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Investment Facilitation for Development: A New Route to Global Investment Governance

Summary

While global investment needs are enormous in order to bolster the implementation of the 2030 Agenda for Sustainable Development, developing countries are often excluded from global foreign direct investment (FDI) flows. Beyond economic fundamentals like market size, infrastructure and labour, the impediments to FDI in developing countries relate to the predictability, transparency and ease of the regulatory environment. In contrast, tax incentives and international investment agreements (IIAs) have been found to be less important (World Bank, 2018). To harness the advantages of FDI, it is critical that governments have policies and regulations in place that help to attract and retain FDI and enhance its contribution to sustainable development. The 2030 Agenda and the Addis Ababa Action Agenda, thus, call for appropriate international frameworks to support investments in developing countries.

In this context, the Joint Ministerial Statement on Investment Facilitation for Development adopted at the 11th Ministerial Conference of the World Trade Organization (WTO) in December 2017 called for the start of "structured discussions with the aim of developing a multilateral framework on investment facilitation". Investment facilitation refers to a set of practical measures concerned with improving the transparency and predictability of investment frameworks, streamlining procedures related to foreign investors, and enhancing coordination and cooperation between stakeholders, such as host and home country government, foreign investors and domestic corporations, as well as societal actors.

Despite the deadlock in the WTO's 17-year-old Doha Round negotiations, the structured discussions on investment facilitation, which have been under way since March 2018, show that the members of the WTO take a strong interest in using the WTO as a platform to negotiate new international rules at the interface of trade and investment. In contrast to previous attempts by developed countries to establish multilateral rules for investment, the structured discussions are mainly driven by emerging and developing countries. Most of them have evolved over the past years into FDI host and home countries reflecting the changing geography of economic power in the world. Their increased role has led to a shift of policy agendas, focusing on practical measures to promote FDI in developing countries while excluding contentious issues such as investment liberalisation and protection, and investor–state dispute settlement (ISDS).

This policy brief provides an overview of the emerging policy debate about investment facilitation. We highlight that four key challenges need to be tackled in order to negotiate an investment facilitation framework (IFF) in the WTO that supports sustainable development:

1) There is a need to properly conceptualise the scope of investment facilitation as a basis for empirical analyses of the potential impact of a multilateral IFF.
2) Many less- and least-developed countries do not yet participate in the structured discussions. It is necessary to enhance their capacity to participate in the structured discussions and address their specific concerns.
3) In order to enhance the contribution of FDI to sustainable development it is necessary to support the development of governance mechanisms at the domestic level.
4) It is key to ensure transparency towards countries not yet participating in the discussions, the business sector and societal actors to support a successful policy process.

What is investment facilitation?

For the past 60 years, IIAs have been the backbone of the international investment regime, providing rules on market access and investment protection backed up by ISDS. More than 3,300 IIAs have been concluded since the late 1950s. IIAs are frequently seen as unbalanced, as they impose binding and enforceable rules on host states while demanding little to no responsibilities from foreign investors. Furthermore, foreign investors increasingly invoke ISDS as a means to settle disputes with host states.

In contrast, investment facilitation does not involve the controversial issues raised by IIAs. It rather constitutes a set of practical measures that allow FDI to flow more smoothly without necessarily requiring substantive changes to domestic rules and regulations. Although there exists no common definition of investment facilitation, its main objective seems to be providing investors with a transparent, predictable and efficient regulatory and administrative framework. It comprises a broad range of measures, such as increased transparency of investment-related laws and regulations and easy access to competent authorities through electronic systems. Furthermore, it can involve the establishment of a national focal point that provides investment-related information, assists investors and addresses problems they encounter. Investment facilitation also promotes better cooperation between relevant agencies, domestically as well as internationally.

International rules for investment facilitation are rare. Only a few IIAs cover rules on the facilitation of business activity (Polanco, 2018). As an exception, Brazil has started to sign international treaties that focus primarily on investment facilitation. Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) illustrate a new approach to international investment rule-making. They promote cooperation between the contracting parties, the establishment of institutions to ensure continued communication between foreign investors and host states (such as contact points and ombudspersons), and the implementation of dispute prevention as well as state-to-state mechanisms for the settlement of disputes. Since 2015, Brazil has signed CIFAs with nine countries from Africa and Latin America.

An emerging policy debate

In the last few years, the concept of investment facilitation has found its way onto the agenda of academic discussions and policy debates on global investment governance. After the successful adoption of the WTO Trade Facilitation Agreement (TFA) in 2013, a group of experts proposed a similar agreement to facilitate investment (Sauvant & Hamdani, 2015). In 2016, the United Nations Conference on Trade and Development (UNCTAD) released the first draft of its "Global Action Menu for Investment Facilitation", which has since been updated and refined. Other international organisations, such as the Organisation for Economic Co-operation and Development (OECD), have worked on the issue of investment facilitation as well. Discussions about investment facilitation have also taken place at the regional level. Asia-Pacific Economic Cooperation (APEC) adopted an Investment Facilitation Action Plan in 2008 and a number of African countries organised the High-Level Trade and Investment Facilitation Forum for Development in Abuja in 2017.

