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Facilitation 2.0: Investment and Trade in the Digital Age

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Facilitation 2.0 is a comprehensive approach to twenty-first-century trade conceived by ICTSD that encompasses services, goods, investment, and e-commerce. It builds on the Trade Facilitation Agreement of the World Trade Organization and lays out a possible way forward for its expansion, while providing an innovative narrative for coherent policymaking at the domestic, regional, and multilateral levels.

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Contents

Abbreviations

ACP	African, Caribbean, and Pacific Group of States
ASEAN	Association of Southeast Asian Nations
BIT	bilateral investment treaty
CEPA	Closer Economic Partnership Arrangement
CFIA	Cooperation and Facilitation Investment Agreement
ECOWAS	Economic Community of West African States
EU	European Union
FDI	foreign direct investment
FIFD	Friends of Investment Facilitation for Development
GATS	General Agreement on Trade in Services
IFA	investment facilitation agreement
IIA	international investment agreement
IPA	investment promotion agency
ISDS	investor-state dispute settlement
JIEPA	Japan–Indonesia Economic Partnership Agreement
LDC	least-developed country
MFN	most-favoured nation
OECD	Organisation for Economic Co-operation and Development
RTA	regional trade agreement
SDG	Sustainable Development Goal
TFA	Trade Facilitation Agreement
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organization

Executive Summary

In recent years, investment facilitation has taken an important place in the investment policy debate, with proposals to develop a multilateral framework to facilitate investment being debated in different fora, without achieving a consensus on whether these efforts should focus on implementing binding commitments or should be directed towards developing best practices and soft laws.

This paper provides an overview on how investment facilitation is currently considered in international investment agreements (IIAs), including both bilateral investment treaties (BITs) and regional trade agreements (RTAs) with investment chapters, aimed at identifying common approaches that could serve as stepping stones for convergence across IIAs and between them and the multilateral trade system. This does not necessarily imply that similarities are the best or desired approaches, and this piece also identifies shortcomings in existing investment facilitation provisions.

As the content of what we understand for investment facilitation is not always clear, the paper first provides an analytical review of different approaches to how investment facilitation is addressed in different fora, such as the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development, the World Bank, and the G20. We conclude that there are at least two slightly different approaches to investment facilitation, identified as the normative and functional approaches. A normative approach focuses on policies, laws, and regulations that enable foreign investors to establish and operate in a specific location, with an emphasis on the policy and procedural aspects of investing. A functional approach focuses on the activities conducted to support an investor through various phases of the investment process, usually coordinated by investment promotion agencies that organise the support of relevant public or private entities and directly assist the investor, with an emphasis on the practical and operational needs of investors and investments.

The piece then reviews the elements of investment facilitation found in existing IIAs. Although provisions explicitly on investment facilitation are still not common in investment agreements, certain elements of this concept can be found in BITs and RTAs with investment chapters, without using that denomination.

When facilitation provisions are included, they are usually of general scope. The paper identifies at least 12 different elements of investment facilitation: (i) provisions on improving investment climate; (ii) removal of bureaucratic impediments to investment; (iii) facilitation of investment permits; (iv) facilitation of entry and sojourn of personnel related to investment; (v) transparency; (vi) capacity-building on investment issues; (vii) investment financing; (viii) insurance programmes; (ix) pre-establishment investor servicing; (x) post-establishment investor aftercare; (xi) relations with investors and the private sector; and (xii) joint cooperation and treaty bodies on investment facilitation.

From the perspective of convergence, improving the investment climate could be considered a central element, as it is subsumed in all the other different provisions with elements of investment facilitation. The most common of these provisions are on transparency, post-establishment activities, and relations with investors and the private sector. These commitments are also the most specific and binding. Also important are provisions facilitating permits for the establishment of an investment and the entry and sojourn of investment-related personnel, but their level of commitments varies across agreements, being mostly a "best efforts" provision.

However, the level of variation of the content of investment facilitation among a small number of IIAs is important. This has implications for the conceptualisation and implementation of these provisions and, in turn, affects the possibility of convergence and coherence of investment facilitation elements. At the same time, the type of facilitation desirable would differ for different stakeholders, such as foreign investors and affected communities.

Given the substantial investment gap that exists to reach the Sustainable Development Goals, it would be highly desirable if foreign direct investment (FDI) flows would rise considerably, particularly to developing countries and least-developed countries (LDCs). But the importance of investment facilitation for sustainable development goes beyond that of an essential source of funding. Such an agreement could aim to facilitate not only investment in general but also the type of FDI that is beneficial for the host state. Investment facilitation can also be understood as guidelines to think about domestic institutions and processes, embedding principles such as transparency, publicity, due process, and inclusion. It can also be used to improve environmental, social, and human rights impact assessments and associated multi-stakeholder consultations.

This paper proposes five policies to consider in the discussion of a multilateral framework for investment facilitation. First, to include more functional approaches in investment facilitation, it is important to consider the needs of the people that work at ground level on these issues and including best practices. Second, if investment facilitation provisions are included at a multilateral level, then it would be necessary to assess the relationship with existing IIAs that do not include such provisions. Third, it is important to consider different levels of implementation of investment facilitation provisions at federal, state, or local levels. Fourth, it is necessary to define in each case which country is better placed to advance investment facilitation policies, because in some cases home states could also play an important facilitation role for FDI, particularly with respect to LDCs. Fifth, it is important to define where investment facilitation efforts could be more effective.

This paper concludes that it is unlikely that a multilateral agreement on investment facilitation will be agreed soon, but it is worthwhile having such a discussion because investment facilitation measures that are correctly designed and effectively implemented could advance sustainable investment.

1. Introduction

Foreign direct investment (FDI) constitutes an important part of private capital flows to developed countries, developing countries, and least-developed countries (LDCs). FDI can lead to tangible and intangible benefits, playing a catalytic role in building and strengthening productive capacity and export growth, including developmental objectives, such as technology and skills transfer, employment generation, higher wages, and poverty eradication (United Nations Committee for Development Policy 2016).

International investment is crucial to support sustainable development. In fact, given the substantial investment gap that exists to reach the Sustainable Development Goals (SDGs) (UNCTAD 2014), it would be highly desirable if FDI flows would rise considerably, especially in key areas critical for reaching the SDGs, and particularly to developing countries and LDCs.

An investment agenda was one of the "Singapore Issues," along with trade facilitation, but investment was then dropped. The first Ministerial Conference of the World Trade Organization (WTO), held in Singapore in December 1996, established a permanent working group on trade and investment, but that topic was subsequently dropped from the Doha Development Agenda after several disagreements on the topic at the December 2003 Ministerial Conference held in Cancun (International Institute for Sustainable Development 2003).

Since the conclusion of the Trade Facilitation Agreement (TFA) in the WTO in 2013, the issue of investment facilitation has attracted concerns from different parties. In 2015, in the framework of the E15 initiative, Sauvant and Hamdani (2015) proposed the launch of an international support programme for sustainable investment facilitation. Following their meeting in Shanghai on 9–10 July 2016, G20[1] trade ministers agreed on Guiding Principles for Global Investment Policymaking, which include "facilitation efforts that promote transparency and are conducive for investors to establish, conduct, and expand their businesses" (OECD 2016). In April 2017, the Friends of Investment Facilitation for Development (FIFD)[2] proposed the Informal WTO Dialogue on Investment Facilitation for Development (WTO 2017c). Participants at the High-Level Trade and Investment Facilitation Forum for Development, held in Abuja, Nigeria on 2–3 November 2017, urged WTO members to undertake more focused discussions aimed at developing a multilateral framework to facilitate investment for development (WTO 2017a). In the December 2017 Joint Ministerial Statement on Investment Facilitation for Development, 70 WTO members made a call for an investment facilitation agreement (IFA) on the margins of the 11th Ministerial Conference (MC11), held in Buenos Aires on 10–13 December 2017 (WTO 2017b).

Investment facilitation has now become a multilateral issue. But, what do we understand of investment facilitation? What are the main elements of that concept? What experience can we extract from existing international investment agreements (IIAs)? Is there any connection that can be made with other components of Facilitation 2.0—services, investment, e-commerce, sanitary and phytosanitary measures, technical barriers to trade, or sustainable development?

