

Multilateral Framework of Investment Facilitation at the WTO: Initiatives and Perspectives from the Global South

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Abstract: The focus of International Investment policymaking in the global South has been shifting from investment protection to investment facilitation (IF). This movement marks an attempt to improve the attractiveness of national economies for foreign direct investment (FDI) and to recover the policy space previously curbed by traditional investment protection clauses. The popularity of investment facilitation led to the beginning of a negotiation process at the World Trade Organization (WTO) to formulate a multilateral agreement in this area. However, the differing negotiation practices related to IF could provoke schisms between the WTO members engaging in this discussion. The latest international investment agreements (IIAs) featuring IF provisions, signed by countries in the global South, indicate that during multilateral negotiations, these countries will focus on improving transparency, predictability and simplicity of the investment environment, as well as preserving their ability to develop public policies that are in line with their development strategies. However, some of the provisions that bring such preferences to fruition would challenge these countries' bureaucratic and financial capacity. As discussions evolve at the WTO, countries in the global South will need to clarify their positions and co-ordinate their efforts in order to shape an alternative framework that fits their interests.

Keywords: investment facilitation; international investment law; structured discussions on investment facilitation at WTO; international investment agreement; multilateral framework of investment facilitation; political economy of investment facilitation.

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Introduction

Bilateral Investment Treaties (BITs), since their conception in the 1960s, have been portrayed as a mechanism to protect foreign investments and have proved extremely advantageous for capital-exporting countries. As such, BITs have been presented to developing countries (DCs) as a mechanism to make their domestic markets more attractive to foreign direct investment (FDI) (Dolzer and Schreuer 2012). However, after decades of existence, there is no evidence of a positive correlation between BITs and increases in FDI inflow (Johnson et al. 2018).

On the other hand, the exponential increase in international investment arbitration disputes based on protection clauses in the late 1990s and early 2000s leaves no room to doubt that such protection clauses have served their original purpose of preserving investors' interests in host countries (Tienhaara 2017). Moreover, investment protection clauses are often pointed out as constraints for host-country governments to pursue legitimate policy objectives (Pohl 2018). As a reaction to this state of affairs, developing countries changed their approach to attracting FDI towards a new paradigm aimed at facilitating investment (Waibel et al. 2010).

Broadly speaking, investment facilitation (IF) consists of a set of practical measures that allow FDI to flow more smoothly. IF measures cover a wide range of areas, all with an ultimate focus on allowing investment to flow efficiently and for the greatest benefit. They normally aim at improving the transparency and predictability of investment frameworks, streamlining procedures related to foreign investors, and enhancing co-ordination and co-operation between stakeholders, such as the host and home-country governments, foreign investors and domestic corporations, as well as societal actors (Berger, Gsell and Olekseyuk 2019).

Commentators frequently assert that the issue of investment facilitation gained popularity after the successful adoption of the Trade Facilitation Agreement (TFA) by the World Trade Organization (WTO) in 2014 (Balistreri, Berger and Olekseyuk 2019; Sauviant and Hamdani 2015), even though investment facilitation disciplines can be identified in BITs concluded as early as the 1990s (Polanco 2018). However, it was only recently that BITs, most of them taking place in the global South, started to include detailed provisions on investment facilitation, which has contributed to a growing momentum around the issue in international organisations and forums.

In December 2017, 60 members, most from the global South, subscribed to the Ministerial Declaration of the World Trade Organization (WTO) in support of the Structured Discussion, aimed at developing a multilateral framework on investment facilitation (WTO 2017). After two years of debate, the initiative now has 100 supporting members (WTO 2020) and has already produced a streamlined text, which is a document that organises text-based examples of IF measures provided by the Members to further instruct the discussions and possibly guide future negotiations (WTO 2019).

The rising support for the Structured Discussions on Investment Facilitation at the WTO and the political encouragement received from other bodies suggests that the issue is gaining traction and might be ready to trigger negotiations. Despite this obvious con-

vergence, there is no clear understanding as to how these shifts, which underpin the IF measures, could result in a multilateral agreement on the subject. So far, the discussion is mainly driven by countries in the global South (Berger, Gsell and Olekseyuk 2019). However, the progress of the negotiations and the increasing engagement of WTO Members may bring to light the hidden schisms and competing interests between countries in the global South and the global North.

This article seeks to explore the initiatives from the global South to codify IF measures in international investment agreements (IIAs), and assess their perspectives regarding a Multilateral Framework on this topic. Its main objective is to observe the past experience of countries in the global South in international negotiations regarding investment facilitation, and from this examination, to assess their interests in the current discussions at the WTO.

The first section analyses the initiatives from the global South aimed at codifying such measures in the IIAs in which they participate and explores the depth of those commitments. In view of the different concepts about investment facilitation and its main elements, we start the first section by conceptualising and defining the type of disciplines that should be considered as IF measures, for the purpose of the ongoing discussions at the WTO.

The second section investigates the perspectives of countries in the global South regarding a multilateral framework on IF at the WTO and builds a link between their initiatives and the expected outcomes of this negotiation. Our analysis takes into consideration past attempts of negotiating multilateral investments agreements and the likely reasons for their failure. In contrast, we will identify a number of issues that must be avoided in the current negotiation in order to enhance its chances of success.

Initiatives to codify IF measures in the Global South

This section aims at evaluating the initiatives in the global South to codify investment facilitation measures. However, before beginning this task, it is worth noting the concept and scope of investment facilitation measures and how relevant international stakeholders are dealing with the subject. We must take a glimpse at the current situation in order to discuss the possibilities and limits of a multilateral agreement on investment facilitation.