The Group of 20 (G20) has been a key forum in which attention on investment facilitation has been raised. During their meeting in Shanghai in July 2016, the G20 trade ministers agreed on the non-binding "Guiding Principles for Global Investment Policymaking". These were formally adopted later that year at the G20 Hangzhou Summit and called for "facilitation efforts that promote transparency and are conducive for investors to establish, conduct and expand their businesses". The discussions on investment facilitation were continued during the German G20 presidency in 2017. The German chair aimed at adopting a non-binding investment facilitation package to foster open and transparent business climates and actions to promote inclusive economic growth. Negotiations, however, collapsed at the last minute, due to the disapproval of India, South Africa and, unexpectedly, the United States of America. Investment facilitation was not part of the agenda of the Argentinian G20 presidency in 2018. Instead, the discussion shifted to the WTO, laying the groundwork for an international agreement.

Recent discussions in the WTO

Past attempts to reach a multilateral investment deal have failed. These include, for example, the Multilateral Agreement on Investment under the auspices of the OECD in the 1990s. Another attempt was the negotiation of the so-called Singapore issues, including rules on investment, as part of the WTO's Doha Round in the early 2000s. One of the key reasons that these attempts failed is the fact that industrialised countries pushed too hard on contentious issues like investment liberalisation and protection and ISDS, which faced strong objections from developing countries. As a result, rules on investment are only selectively included in both the WTO agreement on Trade-Related Investment Measures (TRIMs), prohibiting the use of a number of trade-restricting performance requirements, and the General Agreement on Trade in Services (GATS), which includes limited commitments on the commercial presence of foreign investors.

Recent discussions in the WTO, however, driven by emerging countries, have taken a new route. The current agenda avoids the inclusion of investment liberalisation and protection or ISDS altogether and rather focuses on investment facilitation. The adoption of the TFA in 2013, which entered into force in 2017 and focuses on the simplification, harmonisation and modernisation of export and import processes, gave an important impetus to the discussions on investment facilitation. It comes as no surprise that the conceptual underpinnings of the TFA and the envisaged IFF sound very similar. In fact, trade and investment facilitation can be considered two sides of the same coin. For instance, similar to the discussion on investment facilitation, the TFA contains provisions on transparency, enquiry points, procedures for appeal or review, single window processing and electronic governance.

In the run-up to the Ministerial Conference in Buenos Aires in December 2017, mainly middle-income countries put forward proposals on investment facilitation at the WTO General Council. Proposals were submitted by Argentina, Brazil, China, Kazakhstan, the Russian Federation, the MIKTA grouping (Mexico, Indonesia, Korea, Turkey and Australia) and by a grouping called Friends of Investment Facilitation for Development, which comprises 11 emerging and developing countries. Although the Ministerial Conference in Buenos Aires failed to reach a consensus, a group of 70 WTO members, including both developed and developing countries, signed a joint statement calling for the start of structured discussions with the aim of developing an IFF. At the beginning of 2018, Brazil circulated a draft text for a possible WTO agreement.

Middle-income countries, as a subgroup of WTO members, are mainly driving the process with a view to launching negotiations on investment facilitation. This is noteworthy and underlines the increasingly proactive attitude of these countries towards the WTO. Among the 70 signatories of the Joint Ministerial Statement, 42 represent high-income countries, including the members of the European Union, 13 are upper-middle income, 10 are lower-middle income and 5 are low-income countries (see Figure 1). Together they account for 62% of the global inward FDI stock and 67% of the global outward FDI stock (source: UNCTADstat). However, only five African countries have signed the Joint Ministerial Statement. Moreover, the United States constitutes the largest non-participant, accounting for 24% of the global inward and outward FDI stock. As for developing and emerging countries, the most notable non-signatories are India, South Africa, Turkey, and some southeast Asian economies such as Indonesia, the Philippines, Thailand, and Vietnam.