[1] The Group of Twenty (G20) is a forum for international economic cooperation and decision-making of the governments of the 20 major economies worldwide. It consists of 19 individual countries—Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, the Republic of Korea, the Russian Federation, Saudi Arabia, South Africa, Turkey, the United Kingdom of Great Britain and Northern Ireland, and the United States—together with the European Union (EU).

[2] The initial group of FIFD countries comprised Argentina, Brazil, China, China (Hong Kong Special Administrative Region), Colombia, Mexico, Nigeria, and Pakistan.

In this paper, we will review recent IIAs, including deep-integration regional trade agreements (RTAs), and bilateral investment treaty (BITs) that include investment facilitation provisions, looking into the connections between investment provisions and other components of Facilitation 2.0, identifying similarities in approaches in order to define opportunities for convergence across RTAs and IIAs, and between them and the multilateral trade system, and establishing a clear link with sustainable development. We will also discuss some of the criticisms made to the idea of having an IFA and assess whether it is feasible to achieve a multilateral agreement on this topic.

2. What Do We Mean when We Talk about Investment Facilitation?

Investment facilitation has been at the centre of the recent investment agenda, but there is no precise definition of what we mean when we talk about facilitating investment. Investment facilitation is an expansive notion, not always clearly defined and sometimes confused with the concepts of investment promotion or investment retention (Novik and de Crombrugghe 2018). In fact, the lines between attracting, facilitating, and retaining are sometimes blurred, because it is a continuum rather than a process of discrete phases. There are some slightly different approaches to the content of investment facilitation across institutions, such as the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), the World Bank, and G20.

For UNCTAD, investment facilitation involves a set of policies and actions aimed at making it easier for foreign investors to establish or expand their investments, and to conduct their day-to-day business in host countries, and they can be carried out by both home and host countries. In contrast, investment promotion concerns activities that promote a location as an investment destination, and actions aimed at investment promotion are generally undertaken by prospective host countries (which seek to attract FDI) and, thus, are country-specific and competitive in nature (UNCTAD 2017a).

For G20, two elements seem to be central for investment facilitation: transparency and observation of international best practices. The policies for investment facilitation should maximise economic benefit, be effective and efficient, attract and retain investment, and promote transparency. Regulation related to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate. Also, it should be embedded in an institutional framework based on the rule of law. Investment policies should promote and facilitate investors' observance of international best practices and applicable instruments of responsible business conduct and corporate governance, focusing on high-quality and responsible investment. These elements are included in the G20 Guiding Principles for Global Investment Policymaking, which China spearheaded during its G20 presidency.[3]

The World Bank considers investment facilitation a stage of investment promotion, and the most basic and common function of investment promotion agencies (IPAs). This subfunction of investment promotion seeks to convert investor interest into an investment decision, and is opposed to investor servicing, which helps investors implement investment decisions, and to investor outreach, which seeks to generate investors' interest (Whyte, Ortega, and Griffin 2011).

The OECD perspective is that, even though many IPAs are key investment facilitation players, investment facilitation goes beyond the work of IPAs and involves a whole-of-government approach. OECD also distinguishes between three different phases: promotion, facilitation, and retention. While

[3] G20 Guiding Principles for Global Investment Policymaking, Arts. IV, VII, and VIII.

investment promotion is about attracting potential investors that have not yet selected an investment destination, investment facilitation entails the whole policy framework, starting at the pre-establishment phase, when an investor shows interest in a location. Investment retention is about keeping existing investors satisfied and largely depends on the quality, transparency, consistency, and predictability of the investment policy framework. Some policy instruments may be used for all three phases, but others are quite distinctive and specifically aimed at promotion, facilitation, and retention. In promotion, there is a greater use of proactive policies to attract FDI, such as incentives. In facilitation, another set of policy instruments kicks in (e.g. streamlining procedures for investing—applications, etc.), and the same is the case for retention, where largely aftercare instruments are used (Novik and de Crombrugghe 2018).

As we can see, the confines between these two categories are at times blurred, as there are investment promotion activities that clearly lead to enhanced ease of doing business (e.g. through an effective one-stop IPA), while most investment facilitation initiatives can also be used as powerful attraction and promotional tools. As several measures could fit into investment promotion and facilitation activities, this piece does not frame each measure under these two concepts separately. It rather makes a distinction between at least two different measures of investment facilitation.

There are at least two slightly different approaches about the content of investment facilitation—a normative and a functional approach—which can be seen as two sides of the same coin. A normative approach focuses on policies, laws, and regulations that enable foreign investors to establish and operate in a specific location, with an emphasis on the policy and procedural aspects of investing (e.g. regulations and procedures that govern how incentives are provided). These policies and actions are determined by the host country based on its economic priorities, but ideally also considering other factors, such as the sustainability and responsibility of the investment. A functional approach is focused on the activities conducted to support an investor through various phases of the investment process, usually coordinated by an IPA that organises the support of relevant public or private entities and directly assists the investor with an emphasis on the practical and operational needs of investors and investments (e.g. advice in identifying relevant incentive programmes and practical assistance in completing applications) (Dressler 2018). Again, this does not mean that the needs of the host country are not considered in a functional approach of investment facilitation activities, and host states could perfectly prioritise the support of certain types of foreign investment (e.g. sustainable FDI) to the detriment of others (e.g. portfolio investment).

However, the use of investment facilitation mechanisms to support FDI is not without political and legal concerns. Although investment activities are generally seen as desirable among developing countries, there is no consensus on the need for an international instrument on investment facilitation (Kanth 2017b); the way in which action on investment facilitation is to be taken (multilateral or plurilateral legally binding agreement, voluntary guidelines, best practices, or soft law); or the precise content and implication of such an instrument for policy and regulatory space in strategic sectors (Mohamadieh 2017).

Certain reluctance is also present in some developed countries, notably the United States (US)—the top FDI home country (Kanth 2017c)—and in some developing large economies, such as India and South Africa. In the case of the US, the current administration seems to have a problem with the WTO in general and thus also with it as a possible forum to discuss an IFA (The Economist 2017). This concern is shared by some non-governmental organisations that see risks in bringing investment into the WTO, as other investment-related issues could be brought in at a later stage, including investor protections, such as fair and equitable treatment and expropriation (Our World Is Not for Sale 2017).

South Africa and India disagree with multilateral binding rules on investment facilitation under the aegis of the WTO (Joseph 2017). This does not mean that they are opposed per se to investment facilitation activities. In fact, both have very active IPAs. India considers investment facilitation to be a bilateral issue, and the Indian Government feels that allowing that discussion at the WTO would be analogous to handing over policy space to decide on investment issues (Chakraborty 2017). South Africa considers that such an initiative could undermine its "policy space" and "right to regulate investment" in strategic sectors (Kanth 2017a).

In the same vein, Singh (2018) has pointed out that the adoption of "top-down" rules is detached from ground realities, as investors face most impediments at subnational levels, especially during the implementation of investment projects (e.g. seeking approvals from authorities before construction and complying with existing laws during construction and operation). He suggests that developing a "bottom-up" approach to address administrative procedures at local levels is a better option than implementing "top-down" multilateral binding rules, which raises critical challenges in the implementation process. In practice, one-stop shops may not be effective in countries where setting up a business requires approvals from national, regional, and local authorities that may not cooperate in implementing binding commitments under a multilateral agreement. In the end, investment facilitation is just one instrument to attract investment and is not as important as countries' economic determinants.

In contrast, Argentina, Brazil, China, Germany, the Russian Federation, and the MIKTA (Mexico, Indonesia, Republic of Korea, Turkey, Australia) countries have been fostering the discussion of an IFA in the G20 and later at the WTO (Kanth 2017a). In February 2018, Brazil submitted to the WTO General Council an extensive draft proposal for a potential agreement on investment facilitation, including provisions aimed at improving the transparency, predictability, and efficiency of regulatory and administrative frameworks related to investment policies and measures (WTO 2018).

The lack of success of such initiatives does not necessarily mean to abandon investment facilitation, a policy that could also be pursued unilaterally. In fact, Brazil, China, India, the Russian Federation, and South Africa have developed a common, non-binding framework for investment facilitation, based on the principles of enhancing transparency, improving efficiency, and promoting cooperation, giving autonomy to members to decide what policies and tools to adopt (BRICS Information Centre 2017).