The first part of this section examines a few definitions and examples of IF measures under discussion at the WTO. The second part mentions certain initiatives from countries in the global South aimed at codifying IF measures in the IIAs. First, we point out discussions that have taken place in some international organisations, such as the Organisation for Economic Co-operation and Development (OECD) Policy Framework for Investment and the United Nations Conference on Trade and Development (UNCTAD) Global Action Menu for Investment Facilitation. Then we turn to the initiatives carried out by countries in the global South in regional arrangements and bilateral agreements.

Conceptualisation of Investment Facilitation Measures

Some commentators argue that investment facilitation refers to actions designed to increase transparency, predictability, simplicity and to maximise the effectiveness and efficiency of public administration throughout all stages of the investment cycle (Balistreri, Berger and Olekseyuk 2019). Others expand IF's definition to include measures aimed at streamlining procedures related to foreign investors and enhancing co-ordination and co-operation between stakeholders, such as host and home-country governments, foreign investors and domestic corporations, as well as societal actors (Berger, Gsell and Olekseyuk 2019). The ultimate focus of all IF measures, they add, would be allowing investment to flow efficiently and for the greatest benefit.

International organisations have also defined the scope of IF measures and differentiated them from other investment-related measures. The OECD's Policy Framework for Investment categorises investment promotion and investment facilitation as different types of activities. While investment promotion 'is about promoting a country or a region as an investment destination,' investment facilitation 'is about making it easy for investors to establish or expand their existing investments' (OECD 2015: 39). UNCTAD's Global Action Menu for Investment Facilitation defines IF initiatives as those aimed at tackling ground-level obstacles to investment, including improvements in transparency, information available to investors, predictability, accountability and effectiveness of government officials (UNCTAD 2016). Moreover, IF measures can include dispute mitigation, cross-border co-ordination between relevant stakeholders and other investment support mechanisms (UNCTAD 2016).

In the discussions at the WTO, members presented several text-based examples of desirable IF measures. In these examples, transparency and predictability provisions guide members toward transparent laws on investment matters and to report all investment-related laws to the WTO in order for interested stakeholders to become acquainted with investment-related regulations. Moreover, they also determine that countries should publish all regulations that they intend to adopt in advance, thus providing interested stakeholders an opportunity to provide comments and to consider the comments received (WTO 2020b).

The elements of simplicity, effectiveness and efficiency are referred to in the Structured Discussions as disciplines aimed at streamlining and speeding up procedures. These disciplines guide members to avoid imposing unnecessary requirements on investors when processing the applications necessary to perform an investment, as well as simplifying and setting clear criteria for administrative measures. This set of provisions also requires the creation of a single electronic window (SEW)/one-stop shop type of mechanism to enable foreign investors to access a single entry point and submit all documents required by the agencies or regulatory bodies involved in the admission, establishment, acquisition, and expansion of investments. Moreover, they stipulate that applications should be able to be submitted and fees and charges paid by electronic means (WTO 2020b).

The disciplines envisaged to enhance the co-ordination and co-operation between stakeholders establish national focal points/ombudspersons that would be responsible for

assisting and guiding investors toward implementing investment projects, including the exchange of information with respect to investment opportunities in member countries. Moreover, the NFC/ombudsperson would be responsible for responding to complaints on measures affecting investments with the objective of preventing disputes, thus lowering the probability of litigation and helping stabilise the business environment (WTO 2020b).

It is important to note that the WTO's mandate to discuss investment facilitation expressly directs Members to build-up a multilateral framework that is conducive to development (WTO 2017). The provisions on corporate social responsibility (CSR) are the set of rules mostly conducive to this objective. CSR guides investors and orients their investments toward achieving the highest level of sustainable development possible by adopting a high degree of socially responsible practices. Such practices involve, among others, protecting the environment; respecting the human rights of those involved in the activities of the companies; stimulating local capacities; incentivising the formation of human capital, particularly creating job opportunities; and facilitating the access of workers to professional qualification, among others (WTO 2020b).

Provisions establishing investors' responsibilities and responsible business conduct indicate a trend towards a more balanced relation between investors and states in international investment law (Silva and Ribeiro 2018). Following this rationale, this article adopts a broader approach regarding investment facilitation to include measures aimed at creating a link between investors and host states by promoting the highest social and economic benefit from investments for both parties.

Attempts to include IF measures in international agreements

As argued above, following the exhaustion of traditional BITs, developing countries (DCs) started shaping IIA models to feature provisions reflecting their own priorities. Consistent with the main criticisms of traditional BITs (most commonly, the excessive litigation leading to a curtailment in the freedom to pursue legitimate public policy objectives), most of the innovative proposals arising from the global South have focused on investment facilitation measures. Naturally, processes at the WTO are mainly driven by countries in the global South, along with the majority of text-based examples that inform the Structured Discussions (Berger, Gsell and Olekseyuk 2019). Therefore, pioneering actions by global South over several years have turned it the leader in these discussions.

Although many countries are implementing national laws to facilitate domestic-level investments, the majority of international investment agreements do not contain such provisions, except for the general provisions concerning transparency and admission of foreigners (UNCTAD 2017). Broadly speaking, the other types of IF measures, seldom present in IIAs, are frequently weak (UNCTAD 2017). Provisions concerning transparency are the most common examples of IF measures in IIAs, with the earliest examples of these provisions occurring in the 1990s, such as Article 1802 from the North American Free Trade Agreement (1992), which contains a general obligation to publish 'laws, regulations, procedures and administrative rulings of general application respecting any mat-

ter covered by th[e] Agreement.’ Nowadays, these kinds of provisions are becoming more popular. In 2018, for example, 26 out of the 29 signed IIAs contained specific provisions on investment facilitation, including provisions for increased transparency (UNCTAD 2019: 107).

