductive approach, instrumental value, ability value, and purpose value can reasonably explain the domestic regulatory measures included in these rules. Clear researches on the concept of investment facilitation can guide practice. China's practice on these rules is manifested as two chariots, namely the promotion of principles or rules at the multilateral or regional level and the implementation of advanced investment facilitation measures at the domestic level. However, China has not implemented significant reforms regarding IIT rules, which might reduce its influence on the governance of investment facilitation rules. Therefore, adding an intermediate path, that is, promoting the standardization and cross-border cooperation of

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<sup>81</sup> Article 18.12, EU-Japan EPA.

investment facilitation within large regions, may be China's future option for these rules. Therefore, the extensive connotation and complex measures of investment facilitation mean that further in-depth study is required to extensively understand its specific system construction or mechanism design.