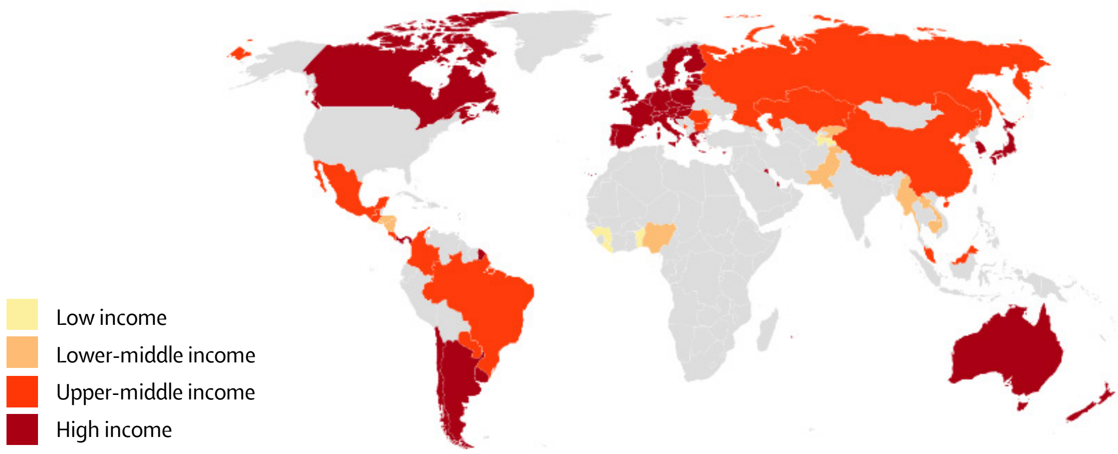
Challenges and ways forward

The structured discussions started in March 2018, and several rounds took place that year involving about 100 WTO members. The main goal is the identification of possible elements of a multilateral IFF, laying the basis for actual text-based negotiations to be commenced with a view to the 12th WTO Ministerial Conference in mid-2020. A number of key challenges, however, need to be overcome on the way towards an IFF. These include, among others, the need to (1) define the scope and measure the impact of an IFF; (2) seek inclusivity; (3) increase the contribution of investment facilitation to sustainability; and (4) ensure transparency of the discussions.

First, in contrast to the dynamism of the international policy debate, empirical research on the impact of a potential IFF is missing. One reason for this is the lack of conceptual clarity. It seems to be clear that investment facilitation is not about investment protection and liberalisation nor about ISDS. Much harder, apparently, is defining what investment facilitation should entail. For example, whether or not outward FDI, investment linkages or dispute prevention should be part of an IFF is still subject to debate. One way to determine what investment facilitation includes is to identify and catalogue measures that affect the facilitation of investment at the country level. Based on such a mapping of domestic policies and procedures facilitating foreign investments, it is possible to analyse empirically the potential benefits of an international IFF. This kind of research in turn is needed to provide policymakers with empirical evidence to better gauge the potential benefits and drawbacks of an IFF and the necessary changes in domestic rules and regulations. An accurate impact assessment will also help policymakers to prioritise investment facilitation actions and mobilise technical assistance and capacity-building efforts for developing countries in a more targeted way.

Second, it is noteworthy that a large number of less- and least-developed countries have not signed the Ministerial

Figure 1: Signatories of the Joint Ministerial Statement on Investment Facilitation for Development, by income group



Source: Authors, based on country classifications from the World Bank

Statement and are not participating in the structured discussions. These countries are typically excluded from global FDI flows and could thus benefit the most from better investment facilitation frameworks. Potentially, an IFF could help promote domestic reforms needed to attract and retain FDI. Domestic investors would also benefit from more transparent, efficient and predictable investment rules. Some reasons for the hesitance of many developing countries to participate in the structured discussions relate to capacity constraints and the fear of losing policy space. Critics warn that negotiations of an IFF in the WTO could be used by developed countries to incorporate contentious issues, such as investment liberalisation and protection and ISDS, which would reduce the policy space of developing countries and, in turn, limit their ability to regulate foreign investors (Joseph, 2017). While this broadening of the agenda is explicitly excluded from the current mandate of the structured discussions, less- and least-developed countries have limited administrative capacities and are constrained with regard to active participation in multilateral negotiations, as well as subsequent implementation of an agreement. It is therefore important that an IFF is crafted in a way that preserves the ability of host countries to implement public policies and that includes rules on special and differential treatment as well as commitments from emerging and developed countries to support capacity-building for less- and least-developed countries.

Third, a key policy objective of the countries participating in the structured discussions is to increase the quantity of FDI flows. However, it is also important to focus on the qualitative contribution of FDI to sustainable development. It is therefore necessary that an IFF helps promote sustainable FDI that contributes to the economic, social and environmental development of host states. Among other things, it is important to build capacities in developing countries for the promotion of linkages between foreign and domestic companies. Beyond that, an IFF should be designed in such a way that it supports appropriate governance mechanisms in developing countries to enhance the contribution of FDI to sustainable development. Promoting the interlinkages between investment facilitation and sustainable development needs to become a major theme of the discussions at the WTO.

Last, but not least, it is necessary to ensure that the international discussions about investment facilitation are transparent. Going forward, transparency is important to inform WTO members that are not yet participating in the structured discussions about the aims and design of an IFF. Transparency is also needed to involve other stakeholders, such as parliaments, non-governmental organisations and the business sector, in the discussions about the design of a multilateral IFF. Given the heated debates about multilateral investment rules in the past, transparency is also a prerequisite to enable a fact-based public discourse about a novel approach to establishing an international investment framework – one that is driven by a new group of (middle-income) countries and focuses on a new set of practical measures to promote FDI in developing countries.

References

Joseph, R. K. (2017). *Investment facilitation in WTO: For development?* (Policy Brief No. 3). New Delhi: Institute for Studies in Industrial Development.

Polanco, R. (2018). *Facilitation 2.0: Investment and trade in the digital age*. RTA Exchange. Geneva: International Centre for Trade and Sustainable Development.

Sauvant, K. P., & Hamdani, K. (2015). *An international support programme for sustainable investment facilitation*. Geneva: E15 Initiative, International Centre for Trade and Sustainable Development and World Economic Forum.

World Bank. (2018). *Global investment competitiveness report 2017/2018. Foreign investor perspectives and policy implications*. Washington, DC: Author.

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