UNCTAD and OECD have been encouraging discussions on the codification of IF measures. The 2016 UNCTAD Global Action Menu for Investment Facilitation proposed several actions in 10 different areas, such as transparency and consistency of investment policies, efficiency in administrative procedures and co-operation for investment promotion (UNCTAD 2016). The OECD Policy Framework for Investment, in its 2015 edition, recognised that ‘investment promotion and facilitation can be powerful means to attract investment and maximise its contribution to development’ (OECD 2015: 39). It emphasised government efficiency and suggested policy improvements aimed at enhancing transparency, predictability, administrative simplification, CSR, and strengthening the role of investment promotion agencies (IPAs) (OECD 2015).

An important initiative to codify measures regarding investment facilitation in the global South comes from the BRICS countries, which established an Outline for Investment Facilitation in 2017. The Outline is a collaborative mechanism to promote and facilitate intra-BRICS investment, which creates best-effort types of provisions to enhance transparency, improve efficiency and promote co-operation. This instrument features important initiatives to facilitate investment among its members, such as exploring the possibility of establishing an ombudsperson to handle enquiries and to provide investment-related information, the establishment of a ‘single window’ document and the development of guidelines on investor responsibilities regarding CSR (Outlines for BRICS Investment Facilitation 2017).

Even though there are no compulsory provisions in this mechanism, it is useful to demonstrate an awareness about IF and paves the way for further co-operation and codification in this matter. Despite the fact that the recent agreement signed between Brazil and India (Investment Cooperation and Facilitation Treaty Between the Federative Republic of Brazil and the Republic of India 2020) includes several IF provisions, we cannot affirm that relations between BRICS countries were influenced by the Outline. As a matter of fact, Brazil-India CFIA negotiations were concluded before the BRICS Outline and reflects the two countries’ investment agreement models.

The initiatives to codify IF measures at the regional level are abundant. The Asia-Pacific Economic Cooperation (APEC), which is made up of a diverse group of developed and developing countries, endorsed an Investment Facilitation Action Plan (IFAP) (2008) aimed at providing a guide to the kind of provisions that would constitute better practices in investment facilitation. The Plan includes a complete set of IF disciplines (e.g. transparency, predictability, efficiency, promotion of responsible business conduct), as well as arrangements to enhance co-ordination and international co-operation between stakeholders. However, APEC’s IFAP does not exclusively focus on investment facilitation, since it recommends its members to adopt investment protection mechanisms, dispute resolution through international arbitration (ISDS), as well as market access (APEC 2018). Indeed,

one of the three IFAP priority themes between 2015 and 2016 was to reduce investors' risks through BITs (APEC 2017).

The implementation of the IFAP has been monitored by the APEC Secretariat and the APEC Support Unit. The last report on the implementation of the IFAP reported satisfactory progress on the other two priority themes for 2015–2016 (e.g. enhancing transparency and simplifying business regulation), including an improvement in the World Bank Doing Business report rankings (APEC 2017). Although these indicators may not focus exclusively on FDI, they can serve as indicative measures of progress related to the IFAP. It specified the best scores for E-transparency, for example (APEC 2017).

Some investment frameworks within regional economic communities (REC) in Africa also contributed to codifying investment facilitation measures in the global South. The most remarkable example comes from the Common Market for Eastern and Southern Africa (COMESA), in its revised Investment Agreement for the COMESA Common Investment Area (CCIA Investment Agreement 2017). Even though the CCIA marks a shift from investment protection to investment facilitation in Africa (Mbengue and Schacherer 2019), its IF provisions are not very detailed. In the realm of transparency, for example, it only determines that member states shall, within 30 days of the enactment, publish to the general public and make available to CCIA Committee any relevant new measure or change in existing measures (Art.4). The provisions envisaged to simplify and expedite procedures are even more timid; it only determines that member states shall take individual initiatives to simplify and expedite procedures for applications, without further explanation (Schedule I).

Likewise, the disciplines to enhance co-ordination and co-operation between stakeholders only require member states to promote public-private linkages to identify investment impediments and propose ways to improve investment environments (Schedule I). The revised CCIA contains detailed CSR measures which stipulate a number of responsibilities for investors related to human rights, environmental protection, and social standards. For instance, these obligations rule that investors must conduct an environmental and social impact assessment prior to making the investment (Art. 30).

The East African Community (EAC) and the Southern African Development Community (SADC) also enacted investment frameworks with relevant IF measures. The EAC Model Investment Code (EAC 2016) and SADC Protocol on Finance and Investment (SADC 2006) constitute a milestone of codification of IF measures in Africa, as they introduce new IF elements like transparency, simplification, cross-border co-operation on investment facilitation, co-ordination between stakeholders and compulsory responsible business conduct for investors (Baruti 2017). Following the shift observed in these three RECs, their member states have been individually enacting laws and regulations focusing on IF rather than investment protection, suggesting a trend in this direction in future IAs negotiated by African countries (Baruti 2017).

This trend was, indeed, bolstered when the *Economic Community of West African States* (ECOWAS) signed its Common Investment Code (ECOWIC 2018) featuring IF measures on Transparency, CSR, and establishing National Focal Points for facilitation

purposes. National investment policymaking also followed suit with the adoption of laws and policies that focus quasi-exclusively on investment facilitation, in Algeria, Egypt, Kenya, Namibia, and Tunisia (Mbengue 2018). On the continental level, the Pan African Investment Code (PAIC 2016), which is an IIA model developed to ‘promote, facilitate and protect investments that foster sustainable development,’ unquestionably endorses Africa’s engagement with IF.

Latin America is also playing an important role in promoting IF measures. Brazil’s Cooperation and Facilitation Investment Agreement (CFIA) is a pillar of this process. Brazil has signed CFIA’s with almost all countries in Latin America. The Brazilian model was also a basis for an important regional agreement: the Intra Mercosur Protocol on Investment Cooperation and Facilitation (MERCOSUR 2017). Due to the similarities between these two instruments, we opted to examine the Intra Mercosur Protocol and the Brazilian CFIA’s in a combined way.