Another important concern about investment facilitation measures refers to how they could affect competitive neutrality, understood as "where no entity operating in an economic market is subject to undue competitive advantages or disadvantages" (OECD 2012, 17). In the context of investment facilitation, this could engender a race between countries in providing ever more generous support to prospective inward investors or their own outward investors (or both in the case of many developed and emerging economies) (Zampetti and Polanco Lazo 2018). The question here is whether, and to what extent, the support host or home countries give investors distorts competition among investors from different countries or between them and national investors (Sauvant et. al. 2014).

The issue of competitive neutrality could raise concerns if the support given to domestic companies investing abroad affects other domestic companies in similar sectors. For example, in the case of the European Union (EU), Article 108 of the Treaty on the Functioning of the European Union mandates the European Commission to keep under constant review all systems of aid existing in EU member states with the goal of preventing unfair advantages over similar sectors in other EU countries. If state authorities have given support to domestic companies, and that support is considered selective (confers an advantage to specific companies, parts of industries, or companies in specific regions), and competition has been or may be distorted, and that intervention is likely to affect trade between member states, then the European Commission must disallow the support, unless it is shown to be compatible with the common market rules (UNCTAD 2018).

3. Elements of Investment Facilitation Provisions in Existing International Investment Agreements

Generally speaking, IIAs do not include provisions on investment facilitation, and IIAs are focused on investment promotion and mostly on investment protection through substantive standards—such as most-favoured nation (MFN), fair and equitable treatment, and expropriation, among others—and procedural mechanisms—notably investor-state dispute settlement (ISDS).

Investment facilitation has been associated with, or even believed to be potentially derived from, trade facilitation, which first became a topic at the WTO at the 1996 Ministerial Conference in Singapore (Novik and de Crombrugghe 2018). However, investment facilitation in IIAs predates that conference. If we look carefully, we can find IIAs including disciplines on investment facilitation in agreements concluded from 1996 up to the conclusion of the TFA negotiations in December 2013 at the Bali Ministerial conference, notably by China, Japan, and the Association of Southeast Asian Nations (ASEAN). This should not be surprising, as trade facilitation disciplines in RTAs predate the WTO initiative on trade facilitation.

New agreements tend to include provisions on investment facilitation, but sometimes they do not go beyond the mere use of the name, without a concrete description of facilitation activities. Brazil's Cooperation and Facilitation Investment Agreements (CFIAs) concluded in recent years with African and Latin American countries are noteworthy, as they include detailed provisions on investment facilitation, which is also a core objective of those treaties. According to Morosini and Ratton Sanchez Badin (2015), the unique features of Brazil's state-supported investment facilitation policy make the Brazilian Government especially concerned with facilitation of investments as it tries to ensure that it will play a central role in helping resolve disputes, making other alternatives, such as ISDS, less important to Brazilian industry.

As detailed in Annex 1, the number of concluded IIAs that have explicit provisions on investment facilitation is still low (35 treaties in total), compared with about 3000 IIAs that have been concluded.[4] But, that number increases substantially if we include in this scoping exercise the elements of investment facilitation identified in Annex 1, which are found in older agreements, but without using that denomination, like provisions on transparency, as well as on investment entry and sojourn of personnel. UNCTAD has mapped at least 360 IIAs with transparency provisions directed at states (obligations to publish laws and regulations) and about 1033 IIAs with provisions on entry and sojourn of personnel (usually subject to domestic laws) (UNCTAD 2018). Similarly, the number of RTAs with investment facilitation elements could be considerably larger if all chapters in RTAs were considered (including transparency, regulatory convergence, business competitiveness, and facilitation chapters, among others).

When facilitation provisions are included, they are usually general in scope. However, very few agreements include provisions to facilitate investment in a specific sector. For example, the Japan–Indonesia Economic Partnership Agreement (JIEPA) supports investment of Japanese investors in the energy and mineral resource sectors in Indonesia.[5] In such cases, one should wonder why

[4] This mapping was done using the Electronic Database of Investment Treaties (EDIT) from the World Trade Institute at the University of Bern. It is important to clarify that we mapped only the provisions that are explicitly considered as investment facilitation tools in existing IIAs; therefore, some provisions that could be considered as such (e.g. market access) are not included in this analysis. We took a restrictive approach in the mapping, to avoid confusion with investment promotion and investment retention, although as mentioned before the lines separating these concepts are blurred.

[5] Japan-Indonesia Economic Partnership Agreement (2007), Art. 98, Annex 12,

facilitation efforts are concentrated in a few high-priority areas, and the rationale for a unidirectional policy (OECD 2015). In this specific case, Boyd (2009) has explained that the bilateral energy relationship has traditionally been very close in liquefied natural gas, where Japan is the world's largest buyer. In JIEPA, Japan sought improved security of energy supply, improving investment opportunities in Indonesia. If the implementation of such measures is effective and applied consistently down to local levels, they can help to change the unfavourable facts on the ground hindering investment and energy security for both nations. Several billion dollars in energy deals were inked on the sidelines of the JIEPA.

But, what is the exact content of investment facilitation provisions in existing IIAs? After examining both the IIAs with explicit provisions on investment facilitation as well as those that include elements of investment facilitation as identified in Annex 1, but that are not labelled as such, at least 12 different elements of investment facilitation can be identified.[6]

In the following sections, we examine the main content of investment facilitation provisions included in IIAs (including both BITs and RTAs with investment chapters).

3.1 Provisions on Improving Investment Climate

Some BITs and RTAs include general commitments to facilitate investment, through activities ensuring favourable conditions of investment, usually under the limits of their respective domestic law.[7] Similar provisions are used to establish an open and competitive investment regime[8] or create a necessary environment for all forms of investment.[9]

When provisions on improving investment climate are included, they are usually of general scope. However, certain IIAs also include more detailed and forward-looking provisions, such as the periodic review of the treaty to create a more open investment environment,[10] or strengthening databases on all forms of investment policy formulations to improve the investment environment.[11]

If we consider the investment climate to be "the set of location-specific factors shaping the opportunities and incentives for firms to invest productively, create jobs, and expand" (World Bank 2005), we can conclude that improving the investment climate is a key element in investment facilitation.

3.2 Removal of Bureaucratic Impediments to Investment

Certain IIAs include specific commitments on the removal of bureaucratic impediments to investment.[12] This is what some call policy advocacy, identifying bottlenecks in the investment climate and providing recommendations to the government (Novik and de Crombrugghe 2018).

[6] Agreeements using certain keywords that generally stipulate a strong commitment regarding facilitation were labelled as "hard" (e.g. "shall," "commit"). Conversely, agreements using keywords that generally spell out softer commitments were classified as such (e.g. "endeavour," "strive," "seek to," "recognise the importance"). Certain agreements that consider facilitation measures purely as areas of potential cooperation, discussion, consultation, and information exchange were labelled as "cooperation."

[7] Finland–Kazakhstan BIT (1992), Art. 7.

[8] Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) Agreement, Art. 1(b) and Art. 2(c).

[9] Association of Southeast Asian Nations (ASEAN)–China Investment Agreement (2009), Art. 21a.

[10] China–Japan–Korea Investment Agreement (2012), Art. 27.3.

[11] ASEAN Comprehensive Investment Agreement (2009), Art. 25e.

[12] Caribbean Community (CARICOM) Treaty (2001), Art. 69.3(b), as part of the harmonization of the investment initiatives; China–Taiwan Cross-Strait Bilateral Investment Protection and Promotion Agreement (2012), Art. 6.1.

Similarly, other BITs and RTAs include provisions on streamlining and simplifying procedures for investment applications and approvals[13] or, more accurately, establishing clear and uniform standards and procedures for examining and approving investment applications, including a reasonable timeframe, making known information that has been omitted from an incomplete application, providing opportunity for correction, and keeping administrative costs as low as possible.[14] The latter type of provision is included in the Brazilian proposal on investment facilitation at the WTO, but it also includes the right to appeal and review the decision of a competent domestic authority (WTO 2018).

