

Investment Facilitation:

Making sense of concepts, discussions and processes

*Background Note to the IISD Investment Law
and Policy Webinar on Investment Facilitation*



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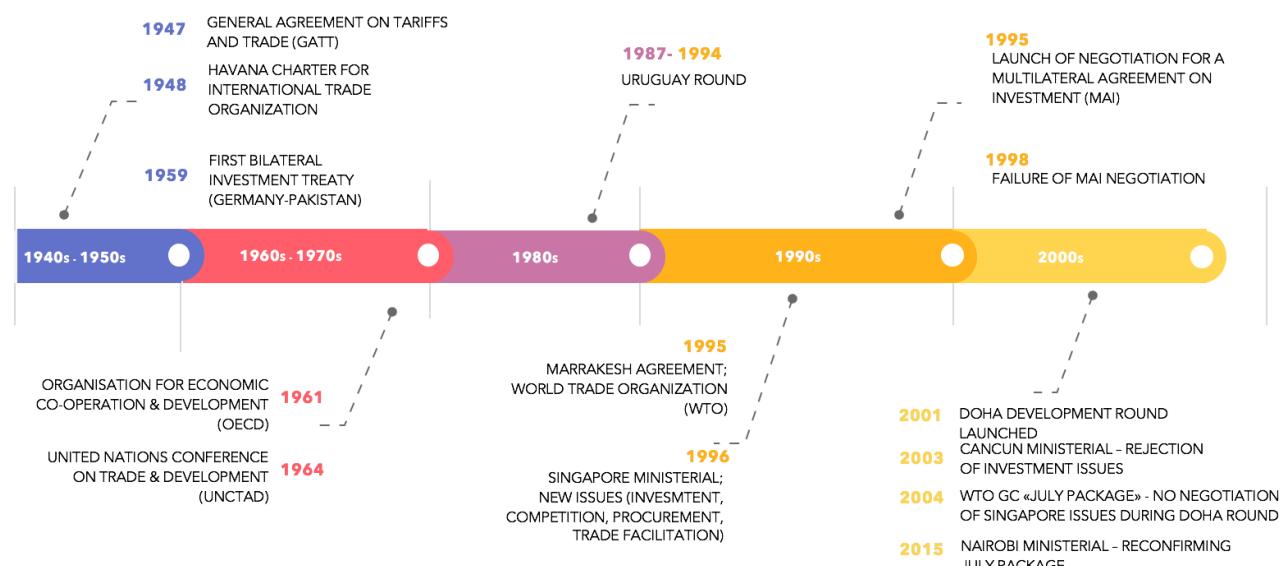
Introduction

Over the past few years, the topic of investment facilitation has made its way to the forefront of discussions on international investment law. This background note will provide an overview of discussions on investment at the global level in order to better understand and place the current discussions on investment facilitation.

Historical Overview of Global Processes on Investment

Before zooming into the narrow issue of investment facilitation, it is helpful to review the development of global investment governance since the years immediately after World War II, when the world economic order, very much as everything else, was being rebuilt from scratch.

Figure 1. Historic overview of global investment governance



In 1947, 25 countries signed the General Agreement on Tariffs and Trade (GATT). This was meant to be a temporary measure, paving the way for the establishment of an International Trade Organization (ITO), which was envisaged as an international regulatory body with responsibilities overseeing trade, foreign direct investment and other areas involving economic development. The negotiation of the Havana Charter—the instrument of constitution for the ITO—was concluded in 1948. The final texts of the charter took a non-liberal approach to investment and development matters due to the strong opposition from the developing countries (Drache, 2000). As is well known, the Havana Charter never went into effect, and the ITO was never established due to shifting of political priorities in many countries, especially the United States. In the 40 years that followed, GATT was the only multilateral instrument governing global economic order, and investment was not covered by this instrument.

The 1960s witnessed the establishment of two organizations with mandates covering global investment and economic development: the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). Neither of the organizations was set up as a regulatory body. Both take research analysis and technical assistances as their main responsibilities.