Brazil enjoys a peculiar position in the international investment regulation arena, given that the country has never ratified a traditional BIT. After its self-exclusion from the global investment agreement network until the 2010s, the country started to export a new approach to international investment law: agreements focused on co-operation and investment facilitation. The title of the agreement is self-explanatory. The text embodies many provisions on facilitation, co-operation and promotion of investment, setting aside traditional BIT clauses such as fair and equitable treatment, indirect expropriation and investor-state arbitration.

As of 2020, Brazil has signed more than 15 such agreements. Brazilian CFIA’s have three main pillars: (i) institutional governance, which is conducted by national focal points and joint committees; (ii) risk mitigation and dispute prevention, also managed by these two institutions; and (iii) agendas on co-operation and facilitation of investments (Godinho 2014). CFIA’s second pillar highlights a model that emphasises dispute prevention over dispute resolution (Monebhurrin 2017).

CFIA’s contain not only comprehensive provisions addressing transparency on laws and regulations (Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the Republic of Suriname [Brazil-Suriname CFIA] 2018, Art.9.1), but also opportunities for investors to be listened to by the Parties (Brazil-Suriname CFIA 2018, Art.9.2b), ombudspersons (Brazil-Suriname CFIA 2018, Art.9) and the joint committees (Brazil-Suriname CFIA 2018, Art.18). These two institutions play a central role in implementing IF measures. They are also fundamental for preventing disputes (Brazil-Suriname CFIA 2018, art.24).

Despite the lack of traditional clauses regarding investment protection, CFIA’s can contribute to quantitatively and qualitatively increasing foreign direct investment by providing a more stable and manageable environment for investors. Since only two CFIA’s (Angola and Mexico) came into force, the practical results of the governance structure are yet to be seen. In any case, it is important to note that these results will depend on the countries’ engagement in this process, since the proper functioning of the national focal points and the joint committees is a responsibility of the state representatives of both Par-

ties (Silva and Valkinir 2020). Meanwhile, the CFIA model still relies on the assumption that the enhanced investment environment will lead to higher attraction and retention of FDI, which is confirmed by recent empirical studies (Blake and Moschieri, 2017). CFIA also embrace concerns regarding investor responsibilities, including CSR provisions (Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates (Brazil-UAE CFIA 2019, Art.15), the commitment to fighting corruption and illegality (Brazil-UAE CFIA 2019, Art.16), as well as the emphasis on investor obligations to comply with national laws (Brazil-UAE CFIA 2019, Art.14).

Apart from Brazil's remarkable influence in the realm of Investment Facilitation, with an Investment Agreement model focused almost entirely on IF measures, there are other disparate examples of IF measures being codified in BITs throughout the global South. In fact, since some of these agreements precede the Brazilian CFIA, it is fair to assume that they might have influenced the conception of the CFIA model and even contributed to the popularity of investment facilitation even prior to Brazil. Provisions regarding CSR, anti-corruption commitments and investor obligations to comply with national laws can be found in the Indian Investment Model (Ministry of Finance of India 2015), in the Agreement of the Organization of the Islamic Conference (OIC 1981) and in the Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria [Morocco-Nigeria BIT] (2016). The latter is also innovative because of the institution of a joint committee with competence not just to facilitate co-operation and the exchange of information, but also to mediate disputes concerning parties' investments (Morocco-Nigeria BIT 2016, Articles 4 and 5).

Other IIAs celebrated by countries in the global South have provided innovations in transparency-related disciplines. They go beyond the general information requirement by encouraging parties to co-operate and consult with each other, as we can see in the Canada-Peru Free Trade Agreement (2008) and the Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China (2008). In some agreements, the obligation to provide information requires states to carry out proactive and responsive actions to address investor inquiries, as stated in Article 2 of the Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment (2020). This more proactive and responsive action may include the establishment of an 'enquiry point' (Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the People's Republic of China and the Association of Southeast Asian Nations 2009, Art.19).

This section has shown initiatives from countries in the global South to codify IF measures and the types of commitments they assumed in their bilateral and regional agreements. These examples show, to a certain extent, the limits and expectations this group of countries may have in the multilateral negotiation of investment facilitation at the WTO, since it demonstrates, at a minimum, the type of commitments with which they are able to comply. Intrinsically, multilateral negotiations are more complex than bilateral

or regional ones, as they bring together several differing interests and sensitivities on the same arena, which can spark an intricate network of coalitions to push for a determined outcome.

No matter how intricate multilateral negotiations become, countries in the global South, given their political and economic particularities and their relative positions in global economic relations, will likely share the same perspectives on a core set of principles, such as avoiding burdensome and financially expensive obligations, safeguarding policy space, as well as avoiding contentious issues such as market access and investment protection. Therefore, although they might diverge on some specific provisions, countries in the global South do have reasons to form a relatively homogeneous coalition to pursue converging interests.

Global South's perspectives at WTO Structured Discussions on IF

This section looks at the perspectives of countries in the global South in the Structured Discussions taking place at the WTO. First, we will analyse aspects regarding the political economy of FDI and how they interact with the provisions under discussion. This analysis will consider the need for countries in the global South to increase FDI inflows and to possess the appropriate tools to co-ordinate international investments that align with their development strategies. Then we turn to the legal aspects of the measures under discussion. Drawing on the negotiation practice of countries in the global South in past IIAs, as discussed in the last section, we will assess these countries' interest in provisions aimed at improving the investment environment, promoting sustainable development, and safeguarding host countries' policy space, as well as their ability to implement and comply with certain specific IF measures. Sparsely, we comment on some negotiating items that could spark divergence among global South countries. Finally, we point out some issues pertaining to the implementation of the IFF.