3.3 Facilitation of Investment Permits

Some IIAs provide that when an investment of an investor of the contracting party is admitted in the territory of the other contracting party, the latter contracting party shall grant the necessary permits for the realisation of such an investment.[15]

This type of provision is found in a large number of IIAs, but without explicitly mentioning that the granting of permits is to be considered an investment facilitation activity. While in some of these treaties the provision is mandatory ("shall grant") where appropriate, or necessary,[16] or in accordance with its legislation,[17] in other agreements it becomes a best efforts provision ("shall endeavour to grant").[18] This has implications not only for the conceptualisation and implementation of these provisions, but also for the possibility of convergence and coherence of investment facilitation elements.

It is important to note that the mandatory provisions of this type have been the subject of disputes between investors and the home states. In *MTD* v. *Chile*, it was clarified that, to the extent that an application for a permit meets the requirements of the law, the investor should be granted such permit. Such provisions "do not entitle an investor to a change of the normative framework of the country where it invests. All that an investor may expect is that the law be applied."[19]

3.4 Facilitation of Entry and Sojourn of Personnel Related to the Investment

Similarly, certain BITs and investment chapters of RTAs include provisions on the facilitation of required permits for the activities of consultants or other qualified experts engaged by investors of the other contracting party, either in general terms or specified as entry, residence, work, and travel permits.[20] This

[13] ASEAN–China Investment Agreement (2009), Art. 21b.

[14] China Hong Kong 2017 CEPA Investment Agreement Art. 15.3 (iv), (v), (vii), and (viii).

[15] Armenia–Iran BIT (1995), Art. 3.

[16] Cuba–Spain BIT (1994), Art. III.2; Spain–Dominican Republic BIT (1992), Art. 3.2; Ecuador–Paraguay BIT (1994), Arts III.2 and IV.1; Czech Republic–Spain BIT (990), Art. 3.2; Honduras–Spain BIT (1994), Art. III.2; El Salvador–Paraguay BIT (1998), Art. 3.2; Croatia–Spain BIT (1997), Art. II.3; Czech Republic–Estonia BIT (1992), Art. 2.2; Paraguay–Peru BIT (1994), Art. 3.2; Bolivia–Uruguay BIT (2000), Art. 3.2; Lebanon–Spain BIT (1996), Art. II.3; Kuwait–Morocco BIT (1999), Art. 2.2.

[17] Chile–Croatia BIT (1994), Art. 3(2); Finland–Jordan BIT (2006), Art. 11.1; Finland–Macedonia BIT (2001), Art. 13.1; Egypt–Switzerland BIT (2010), Art. 3.2.

[18] Egypt–Spain BIT (1992), Art. 3.2; Poland–Spain BIT (1992), Art. 3.2; Belgium–Luxembourg Economic Union (BLEU)–Pakistan BIT (1998), Art. 3.2; Spain–Uruguay BIT (1992), Art. 3.2; India–Spain BIT (1995); Art. 2.2; Korea–Spain BIT (1994), Art. 2.3.

[19] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award 25 May 2004, para. 205.

[20] This type of commitment can also be found in RTA chapters on trade in services or movement of business people, but these have not been mapped in this paper, for the reasons explained before.

type of provision is sometimes mandatory,[21] usually with qualifications such as "being necessary,"[22] "where appropriate,"[23] "as required,"[24] or "in conformity with domestic laws."[25]

However, this type of facilitation often is only a best efforts commitment, where parties endeavour, whenever necessary, to grant the permits required in connection with the activities of consultants or experts engaged by investors of the other party.[26] For example, Brazilian CFIAs include bilateral facilitation agendas that comprise programmes on money visa proceedings (Morosini and Ratton Sanchez Badin 2015).

3.5 Transparency

Some IIAs include transparency commitments as part of investment facilitation activities.[27] But, the large majority include transparency provisions, without reference to investment facilitation.[28] As noted above, many IIAs already include such provisions—at least 332 BITs have transparency obligations to publish laws and regulations (UNCTAD 2018), and more than 50 RTAs have horizontal chapters on transparency (Lejárraga and Shepherd 2013).

Traditionally, IIAs with transparency provisions consider so-called horizontal obligations, such as the publication or dissemination of regulations regarding or affecting foreign investment. Dissemination of investment information, including investment laws, regulations, policies, and procedures,[29] and eventually administrative rulings and judicial decisions. At the same, such agreements usually exclude from these commitments the disclosure of confidential or proprietary information or access to any data, the disclosure of which would impede law enforcement or would be contrary to legislation on public access to documents of that party, or prejudice legitimate commercial interests of particular investors.[30]

In addition, in certain cases, agreements include specific transparency provisions with more detailed commitments on exchange of information on topics, such as statistical information on the market for goods and services; governmental procurement and public concessions; social and labour requirements; information on specific economic sectors or segments previously identified by the parties; regional projects and understandings on investment; and information on public–private partnerships.[31]

Some agreements also include the exchange of experience in the design and implementation of sectoral legislation.[32] What are missing in the agreements examined in this paper are more provisions facilitating actual access to laws and

[21] Czech Republic–Spain BIT (990), Art. 3.3.

[22] Cuba–Spain BIT (1994), Art. III.3; El Salvador–Paraguay BIT (1998), Art. 3.2; BLEU–Pakistan BIT (1998), Art. 3.3; Croatia–Spain BIT (1997), Art. II.4; Paraguay–Peru BIT (1994), Art. 3.2; Lebanon–Spain BIT (1996), Art. II.3–4.

[23] Bolivia–Uruguay BIT (2000), Art. 3.2.

[24] Honduras–Spain BIT (1994), Art. III.3.

[25] Spain–Dominican Republic BIT (1992), Art. 3.3; Finland–Jordan BIT (2006), Art. 11.2; Finland–Macedonia BIT (2001), Art. 13.2; Egypt–Switzerland BIT (2010), Art. 3.2.

[26] Egypt–Spain BIT (1992), Art. 3.2; Poland–Spain BIT (1992), Art. 3.3; Spain–Uruguay BIT (1992), Art. 3.3; India–Spain BIT (1995), Art. 2.3; Kuwait–Morocco BIT (1999), Art. 2.3; China–Japan–Korea Investment Agreement (2012), Art. 8.

[27] China–Hong Kong Closer Economic Partnership Arrangement (CEPA) (2003), Art. 16; China–Macao CEPA (2003), Art. 16.

[28] Here we do not include transparency provisions that are applicable to ISDS, as they do not apply to the facilitation process.

[29] China–Hong Kong CEPA (2003), Annex 6, Arts 3.2.1, and 7.2.1; China–Macao CEPA (2003), Annex 6, Arts 3.2.1 and 7.2.1; Japan–Malaysia FTA (2005), Art. 92.1(b); Malaysia–New Zealand FTA (2009), Art. 10.16b; Australia–Malaysia FTA (2012), Art. 12.13b. It is also included in Art. 5 of Brazil's Investment Facilitation proposal at the WTO.

[30] Finland–Jordan BIT (2006), Art. 14.

[31] Brazil–Malawi CFIA (2015), Arts 5.2 and 5.3.

[32] Brazil–Mozambique CFIA (2015), Art. 4.i

regulations, for example through dedicated webpages or by providing translations in other languages. Investment chapters in BITs and RTAs also do not include public comment procedures of planned regulation that are open to foreign parties, including foreign investors, although this is featured in the regulatory convergence chapters of most recent RTAs (Polanco Lazo and Sauvé 2017).

3.6 Capacity Building on Investment Issues

Certain BITs and RTAs consider provisions on investment facilitation, focused on measures aimed at capacity building on investment in general terms,[33] or specifically for domestic investment promotion agencies. In some cases, these activities include assistance to facilitate technology transfer on cross-border investment.[34]

In at least one agreement, the capacity building is focused on one specific topic: the development of a model investment treaty. The Cotonou Agreement even provides an overview of the content of such a model agreement, including fair and equitable treatment, MFN, protection against expropriation, transfer of capitals and profits, and investor-state arbitration.[35]

Such content should probably be revised in the light of the existing EU policy regarding investment agreements, particularly with respect to the investment court system. Up to now, the only agreements that contain the feature of standing investment courts are the EU FTAs with Viet Nam, Singapore, and Canada—the Comprehensive Economic and Trade Agreement. The inclusion of this feature is also being debated in the process of the modernisation of the EU FTAs with Mexico (Torrent and Polanco 2016) and Chile (Polanco and Torrent 2016), and in the negotiation of an FTA with Japan, where the European Commission (2018) has even declared that for the EU "ISDS is dead." Following the EU Trade for All policy (European Commission Directorate-General for Trade 2016), the investment court system will probably be under consideration in other future EU negotiations of FTAs, such as with Myanmar and the Philippines.