The first and only multilateral regulatory body on international economic governance was set up in 1995—the World Trade Organization (WTO). This was a direct result of a series of negotiations started in 1987, commonly known as the Uruguay Round of GATT. During the negotiations, the United States and other advanced economies, lobbied by business groups, tried hard to include liberal investment commitments in the WTO. However, as developing countries were not comfortable with liberalization commitments coupled with international dispute settlement procedures and were troubled by the possibility of losing political autonomy, eventually the pact only had very limited coverage on investment issues: the General Agreement on Trade in Services (GATS) covers investment measures relating to the establishment of commercial presence, as recognized by GATS as Mode 3 of trade in services. The Agreement on Trade-Related Investment Measures (TRIMs) also covers certain investment measures but only to the extent that they affect trade in goods.

Disappointed with Uruguay Round achievements, some advanced economies tried to include broader investment issues, especially market access, into a binding multilateral agreement. In 1995, the OECD led the negotiation of the Multilateral Agreement on Investment (MAI). The process began to fall apart shortly after it started as the high level of liberalization commitment demanded by some countries was simply not acceptable by others (Walter, 2001). The first investor-state cases under the investment chapter of the North America Free Trade Agreement (NAFTA) also contributed to the suspicion of investment protection provisions by some.¹ The negotiation finally stopped in 1998.

Another wave of attempts came back to the WTO. In 1996, at the Singapore Ministerial, a working group was set up to look more generally into how trade relates to investment. Strong opposition from developing countries prevented the adoption of a resolution. Multiple attempts to revise the issue were carried out in subsequent years, all fended off by developing countries. In 2003, the Cancún Ministerial did not make any progress because of this thorny issue. Finally, in August 2004, the General Council of WTO published the “July Package,” confirming that investment issue will not be negotiated in the WTO until the end of the current Round.² This was further confirmed recently in 2015 at the Nairobi Ministerial.³

¹ A major case that drew the public's attention was *Ethyl Corporation v. Canada*, initiated by a U.S. investor under the NAFTA in 1996, challenging Canadian government measures on the production of a certain gasoline additive. Canada eventually settled the case and paid the investor USD 13 million.

² WTO. (2004). Decision Adopted by the General Council on 1 August 2004, WT/L/579, available at https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

³ WTO. (2015). Nairobi Ministerial Declaration, WT/MIN(15)/DEC, para. 34, available at https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm



Developments at Bilateral and Regional Levels

In contrast to the WTO, which has very limited coverage on investment issues, a network of over 3,000 bilateral investment treaties (BITs) and investment chapters in free trade agreements (FTAs) has developed alongside the major international institutions to become the major source of law governing cross-border investments. These bilateral and regional agreements are highly fragmented and incoherent, resulting in over 850 arbitration cases brought primarily in the last two decades. The broad and unpredictable interpretations of these agreements by arbitral tribunals have been widely criticized.

The post-colonial era gave rise to an investment treaty model that focused almost exclusively on investment protection. In the 1980s, elements of investment liberalization began to make their way into investment treaties and chapters, becoming particularly prominent with the 1994 NAFTA. More recently, an increasing number of newly concluded agreements have begun to incorporate provisions with more consideration for sustainable development.

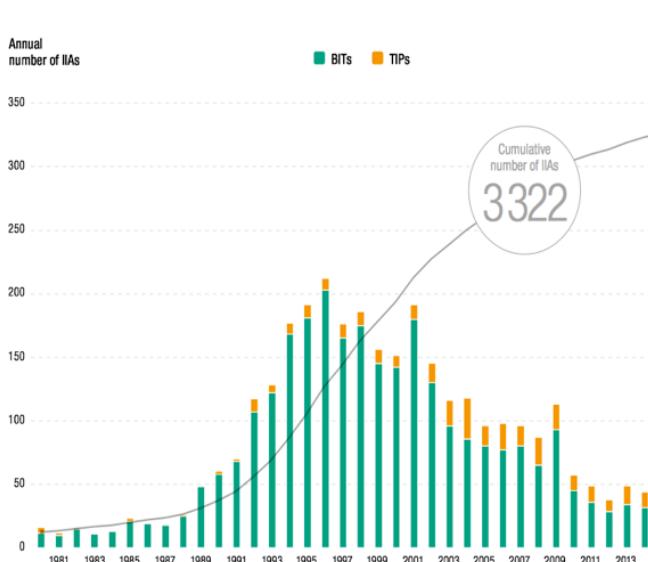


Figure 2. Trends in investment treaties signed, 1980-2017

Source: UNCTAD (2018, p. 89).