Investment facilitation and the political economy of FDI: integrating the issue of development in the IIA agenda

Developing countries need considerably higher investment than the amount of it they have been receiving. According to UNCTAD's World Investment Report (2014: 140), DCs are expected to increase threefold their amount of annual FDI inflow in order to implement the United Nations' Sustainable Development Goals (SDGs) for 2030. In order to meet this need, virtually all governments worldwide have been giving high consideration to macroeconomic management and virtually all countries have been implementing enticing FDI regulations to make the investment environment more favourable (Sauvant 2020). Accordingly, they have acted to improve the economic fundamentals, regulatory framework, and the capacity of IPAs to enhance FDI inflows. This is the context in which an investment facilitation framework (IFF) could prove to be a valuable tool: by adding value to what national governments have already done internally (Sauvant 2020). Coun-

tries in the global South, as net recipients of FDI and, in some cases, highly dependent on foreign investment, could see their prospects of attracting foreign capital significantly increase.

However, concerns in the global South are not only on the capacity to attract FDI, but also these countries' ability to harness the advantages of the FDI and consequently enhance its contribution to sustainable investment. In fact, there are relevant discussions in the literature about FDI's contribution to sustainable development. Its beneficial effects might depend on several factors, while massive capital inflows can also have negative implications, such as the crowding out of domestic firms (Colen et al. 2012). Depending on the size and complexity of a host country's economy, foreign investment inflow could shape its economic structure and define its trade performance by redefining, for example, a country's relative position in global value chains (Perrone 2020). While data and case studies suggest divergent conclusions on the effects of FDI for different economies, the logical conclusion is that FDI could be beneficial for sustainable development, but it depends on how it is conducted (Cohen 2007).

The importance of multinational enterprises in the globalised economy increases the responsibility of host countries to develop strategies to seize the benefits that arise from FDI. Developing countries could do much more than they currently do to enable FDI to upgrade domestic enterprises, increase competition, contribute to the creation of new jobs, improve employees' living standards and alleviate poverty (Sauvé 2006). A multi-lateral investment agreement capable of addressing such concerns must provide WTO members with the framework to maximise the potential benefits of FDI and enable them to build innovative approaches to include foreign investment in their development strategies.

Critics of the IFF still speculate that the discussions in the WTO could turn toward advocating for the longstanding interests of developed countries in market access and investment protection (Joseph 2017). It is worth recalling that during the 1990s, international investment policy discussions were focused mainly on the agenda of attracting and promoting FDI by opening up sectors to foreign firms and creating friendly business environments. As a consequence, initiatives envisaging increases in benefits for host countries were deemed as inconvenient interferences to the free market (Perrone 2020). Thus, the mere presence in the Structured Discussions on Investment Facilitation of topics such as corporate and social responsibility, co-ordination between stakeholders, and cross-border co-operation represent, above all, the inclusion of development issues in the realm of the IIAs.

The provisions commonly found in traditional BITs envisage providing greater predictability to the business environment and giving investors reasonable guarantees that the regulatory framework will remain stable and will protect their investments against undue government interferences. It seeks to materialise such expectations through specific clauses such as national treatment, fair and equitable treatment, prohibition of performance requirements, minimum standards of treatment and the ISDS (Dolzer and Schreuer 2012). Such commitments, however, equally entail the relinquishment of part of

their sovereignty. Indeed, the jurisprudence of arbitral tribunals installed to settle investment disputes shows a large number of examples in which national capacity to co-ordinate investments and pursue legitimate policy objectives has been reduced due to the foreign investment protections conferred by IIAs (Tienhaara 2017). Therefore, the IFFs, as long as they avoid such contentious issues, do not encumber the freedom of states to develop policies that they judge as more appropriate for their developmental needs.

Despite the growing support among WTO Members for the Structured Discussions on IF at the WTO, the feasibility of a multilateral and even plurilateral Agreement is still unclear. The negotiation process might be long and comprise contending views. One of the great challenges of the negotiation process is to strike a balance between establishing a set of meaningful rules capable of improving the investment environment and avoiding bold provisions that DCs would not be able to comply with.

The first issue that WTO Members might oppose is the scope of the agreement. The Scope refers to the type of investment measures with which it would oblige WTO Members to comply. Past attempts to negotiate a Multilateral Framework for International Investment failed mostly because industrialised countries pushed to address contentious issues such as market access and investment protection, which faced strong objection from developing countries (Dattu 2000). Even though the mandate for the structured discussions on IF explicitly excludes investment protection measures (WTO 2017), developed countries' interest in the process raises concerns that the WTO could be used by developed countries to incorporate these contentious issues (Joseph 2017). Therefore, the first concern in defining the scope of the future IFF is to make sure that it covers only investment facilitation and does not permit a broad interpretation to allow either market access or investment protection.

In order to be meaningful, the scope of the agreement should cover IF measures taken in all phases of investment (e.g. admission, establishment, acquisition and expansion in services and non-services sectors). This way, the framework would have the broadest reach possible, as to allow investments to flow efficiently both in greenfield and brownfield projects, as well as to cover the industrial, agriculture, trade, and services sectors.

It is important for countries in the global South to undertake an in-depth analysis of specific measures under discussion at the WTO in order to identify provisions that hold a higher potential to add value, in terms of increasing flows and enhancing host countries' abilities to grasp the benefits of FDI, as well as provisions that might pose implementation difficulties. Moreover, there are provisions that might prove important to help the DCs that lack financial resources and bureaucratic capacities to fully implement the future IFF.