This example highlights the fact that certain investment issues evolve in a very short time—an argument that could be used to counter the proposal of having an IFA.

3.7 Investment Financing

Very few IIAs include provisions on investment facilitation through direct financing of investment projects. One that does is the Cotonou Agreement between the EU and the African, Caribbean, and Pacific Group of States (ACP), which implemented provisions on investment financing in 2003, through an investment facility—a revolving fund that meets the financing needs of investment projects in the regions with a broad range of flexible risk-bearing instruments. The European Investment Bank has managed the ACP investment facility since it began in 2003.[36]

The ACP investment facility is aimed at reducing poverty by creating jobs and sustainable growth. In addition to senior and intermediated loans, the European Investment Bank carries out equity and quasi-equity investments and junior and subordinated loans and provides guarantees, interest rate subsidies, and technical assistance. Since the revolving fund began operating in 2003, more than 80 percent of the allocations have gone to the private sector (European Investment Bank 2018). To support the preparation and implementation of the projects

[33] Japan–Malaysia FTA (2005), Art. 92.1(a);

[34] ECOWAS Supplementary Act on Investments (2008), Art. 21c; Nigeria–Morocco Art. 25.1.c.

[35] Cotonou Agreement, Art. 75(g), Annex II, Art. 15.2.

[36] Cotonou Agreement, Art. 76(d), Art. 83, Annex I, Annex IB, Annex IC, Annex II (Terms and Conditions of Financing).

it finances, the European Investment Bank also provides grants in the form of interest rate subsidies and technical assistance to its borrowers and final beneficiaries (European Investment Bank 2018). The average budget for the investment facility has reached €95 million for the period 2014–2020, compared with just over €40 million for the previous period (2003–2013) (European Investment Bank 2018). The sectors that have benefited most from the investment facility are energy, water and sewage, transport, financial services, and telecommunications.

A separate section of the investment facility, the Impact Financing Envelope, is used for higher-impact projects with bigger risks and higher returns, reaching private-sector operations that go beyond the levels of risk presented by traditional operations but that will have a large developmental impact (European Investment Bank 2018).

The Cotonou Partnership Agreement was signed in 2000 for a 20-year duration, and it will expire in February 2020. At present, no formal decision has been made on the future of the ACP–EU partnership beyond the current framework. However, in a Joint Communication to the European Parliament and the European Council, the European Commission sets out the ideas and proposed building blocks for a political partnership with the ACP countries, without including a renewal of the investment facility (European Commission 2016). Some have argued that unless replaced by even more effective instruments, it would seem pertinent to preserve the innovative mechanisms of the investment facility and the Impact Financing Envelope, and further develop them (Bilal and Grosse-Puppendahl 2016).

3.8 Insurance Programmes

Most OECD countries have national agencies that provide domestic companies with export credit and political risk insurance, a phenomenon that started in the late 1950s, when the Federal Republic of Germany, Japan, and the US started offering insurance programmes to foreign investors against non-commercial risks (Parra 2012). The largest of these agencies include the Overseas Private Investment Corporation (US), the Nippon Export and Investment Insurance (Japan), the China Export Credit Insurance Corporation (China), the Office national du Ducroire (Belgium), Export Development Canada(Canada), the Export Credits Guarantee Department (United Kingdom), COFACE (France), Export Finance and Insurance Corporation (Australia), and Swiss Export Risk Insurance (Switzerland).[37]

Other countries have delegated the management of their investment guarantees scheme to private companies. That is the case of Germany, which has appointed a consortium formed by PricewaterhouseCoopers and Euler Hermes Aktiengesellschaft (PricewaterhouseCoopers 2010). These insurance schemes can include requirements aimed at ensuring the guaranteed FDI fulfils sustainable and developmental objectives of the host country (Zampetti and Polanco Lazo 2018).

However, the possibility of facilitating investment using these insurance tools is largely absent from IIAs, with some notable exceptions, such as the IIAs concluded by the Economic Community of West African States (ECOWAS) and the Nigeria–Morocco BIT.[38]

3.9 Pre-Establishment Investor Servicing

Certain BITs and IIAs include clauses aimed at providing support to prospective investors to facilitate their establishment. One example of this is the set-up of one-stop investment centres in the respective host countries to provide assistance and advisory services

[37] The large majority of these agencies are members of the Berne Union, a worldwide association of export credit and investment insurance industry members, including both public and private companies. See http://www.berneunion.org/about-the-berne-union/berne-union-members/.

[38] ECOWAS Supplementary Act on Investments (2008), Art. 27.1.b; Nigeria–Morocco BIT (2016), Art. 5.2.

to the business sectors (Novik and de Crombrugghe 2018).

Other similar clauses address the provision of advisory services to the business community of the other member states.[39] Similarly, Article 9 of the Brazilian proposal on investment facilitation at the WTO considers a single electronic window as a single entry point for the submission of all documents required by the agencies or regulatory bodies involved in the admission, establishment, acquisition, and expansion of investments. Documents uploaded at the single electronic window shall not be subsequently required by any governmental entity unless their authenticity cannot be established (WTO 2018). In some cases, the obligation extends to the home state, which shall provide information about the form and extent of available assistance given to outward investors, depending on the size and type of different investments.[40]

However, the benefits of having a single window system for investors have been challenged. Singh (2018, 26) points out that, unlike trade facilitation, where few agencies dealing with cross-border trade and customs compliance are involved, investment facilitation requires the cooperation of many agencies at all levels of government, raising critical challenges in the implementation process: "One-stop shops may not be effective in countries where setting up a business requires approvals from national, regional and local authorities that may not cooperate in implementing binding commitments under a multilateral agreement."

3.10 Post-Establishment Investor Aftercare

Some IIAs include provisions aimed at retaining established companies and encouraging reinvestments by assisting investors in the challenges they face after their establishment. It has been suggested that these aftercare measures should focus on investors that have a high developmental impact and strong records of responsible business conduct (Novik and de Crombrugghe 2018).

These aftercare measures are multiple and may include the exchange of views between the parties to conduct consultations to solve problems related to investment,[41] or the establishment of a focal point or ombudsperson within the government to promote investment institutional governance by establishing a specific forum and technical channels acting as facilitators between governments and the private sector,[42] or to prevent or resolve any potential dispute and facilitate the communication with other relevant agencies. For example, in all Brazilian CFIAs, the focal points shall directly act to prevent disputes and facilitate their resolution in coordination with relevant government authorities and in cooperation with relevant private entities.[43]

3.11 Relations with Investors and the Private Sector

Certain BITs and RTAs include facilitation activities aimed at establishing more specific relations with investors and the private sector in general, considered as relevant stakeholders. These activities include consultations with the business community

[39] ASEAN Investment Agreement, Art. 25g.

[40] ECOWAS Supplementary Act on Investments (2008), Art. 27.2.

[41] China–Hong Kong CEPA (2003), Annex 6, Art. 3.2.2.

[42] Brazil–Mozambique BIT (2015); Angola–Brazil BIT (2015), Art. 17.1; Brazil–Malawi CFIA (2015), Art. 14.1.

[43] Brazil–Mozambique CFIA (2015), Arts 5.4(iii) and 15.1; Angola–Brazil CFIA (2015), Arts 5.4(iii) and 15.1; Brazil–Mexico CFIA (2015), Arts 15.4.c and 18; Brazil–Malawi CFIA (2015), Art. 13; Brazil–Colombia CFIA (2015), Arts 15.4.c and 22; Brazil–Chile CFIA (2015), Arts 18.4.c and 22; Brazil–Peru ETEA (2016), Art. 2.20; Intra-MERCOSUR Investment Facilitation Protocol (2017), Art. 18.3.c; Brazil–Ethiopia BIT (2018), Art. 18.4.d; and Brazil–Suriname BIT (2018), Art. 19.4.d.

on investment matters,[44] support for joint business councils, between home and host states,[45] and the organisation of symposiums, seminars, and other activities beneficial to investments,[46] as well as fostering joint investment promotion activities or technical cooperation in mutually agreed sectors.[47]

There will undoubtedly be disagreement on whether and what types of "facilitation" are desirable for different stakeholders. For example, if we take the example of streamlining and simplifying procedures for investment applications and approvals, for some it could help increase investment into countries that have duplicative and burdensome regulatory requirements for starting or operating a company. However, in the eyes of others, these requirements may be crucial for ensuring that projects are developed with input from interested and affected communities (Coleman et al. 2018).