Improving the investment environment

Provisions on transparency are among the most important set of measures that can enhance the prospects of attracting FDI to countries in the global South and exporting FDI therefrom. Availability of information regarding foreign markets is an important tool for supporting outward FDI and providing clarity for foreign investors about the risks and

opportunities of investing abroad—especially those that are not able to undertake extensive market research. This might be the case of small and medium enterprises (SMEs) and companies from the global South not acquainted with foreign investments. It is worth recalling that the investment agreement model that most influences the structured discussions, the Brazilian CFIA, emerged as a mechanism to provide support and mitigate risks for national investors seeking to invest abroad (Monebhurrin 2017).

The set of measures aimed at enhancing simplicity and speeding up foreign investment guides members towards implementing consistent, reasonable, objective and impartial measures, reducing and simplifying administrative procedures, establishing clear criteria and requirements for administrative procedures regarding investments, and finally, using information technology to accept and manage investment applications. This area of the agreement would require less effort to implement and would therefore not pose material constraints on countries in the global South to implement the resulting obligations, since most of the proposals in this section only require the rationalisation and simplification of measures.

The provisions within the realm of institutional governance aim to establish NFPs/ombudspersons that would be responsible for assisting and providing guidance to foreign investors during all phases of the investment cycle. This is one of the pillars of the IFF, as it materialises an on-demand type of support to foreign investors, capable of reducing uncertainty and providing useful information for companies seeking to invest in markets where it would not be willing to in the absence of such support. Together with transparency, institutional governance is the aspect of the IFF that can most contribute to reducing uncertainty for investors seeking to invest in a developing country.

By dealing with complaints and providing guidance to foreign investors, it is natural for these mechanisms to identify systemic flaws and inefficiencies in the investment regulatory system of the host country, which could lead to the establishment of an effective and inexpensive system of continuous improvement, drawn from the feedback received from investors. Therefore, the institution of an ombudsperson for investments is likely to become an important point of information to improve laws and regulations and to steer regulatory reforms and improve the investment climate in the host country (Oliveira 2020).

Another element of utmost importance for investment facilitation is the SEW/one-stop shop mechanism. This commitment would make it necessary for WTO Members to formulate a channel to unify the multiple state agencies participating in the approval of investment projects. This would eliminate the need for investors to fill out applications more than once and allow several agencies to work simultaneously once the application is completed.

According to Singh (2017), numerous countries have established SEWs, but these efforts have not always been accompanied by increased foreign investment. However, it is hard to dispute that SEWs would be one of the IF elements that could most contribute to simplifying and streamlining investment applications. What is more, the implementation of SEWs can intrinsically be conducive to revising and rationalising possible overlaps and identical responsibilities undertaken by multiple agencies responsible for identical or

similar investment authorisations. Therefore, this is another commitment whose implementation would lead to the observations necessary to identify systemic flaws and automatically enable improvements, as is the case of the Ombudsperson.

Promoting sustainable development and safeguarding host countries' policy space

One of the stated goals of the discussions at the WTO is to build a framework that facilitates and ultimately leads to an increase of the flow of FDI globally. Nevertheless, it is desirable for DCs to increase their capacities to attract not only greater volumes of FDI, but also better quality FDI (Berger, Gsell and Olekseyuk 2019). While the discussion on FDI quality can become highly subjective, one can hardly dispute that investments prone to depleting natural resources, damaging the environment and lowering labour standards, do not contribute to sustainable development. Instead, a framework that enhances the prospects of attracting FDI committed to contributing to sustainable development would be more aligned with the interests of companies in the global South. Indeed, the WTO mandate expressly calls for the creation of an agreement that would increase investment conducive to development (WTO 2017).

As Sauvant and Hamdani (2015) argue, all investment is potentially sustainable. To realise this potential, however, investment regimes need clear and broad regulations, institutions to make laws fully operational, and co-ordination among different levels of government (Savant and Hamdani 2015). An IFF could help in this regard by directing countries to clarify and simplify their investment regimes, to promote the enhancement of their institutional governance, and to guide Members towards good practices through CSR provisions, in order to encourage international investment and safeguard national interests.

Several efforts are underway from international organisations to develop CSR standards that would guide companies toward complying with responsible business conducts or hold them accountable for the impact of their investments. The most widely known of these examples are the United Nations Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises (Savant and Gabor 2019). Besides that, discussions on an international treaty for business and human rights have been taking place at the UN Human Rights Council since 2014. Despite numerous international commitments in this regard, it is important to remark that all of them are non-binding and it is still uncertain whether the UN Human Rights Council's initiative to establish a treaty on this matter will succeed. While the absence of binding international commitments in this regard might be a testament for the need of the IFF to regulate businesses' conduct, it might also indicate the difficulties of reaching an agreement for the inclusion of bold standards regarding CSR.

The CSR provisions discussed so far at the WTO vary from the mere affirmation of the importance of internationally agreed-upon CSR instruments, the encouragement of

CSR standards by members or a mix of compulsory actions to strive toward a higher degree of sustainable development based on expressly enumerated voluntary principles. Sauvart and Gabor (2019) argue that any of the alternatives would ‘re-assert the IFF’s focus on sustainable development and could have a positive effect on making investors more supportive of sustainable development.’ Certainly, the inclusion of any of the alternatives in the IFF would put the issue of CSR in the spotlight. However, the explicit mention of a series of commitments and the listing of the responsible business conduct investors should follow would highlight these obligations to a greater extent than merely affirming the importance of CSR or encouraging CSR standards. Thus, this would elevate the importance of CSR commitments and call the international community’s attention to the importance of this issue.