Furthermore, some non-governmental organisations have criticised investment facilitation activities directed to strengthen stakeholder cooperation and consultation, as in practice they could become opportunities for investors and their home states to pressure host countries and respond to unlimited requests for information (Our World Is Not for Sale 2017).

3.12 Joint Cooperation and Treaty Bodies on Investment Facilitation

Provisions on investment facilitation in IIAs regularly consider carrying out investment facilitation activities through direct consultation or cooperation between the contracting parties.[48] Some agreements give investment facility tasks to treaty bodies especially created in the agreement. For example, the Japan–Malaysia FTA (2005), established as one of the tasks of the Sub-Committee on Investment the discussion of issues related to facilitation of investments.[49] ECOWAS calls for the creation of regional structures for the implementation of the Community rules in the area of promotion and facilitation of investments.[50]

However, in both cases, the implementation of investment facilitation activities is considered in general terms, without specific commitments. In contrast, Brazilian CFIAs establish that the agreement shall be operated by the national institutions of the two parties and the Joint Committee as provided in the Agreement. The Joint Committee has the duty and responsibility to coordinate the implementation of cooperative and mutually agreed facilitation agendas. In several of these agreements, it is mentioned explicitly that the main purpose of the creation of the aforementioned Joint Committee is the promotion of institutional governance in this area by establishing a specific forum, and technical channels act as facilitators between governments and the private sector.[51]

In the agreements with Angola, Malawi, Mexico, and Mozambique, certain topics have already been defined for the agendas of cooperation and facilitation, such as payments and transfers (facilitation of remittances and foreign capital exchange between

[44] ASEAN Investment Agreement, Art. 25f.

[45] ECOWAS Supplementary Act on Investments (2008), Art. 27.

[46] China–Taiwan (2012), Art. 6.2.2; China–Hong Kong (2017), Art. 15.3.ii.

[47] Australia–Malaysia FTA (2012), Art. 12.13.

[48] China–Hong Kong CEPA (2003), Art. 17 and Annex 6, Art. 3.2.3—but these activities are largely focused on trade facilitation rather than on investment; India–Japan EPA Art. 128.2(a).

[49] Japan–Malaysia FTA (2005), Art. 93.1(d).

[50] ECOWAS Supplementary Act on Investments (2008), Art. 25.

[51] Brazil–Mozambique CFIA (2015), Arts 2, 4.4(iii), and 17.1; Angola–Brazil CFIA (2015), Arts 2, 4.4(iii), and 17.1; Brazil–Mexico CFIA (2015), Art. 14.4.c; Brazil–Malawi CFIA (2015), Art. 3.4(iii)(c).

the parties); visas (facilitation of the temporary entry and stay of managers, executives, and skilled employees of economic operators, entities, firms, and investors of the other party); environmental legislation and technical regulations (facilitation of the issuance of documents and certificates, licences relating to the investment of the other party); and cooperation in sectoral legislation and institutional exchanges.[52] The agreement with Colombia has a slightly different pre-established agenda, without considering issues of payments and transfers (that are explicitly regulated in the agreement, Article 9) and adding two new topics on supply chains (parties shall cooperate in promoting strategic alliances, including production linkages between private enterprises of the parties favouring alliances with micro-, small, and medium-sized enterprises) and investment in logistics and transportation.[53] In the agreements with Chile, Ethiopia, MERCOSUR, Peru, and Suriname there are no topics previously determined as part of the agenda.

The Joint Committee may include other topics in the development of thematic agendas, including cooperation and facilitation issues relevant to the development and facilitation of bilateral investments. The agendas are to be discussed between the competent governmental authorities of both parties and may give rise to discussions in order to reach common understandings on the matter. The results of the discussions will be the subject of additional protocols to the Agreement or give rise to specific legal instruments. The Joint Committee will coordinate the implementation of timetables for discussions involving such thematic agendas of cooperation and facilitation and the discussion of specific commitments.[54]

In some Brazilian CFIAs, specific cooperation between IPAs is considered in order to facilitate investment in the territory of the other party.[55]

4. How Do We Foster Coherence with Other Components of Facilitation 2.0?

In a scenario where investment facilitation provisions have increasingly been debated and in certain cases included in BITs and RTAs, it would be useful to consider which other existing elements of Facilitation 2.0 could be useful for a coherent future development of investment facilitation, particularly with respect to trade in goods, services, and electronic commerce.[56]

Goods, services, and investment are increasingly intertwined, and yet trade rules continue to be segmented along the goods and services divide, and both are separated from investment—and usually none of these rules makes the relevant connections with the digital economy (Pasadilla et al. 2017).

In that framework, the experience that is bringing the implementation of the trade facilitation agreement, streamlining and simplifying international trade in goods procedures, would be a first element to consider, particularly with respect to aspects that could be easily applicable to investment facilitation, such as the publication and availability of information online; notice, comment, and review of proposed

[52] Brazil–Mozambique CFIA (2015), Annex I; Angola–Brazil CFIA (2015), Annex I; Brazil–Mexico CFIA(2015), Annex I; Brazil–Malawi CFIA (2015), Annex I.

[53] Brazil–Colombia CFIA (2015), Annex I.

[54] Brazil–Mozambique CFIA (2015), Art. 8; Angola–Brazil CFIA (2015), Art. 8; Brazil–Mexico CFIA (2015), Art. 20; Brazil–Malawi CFIA (2015), Art. 7.

[55] Brazil–Colombia CFIA (2015), Art. 21; Brazil–Chile CFIA (2015), Art. 23.

[56] For the purposes of this paper, we consider regulatory coherence as part of the overarching notion of regulatory convergence, aimed at reducing unnecessary regulatory incompatibilities between countries, in a process that is both dynamic and incomplete. See Polanco Lazo and Sauvé (2017).

regulations; opportunity to comment, information before entry into force, and consultations; and other measures to enhance impartiality and non-discrimination.[57]

Improving transparency and information available to investors on the relevant investment conditions and procedures is a basic feature of any investment policy framework at the domestic level.[58] The transparency principle extends also to efficient administrative procedures and enhanced predictability of the policy environment through consultation procedures for all stakeholders.[59]

With respect to trade in services, the question countries should pose is whether they can facilitate investment without facilitating services (or vice versa). Investment in services is regulated not only in IIAs, but also maybe more importantly by the WTO General Agreement on Trade in Services (GATS). When services are supplied via commercial presence (GATS mode 3), they are subject to the GATS crosscutting MFN requirement. Moreover, in those sectors inscribed in their schedules of GATS commitments, WTO members are bound to respect the specified levels of market access, including national treatment, which consists of extending to foreign services and service suppliers the same competitive conditions that are afforded to their domestic counterparts (Adlung 2014). Thus, it will be important to coordinate investment facilitation efforts that are undertaken with respect to the provisions of services through commercial presence (GATS mode 3).[60]

Finally, it could be important to consider the links between electronic commerce and investment for the purposes of investment facilitation. Most FTAs recognise that services delivered or performed electronically are subject to the relevant provisions of the chapters on investment, trade in services and financial services, including any obligations, exceptions, or non-conforming measures contained therein (Pasadilla at al. 2017). Some IIAs already recognise that the application and promotion of electronic business will create more trade and investment opportunities for all contracting parties, considering exchange and cooperation activities in the area of electronic business.[61] In that sense, it could be important to create information portals or single windows on legal and administrative procedures to start and operate an investment or online investment registration system (if required).[62]

Capacity building on improving the investment environment to accelerate bridging the digital infrastructure divide is another key point of contact between investment facilitation and e-commerce. For example, how open are the countries to foreign investment in critical infrastructure for e-commerce, such as electricity and the information and telecommunications market? The capacity of the crucial infrastructure would greatly affect the capacity to deliver or consume online services, and investment is needed for its constant upgrade (Pasadilla at al. 2017).

[57] Trade Facilitation Agreement, Arts 1, 2, 4, and 5.

[58] Principle II G20 Principles; Article 1 WTO's Trade Facilitation Agreement.

[59] Principle IV G20 Principles; Article 2 and 5 WTO's Trade Facilitation Agreement.

[60] On a related note, an Indian proposal for a Trade Facilitation Agreement for Services (TFS) has been added to the WTO Council for Trade in Services. The proposed TFS Agreement had been conceived as the services counterpart of the goods TFA. India believes that the broad objectives of the TFA, which were simplification and transparency, reduction of transaction costs, streamlining of procedures, disciplining fees and charges, expeditious processing of applications, and cooperation between competent authorities, among others, are equally relevant for facilitating trade in services, and largely based its proposal on the TFA. See WTO (2017d).

[61] China–Hong Kong CEPA (2003), Annex 6, Art. 6; China–Macao CEPA (2003), Annex 6, Art. 6.

[62] See Brazil's proposal for investment facilitation, on electronic documents and a single electronic window (Arts 4 and 9).

5. Could Investment Facilitation Advance Sustainable Development?

The relationship between investment facilitation and sustainable development has been focused mainly on the need to increase investment flows to close the financing gap needed to achieve most of the SDGs by 2030—in aggregate to approximately US$ 4 trillion a year. Meeting these needs will require incentivising private investment in social infrastructure, such as education, health, water, and sanitation, and in other infrastructure needs, such as electricity, transport, and telecommunications (Sauvant and Hamdani 2015). Investment in many of these SDG sectors involves the provision of public services, which tend to be more intensively regulated. Investment facilitation measures can play an instrumental role in streamlining regulations and administrative procedures in these sectors and help investors overcome entry barriers by providing necessary assistance in navigating sector-specific regulations (UNCTAD 2017b).

It has been suggested that the importance of investment facilitation for sustainable development goes beyond being an essential source of funding. Investment facilitation can also be understood as guidelines to be adopted for countries to think about their domestic institutions and processes, embedding principles such as transparency, publicity, due process, inclusion, and electronic governance in their domestic structures, agencies, or bodies (Bogliolo Piancastelli de Siqueira 2018).

Some have warned that while the debate on the effectiveness of IPAs is far from settled, to pretend that investment facilitation rules would strengthen sustainable investment flows and help achieve the 2030 SDGs would be unrealistic. They call on proponents of an IFA to make "more persuasive arguments, drawing on robust evidence, to convince those who are sceptical about the value of such an agreement" (Singh 2018, 23).

But, there are other ways that an IFA could help to achieve SDGs. First, such an agreement could target the type of investment that is facilitated. It is important to facilitate not only investment in general but also the type of FDI that is beneficial for the host state. For example, FDI flows to the LDCs remain concentrated in the extractive industries and related manufacturing activities (UNCTAD 2016). Due to a lack of financial resources and human capacities, LDCs could be drawn to accept any investment and not just sustainable investment flows. To attract that type of FDI, development partners[63] could assist LDCs in both promotion and facilitation of investment policies that contribute to national development objectives (United Nations 2011). It could be useful if an agreement, including investment facilitation provisions or an eventual multilateral agreement, on the subject not only encourages higher investment flows but also sustainable FDI flows—that is, investment with certain sustainability characteristics (Zampetti and Polanco Lazo 2018). For that purpose, it could be useful to identify these characteristics, a work that Sauvant and Mann (2017) have undertaken, examining about 150 instruments, ranging from IIAs to non-binding intergovernmental instruments and voluntary global business codes.

Unfortunately, few IIAs currently include investment facilitation measures with an explicit linkage to sustainable development, and these activities are largely of a cooperative nature, such as the promotion of environmental and social public health impact assessment process,[64] meetings to study issues to avoid lowering or derogating from domestic health, safety, or environmental

[63] Development partners are essentially developed countries, emerging economies, multilateral development agencies, and other stakeholders in civil society and the private sector. However, for the purpose of this paper, development partners are understood, restrictively, to mean capital-exporting countries, including developed countries and increasingly emerging economies, as well as the EU, which is a particularly important partner for the LDCs.

[64] ECOWAS Supplementary Act on Investments (2008), Art. 28.

measures,[65] or in general cooperative activities to support sustainable investment.[66] The Morocco–Nigeria BIT (2016) explicitly states that the home country of investors should assist the host country in the facilitation of foreign investment, in particular by their own investors, and that such assistance shall be consistent with the development goals and priorities of the host country.[67]

Second, there are some relevant areas in which investment facilitation could be used to provide international collaboration and assistance, for example to improve the processes around environmental, social, and human rights impact assessments and associated multi-stakeholder consultations (Coleman et al. 2018).

As an essential element for investment facilitation, development partners could assist developing countries and LDCs in assessing the economic, environmental, social, human rights, and governance impacts of foreign investments. Establishing the parameters of desirable and sustainable inward investment may also allow development partners to better design and focus their own activities to promote sustainable investment towards outward locations. Development partners can then link outward investment promotion and facilitation measures to investors' compliance with certain criteria related to sustainable investment that are internationally agreed or widely recognised and deemed important to promote their own sustainable development priorities. The focus would thus decisively shift from just facilitating additional investment to facilitating sustainable investment (Zampetti and Polanco Lazo 2018).

[65] China–Canada BIT (2012), Art. 18.3.

[66] ECOWAS Supplementary Act on Investments (2008), Art. 21d.

[67] Morocco–Nigeria BIT (2016), Art. 25.

6. Conclusion

As we have seen, provisions on investment facilitation are still not common in investment agreements, although certain elements of this concept can be found in BITs and RTAs with investment chapters, without using that denomination.

When facilitation provisions are included, they are usually of general scope. After examining both IIAs with explicit provisions on investment facilitation as well as those that include elements of investment facilitation but that are not labelled as such, this paper has identified at least 12 different elements of investment facilitation. From the point of view of convergence, the most common of these provisions are on transparency, post-establishment activities, and relations with investors and the private sector. These commitments are also the most specific and binding (as opposed to broader and best-endeavours principles). Also important are provisions facilitating permits for the establishment of an investment and the entry and sojourn of investment-related personnel, but their level of commitment varies across agreements, being mostly best efforts. Improving the investment climate could also be considered a central element, as it is subsumed in all the other provisions with elements of investment facilitation, and it could be considered a stepping stone for achieving greater coherence among all the different components.

However, the level of variation of the content of investment facilitation among a small number of IIAs is important. This has implications for the conceptualisation and implementation of these provisions as the facilitation of investment does not always mean the same thing—in some cases, it is a binding obligation, in others only a best endeavour—which in turn affects the possibility of convergence and coherence of investment facilitation elements. At the same time, we need to consider that there will also be disagreements about whether and what types of facilitation are desirable for different stakeholders (e.g. foreign investors and affected communities).

In order to advance investment facilitation provisions in BITs and RTAs, there are a number of issues that need to be considered for effective implementation.

First, when investment facilitation provisions are found, they largely include a normative rather than a functional approach, seemingly without major consideration of what is needed as investment facilitation, from the point of view of people that work at the ground level on these issues. Best practices coming from the ground up could really be relevant and make a change if facilitation measures are implemented.

Second, if investment facilitation is considered in new IIAs, what do we do with the old ones? Is it necessary to reform them, or should it be automatically considered that they could benefit from the MFN treatment included in the large majority of these agreements?

Third, it is important to note that the size of countries matters, especially if they are federal. In countries with federal governments, national focal points in charge of investment facilitation may not be able to perform these tasks without encroaching on the functional autonomy of regional governments and local government authorities (Singh 2018). Therefore, if investment facilitation is to be implemented, it is important to clarify the competences and roles of different local, regional, subregional, and state authorities. Current commitments on investment facilitation found in RTAs with investment chapters or BITs do not generally distinguish between these levels.

Fourth, it is necessary to define in each case which country is better placed to advance investment facilitation policies. Investment facilitation is usually perceived as closed to investment promotion and thus as a task that pertains to the host state. However, in certain cases, home states could also play an important facilitation role in FDI, particularly with respect to LDCs, which are not always in a position to attract sustainable and responsible investment.