As frequent recipients of FDI, global South countries have a clear interest in including CSR commitments in the IFF. However, the different views regarding specific CSR elements will hinder them to forge a homogeneous approach. One obvious example would be the issue of labour rights, where countries in the global South perform extremely diversely when it comes to the protection of such rights (ITUC 2019). The low level of labour standards is not only a result of political orientation of governments but also can arise from structural conditions of the global markets, where many DCs, looking to attract FDI, face significant incentives not to comply with labour rights provisions as pressures of competitiveness (Blanton and Peksen 2016). The same dynamic could repeat for other CSR principles where some countries might be more interested in disputing the so-called ‘race to the bottom’ than promoting a higher degree of socially responsible practices.

It is also in the interest of countries in the global South to ensure that the future IFF does not restrict their policy space and secures their right to regulate. One of the main shortcomings of investment treaties has been the curtailment of countries’ policy space, which is constantly challenged by investors—a situation occurring most frequently in developing countries (Pauwelyn 2014; Tienhaara 2017). Regulatory autonomy is essential for host countries to formulate the rules that appropriately craft investment policies designed to promote development. Therefore, it is important for a future IFF to be crafted in a way that preserves the ability of host countries to implement public policies to decide the best way for the FDI to meet domestic development needs.

Issues regarding the implementation of the multilateral framework

Countries in the global South might experience difficulties in implementing certain provisions under discussion at the WTO, as they do not possess the necessary bureaucratic capabilities and financial resources. Firstly, an IFF that indistinctly applies to all levels of government (e.g. central, regional and local) could prove overly burdensome for certain DCs. To make the negotiation smooth and the future implementation of the IFF feasible, WTO members should pursue a more flexible approach in this regard, as to allow DCs to implement the agreement without excessive burden. One possible solution would be the adoption of compulsory requirements for central governments and best effort-type

provisions for sub-central levels. As commented below, even for the central level of governments, some of the boldest provisions could prove burdensome and require a phase-in type of commitment for DCs.

Some specific provisions could pose compliance difficulties for DCs, as well. One of the commitments to enhance transparency, for example, encourages WTO members to establish a comment period for any proposed changes to investment-related laws and regulations. It aims to entitle interested stakeholders, such as foreign investors and societal actors who might be affected by proposed changes, to participate and influence the rule-making process regarding FDI. Indeed, the proposals guide WTO members toward considering the comments received, meaning that WTO members could withdraw or even adjust their proposals after the stakeholders' comments. Despite the merit of this proposal, which would certainly contribute to increasing the transparency and predictability of the investment environment, this type of provision could prove burdensome and be difficult to implement in certain countries.

The first burden in complying with this provision would be identifying which proposed measures affect investment. Since regulations on allowing investments can entail matters as diverse as environment, health, public security, and finance, among others, overseeing all regulations proposed by various government bodies and agencies requires a considerable bureaucratic capacity that most countries in the global South might lack. The advance publication of such measures could also prove burdensome. Most countries only provide for the publication of measures (in official gazettes, for example) once they are eventually approved and become official. Moreover, analysing and reflecting on the comments received would require a considerable amount of qualified personnel. Thus, the obligation to provide a comment period could provoke a divide among global South countries that face the aforementioned constraints and those that would be willing to push for a bolder commitment.

Despite its importance, the SEW/one-stop shop mechanism is another commitment that countries in the global South might find seriously difficult to implement. Firstly, it would require a thorough data collection to identify all state agencies responsible for investment applications. Secondly, it would demand the creation of an electronic system allowing the apparatuses from numerous agencies to each execute their roles in the application process. In addition, if the IFF were to oblige sub-central levels of government to participate in the SEW schemes, this might pose enormous hardships to countries with numerous provinces and municipalities. Potentially, this type of provision could spark controversy among global South countries, by opposing smaller states, where SEW's implementation would be simpler, to those where it would be more difficult, especially the largest and mostly subdivided in provinces and municipalities.

The trade-offs in this negotiation are clear. Countries in the global South are likely to benefit from the establishment of meaningful IF provisions. On the other hand, some DCs might feel discouraged to compromise on some of the IFF's boldest provisions. While flexibility and creativity will be important tools to strike a balance between the various countries involved, the endeavour to negotiate an overly ambitious framework is likely to

lead the process to a stalemate. This judgement results from a pragmatic analysis of WTO Members' capacity to implement the so-called bold provisions and from past attempts to negotiate other multilateral investment frameworks within and outside the WTO (Singh 2017).

The burden of implementing such demanding provisions could be alleviated if the IFF included technical assistance and capacity building schemes. According to Sauvart and Handami (2015), such schemes should focus on an initial consultation to assess the specific needs of the DCs and support strengthening the IPAs' capacities, and to structure the ombudsperson/NFPs to accomplish their responsibilities, as described in the agreement. Building the structure necessary for the operation of IPAs and the ombudsperson for investments is certainly a laborious task for which many countries would need technical assistance. However, there are other fields where capacity building activities would also be crucial. As commented above, the creation of a SEW is a bold commitment that would require enormous efforts. Moreover, the adjustments necessary to implement the transparency provisions and streamlining procedures are not negligible and might require extensive work. Without implementing these capabilities, an IFF would likely have a null or very limited effect on the DCs' abilities to seize the opportunities it creates.

If WTO members manage to negotiate a sophisticated agreement, featuring burdensome commitments requiring Members to implement several facilities and services for foreign investors, then the technical assistance and capacity building provisions also must be substantial, as to allow DCs to implement them and comply with them. Therefore, countries in the global South should be attentive to the commitments with which they must comply and try to modulate the amplitude of the technical assistance and capacity building provisions accordingly. The financial resources and the technical expertise might come from WTO members themselves or from international organisations. The IFF's capacity building scheme could be inspired by the WTO's Aid for Trade initiative, which mobilised US\$300b between 2006 and 2016, reaching 146 countries (Sauvart 2020). Another successful example of technical assistance in this regard is the co-operation between Brazil and the World Bank to improve the recently launched Brazilian Direct Investment Ombudsman (Oliveira 2020), which also could serve as a benchmark for the WTO's IFF.