Fifth, it is important to define where investment facilitation efforts could be more effective. Undoubtedly, a multilateral agreement could reduce transaction costs and provide opportunities for states with different levels of development to provide inputs in the treaty-making process. However, the times seem not to be promising for multilateral initiatives, in the current environment of stagnation or blockage of multilateral international initiatives and the rise of unilateral trade and investment actions—or a plain return to protectionism. In addition, the overall criticism of the international investment regime also adds another element of uncertainty to such negotiations, regardless of where they take place—the WTO, the United Nations system, or other fora.

Even with those uncertainties, it seems reasonable at least to try a multilateral discussion of the topic, emphasising that FDI is needed to achieve the SDGs, and countries are always free to decide to promote only responsible or sustainable investment. Countries could promote the use of existing provisions on investment facilitation—such as those referred in this study—to reach a consensus about existing best practices that can serve as a basis for a multilateral agreement. Yet, the problems in achieving consensus on this issue described earlier in this paper seem to be insurmountable. Even among like-minded countries, there is no consensus on which fora such negotiations should take place in or the nature of such an agreement. Some believe that in the present context, where multilateralism is under attack, efforts on investment facilitation should rather be directed at developing soft law instruments, such as best practices and voluntary codes of conduct. A binding system of commitments under the WTO—the only forum where a proposal is now informally discussed by a limited number of member countries—is still far away. Furthermore, it remains uncertain whether the WTO's current negotiating mandate allows it to deal with investment facilitation (Singh 2018).

In the likely event that those initiatives are unsuccessful, countries could also insist on promoting investment facilitation, either at a bilateral or even a unilateral level, reducing bureaucracy and facilitating the procedures to establish and retain foreign investment, and effectively assisting foreign investors in those processes, if the investment is both sustainable and responsible. Maybe the worst thing that can happen if investment facilitation measures are correctly designed and effectively implemented is that these countries get exactly what they want: more sustainable investment.

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Annex 1. International Investment Agreements with Explicit Provisions on Investment Facilitation

Treaty	Improving investment climate	Removal of bureaucractic impediments	Facilitation of investment permits	Facilitation of permits for entry and sojourn of personnel	Transparency	Capacity building on investment issues	Treaty body with investment facilitation tasks
Finland-Kazakhstan BIT (1992)*	√						
Armenia-Iran BIT (1995)			√				
Cotonou Agreement (2000)						√	
CARICOM Single Market (2001)		√					
China-Hong Kong CEPA (2003)					√		
China-Macao Partnership Agreement (2003)					√		
BIMSTEC Framework Agreement (2004)	√				√		
Japan-Malaysia EPA (2005)				√	√	√	√
Indonesia-Japan EPA (2007)	√				√	√	
ECOWAS Supplementary Act on Investments (2008)					√	√	√
Canada-Peru FTA (2008)							√
ASEAN Comprehensive Investment Agreement (2009)	√	√			√		√
ASEAN-China Investment Agreement (2009)	√	√	√		√		

Treaty	Investment financing	Insurance programmes	Pre-establishment investor servicing	Post-establishment investor facilitation	Relation with investors and private sector	Joint cooperation on investment facilitation	Treaty body with investment facilitation tasks
Finland-Kazakhstan BIT (1992)*							
Armenia-Iran BIT (1995)							
Cotonou Agreement (2000)	√						
CARICOM Single Market (2001)							
China-Hong Kong CEPA (2003)				√		√	
China-Macao Partnership Agreement (2003)				√		√	
BIMSTEC Framework Agreement (2004)						√	
Japan-Malaysia EPA (2005)							√
Indonesia-Japan EPA (2007)							
ECOWAS Supplementary Act on Investments (2008)		√	√		√		√
Canada-Peru FTA (2008)							√
ASEAN Comprehensive Investment Agreement (2009)			√		√		√
ASEAN-China Investment Agreement (2009)			√				

Treaty	Improving investment climate	Removal of bureaucractic impediments	Facilitation of investment permits	Facilitation of permits for entry and sojourn of personnel	Transparency	Capacity building on investment issues	Treaty body with investment facilitation tasks
Eastern and Southern African States (ESA)-EU Interim EPA (2009)							
Malaysia-New Zealand FTA (2009)					√		
Egypt-Switzerland BIT (2010)			√	√			
India-Japan EPA (2011)							
China-Japan-Republic of Korea Trilateral Investment Agreement (2012)	√			√			
Australia-Malaysia FTA (2012)					√		
Cross-Strait Bilateral Investment Protection and Promotion Agreement (2012)		√			√		
Canada-China BIT (2012)							
Egypt-Mauritius BIT (2014)				√	√		
ASEAN-India Investment Agreement (2014)	√	√	√		√		
Brazil-Mozambique BIT (2015)					√		√
Angola-Brazil BIT (2015)					√		√
Brazil-Mexico BIT (2015)					√		√
Brazil-Malawi BIT (2015)					√		√
Brazil-Colombia BIT (2015)					√		√

Treaty	Investment financing	Insurance programmes	Pre-establishment investor servicing	Post-establishment investor facilitation	Relation with investors and private sector	Joint cooperation on investment facilitation	Treaty body with investment facilitation tasks
Eastern and Southern African States (ESA)-EU Interim EPA (2009)						√	
Malaysia-New Zealand FTA (2009)							
Egypt-Switzerland BIT (2010)							
India-Japan EPA (2011)						√	
China-Japan-Republic of Korea Trilateral Investment Agreement (2012)							
Australia-Malaysia FTA (2012)					√		
Cross-Strait Bilateral Investment Protection and Promotion Agreement (2012)					√		
Canada-China BIT (2012)						√	
Egypt-Mauritius BIT (2014)							
ASEAN-India Investment Agreement (2014)			√			√	
Brazil-Mozambique BIT (2015)				√	√		√
Angola-Brazil BIT (2015)				√	√		√
Brazil-Mexico BIT (2015)				√	√		√
Brazil-Malawi BIT (2015)				√	√		√
Brazil-Colombia BIT (2015)				√	√		√

Treaty	Improving investment climate	Removal of bureaucractic impediments	Facilitation of investment permits	Facilitation of permits for entry and sojourn of personnel	Transparency	Capacity building on investment issues	Treaty body with investment facilitation tasks
Brazil-Chile BIT (2015)					√		√
Brazil-Peru ETEA (2016)					√		√
Nigeria-Morocco BIT (2016)					√	√	√
Intra-MERCOSUR Investment Facilitation Protocol (2017)					√		√
China-Hong Kong CEPA Investment Agree-ment (2017)		√	√	√	√		√
Brazil-Ethiopia BIT (2018)					√		√
Brazil-Suriname BIT (2018)					√		√
	7	6	5	5	25	5	16

√	Hard commitment	√	Soft commitment	√	Cooperation

*Finland-Kazakhstan have signed a new BIT in 2007 (not yet in force) but without provisions on investment facilitation.

Treaty	Investment financing	Insurance programmes	Pre-establishment investor servicing	Post-establishment investor facilitation	Relation with investors and private sector	Joint cooperation on investment facilitation	Treaty body with investment facilitation tasks
Brazil-Chile BIT (2015)				√	√		√
Brazil-Peru ETEA (2016)				√	√		√
Nigeria-Morocco BIT (2016)		√	√	√	√		√
Intra-MERCOSUR Investment Facilitation Protocol (2017)				√	√		√
China-Hong Kong CEPA Investment Agree-ment (2017)			√				√
Brazil-Ethiopia BIT (2018)				√	√		√
Brazil-Suriname BIT (2018)				√	√		√
	1	2	6	13	15	7	16

√	Hard commitment	√	Soft commitment	√	Cooperation

Jointly implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), the RTA Exchange works in the interest of the sharing of ideas, experiences to date, and best practices to harvest innovation from RTAs and leverage lessons learned towards progress at the multilateral level. Conceived in the context of the E15 Initiative, the RTA Exchange creates a space where stakeholders can access the collective international knowledge on RTAs and engage in dialogue on RTA-related policy issues.

IDB
Inter-American Development Bank

ICTSD
International Centre for Trade and Sustainable Development