An interesting question concerns the applicability of the Dispute Settlement Understanding (DSU) to the future IFF, which is to be subject to the adoption of a decision by the Members. Although international investment has become a matter of intense litigation, there are reasons to believe that this will not be the case of the IFF since it does not create rules on the most contentious issues, namely investment protection and market access. In any case, the DSU mechanisms will be important to enforce the IF measures, which is of the interest of all members. Since it is hard to estimate the occasional damages from the non-compliance with measures aimed at facilitating investment, Members should avoid the most drastic sanctions provided for in the DSU, such as cross-retaliation through other WTO agreements. As mentioned above, global South countries might face some difficulties to implement some of the IFF provisions. Therefore, they might adopt a

more cautious approach regarding sanctions by adjusting the terms of application of the DSU, as provided for in its Appendices 2 and 3.

Finally, it is important to stress that not all countries in the global South are convinced about the value of creating a multilateral framework of IF. India and South Africa are the most remarkable examples. Despite their engagement in other instruments, such as the BRICS Outline for Investment Facilitation and the CFIA between India and Brazil, the negotiation of multilateral rules on IF faces strong opposition as part of their political stance at the WTO. In any case, no major implications would arise from this divergence, except the fact that the agreement without the full WTO membership will make it plurilateral, instead of a multilateral one.

Conclusion

The latest developments on investment facilitation in international debates suggest that it has become a multilateral issue and is undergoing a steady march towards the negotiation of a multilateral or plurilateral agreement at the WTO. The advance of the discussions will divide WTO members according to their specific interests in the matter. This article demonstrated that countries in the global South have always been pioneers in codifying IF measures. Thus, despite their likely divergence in a few specific issues, they form the most obvious group with a clear interest in formulating a bold and broad set of rules in this matter.

Provisions regarding transparency, simplicity, and responsible business conduct, as well as those aimed at enhancing co-ordination between stakeholders, are the most remarkable examples of areas where countries in the global South could push for bolder commitments. The same applies to the measures that would ease the implementation of the framework, e.g. technical assistance and right to regulate. On the other end, some provisions would require extensive administrative capabilities in order to be implemented, such as the SEW/one-stop-shop mechanisms and the specific transparency provision demanding members to provide an opportunity to comment on proposed investment-related measures. Countries in the global South should adopt a cautious approach toward those provisions.

The feasibility of a multilateral or plurilateral framework on investment facilitation at the WTO will be determined by the IF elements it addresses, the scope of their intended reach, and the flexibility members are willing to adopt in order to strike a balance and arrive at an agreement. Judging by past attempts to negotiate a multilateral investment framework, WTO members should pursue a cautious approach and develop creative solutions, such as best-endeavour and phase-in type commitments, and allow the modulation of the scope of certain provisions to exempt sub-central entities, when necessary.

Notes

- 1 The Streamlined Text (INF/IFD/RD/45) is not publicly available. The access to the document is restricted to WTO members.

- 2 Group of countries formed by Brazil, Russia, India, China, and South Africa.
- 3 The 2015 India BIT model contains provisions concerning entry and sojourn of personnel (art.9), transparency (art.10) and investor obligations (art.10 and 12) (INDIA, 2015). Brazilian CFIA's signed with Angola, Mozambique, Malawi, and Mexico, for example, also include clauses concerning CSR, transparency, dispute prevention, agendas for further cooperation and facilitation besides the focal point. This model will be better explained on the following pages of this article.
- 4 COMESA's 19 Member States are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.
- 5 Burundi, Kenya, Rwanda, Tanzania, Uganda, and South Sudan.
- 6 SADC's currently 15 Member States are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.
- 7 By July 2020, Brazil has signed CFIA's or other agreements with investment chapter following CFIA model with Angola, Mozambique, Malawi, Mexico, Colombia, Chile, Colombia, Peru, Morocco, Ethiopia, Guyana, Suriname, Ecuador, United Arab Emirates, India and Intra Mercosur Protocol. The text of the agreements can be accessed at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil>.

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Estrutura Multilateral de Facilitação de Investimentos na OMC: Iniciativas e Perspectivas do Sul Global

Resumo: O foco da formulação de políticas de investimento internacional no Sul global tem mudado da proteção ao investimento para a facilitação do investimento (FI). Este movimento marca uma tentativa de melhorar a atratividade das economias nacionais para o investimento estrangeiro direto (IED) e de recuperar o espaço político anteriormente limitado pelas cláusulas tradicionais de proteção ao investimento. A popularidade da facilitação de investimentos levou ao início de um processo de negociação na Organização Mundial do Comércio (OMC) para a formulação de um acordo multilateral nesta área. Entretanto, as diferentes práticas de negociação relacionadas à FI poderiam provocar cismas entre os membros da OMC envolvidos nesta discussão. Os últimos acordos internacionais de investimento (IIAs) com disposições sobre FI, assinados por países do Sul global, indicam que durante as negociações multilaterais, esses países se concentrarão em melhorar a transparência, previsibilidade e simplicidade do ambiente de investimento, bem como em preservar sua capacidade de desenvolver políticas públicas que estejam alinhadas com suas estratégias de desenvolvimento. No entanto, algumas das disposições que concretizam essas preferências desafiariam a capacidade burocrática e financeira desses países. À medida que as discussões na OMC evoluem, os países do Sul global precisarão esclarecer suas posições e coordenar seus esforços a fim de moldar uma estrutura alternativa que atenda a seus interesses.

Palavras-chave: facilitação de investimentos; lei de investimentos internacionais; discussões estruturadas sobre facilitação de investimentos na OMC; Acordo Internacional de Investimentos; estrutura multilateral de facilitação de investimentos; economia política de facilitação de investimentos.

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