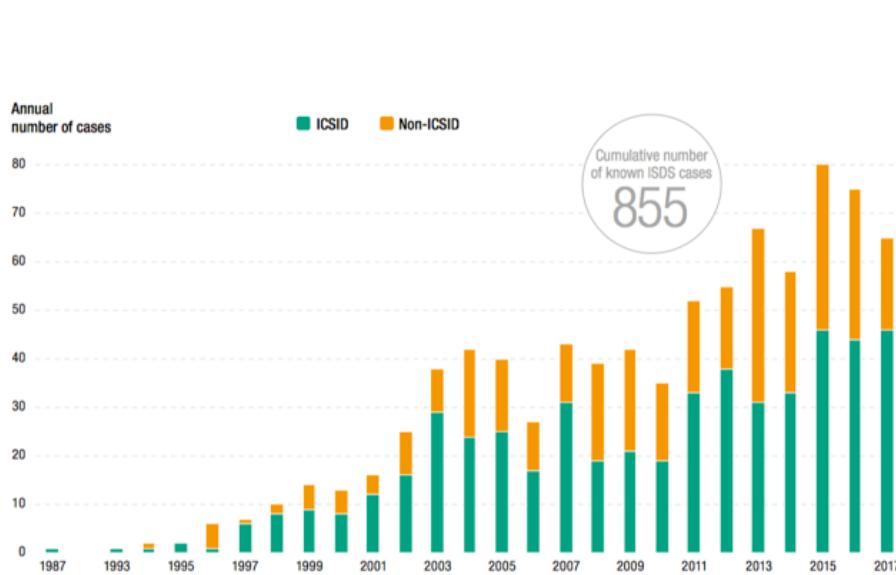


Figure 3. Trends in known treaty-based ISDS cases, 1987-2017

Source: UNCTAD (2018, p. 92).



In addition to moving away from old models, some countries took more innovative approaches. An important example is Brazil's new bilateral treaty model called the Cooperation and Facilitation Investment Agreement (CFIA) introduced in 2014. Instead of focusing on investment protection and liberalization, the CFIA focuses on facilitation, cooperation and risk mitigation. The new model is the result of an extensive consultation by the government with the private sector to identify those key areas businesses would prioritize in making their investments. It is worth noting that the focus of the CFIA is on facilitation and cooperation, rather than liberalization and protection, though there are some limited elements of both included (Morosini & Sanchez Badin, 2015). Each CFIA includes annexes listing practical issues (such as transfers of payments, visas and environmental and technical regulations) to be covered under the cooperation arrangement to ensure a better mutual understanding and swift application of each other's respective laws and regulations. In addition, the CFIA requires investors to assume certain responsibilities to be able to enjoy the benefit of facilitation provided by the host state (Bernaconi-Osterwalder & Brauch, 2015).

Ongoing Investment Facilitation Efforts in International Institutions

The approach taken by Brazil is in large part in line with UNCTAD's recommendation on using investment facilitation efforts to channel investment towards sustainable development. The Global Action Menu for Investment Facilitation initially published by UNCTAD in 2016 reaffirms the fundamental importance of investment facilitation for growth and development and proposes 10 action lines with a series of options for investment policy-makers and government agencies (UNCTAD, 2017). The menu defines investment facilitation as policy measures to make it easier for investors to establish, expand and operate in host countries (UNCTAD, 2017, p. 4). It further confirms that this does not require new laws or regulations to be put into place (UNCTAD, 2017, p. 11) but encourages enhancing regulatory transparency and predictability of the host state's investment environment (Action Lines 1 and 2). Other improvements could be in the areas of streamlining and speeding up administrative procedures (Action Line 3).

In practice, it would be critical to see how these are defined in context, as they are not easily delineable from investment protection or liberalization commitments also covered by existing bilateral or regional investment agreements. For example, typical investment protection clauses in the traditional investment treaty models—such as national treatment, most-favoured-nation treatment, fair and equitable treatment, expropriation, and other clauses

Figure 4. Action Lines 1-3 of UNCTAD's Global Action Menu

ACTION LINE
1
ACTION LINE
2
ACTION LINE
3
ACTION LINE

Promote accessibility and transparency in investment policies and regulations and procedures relevant to investors.

- Provide clear and up-to-date information on the investment regime.
- Establish a single window or special enquiry point for all enquiries concerning investment policies and applications to invest.
- Maintain a mechanism for providing timely and relevant notice of changes in procedures, applicable standards, technical regulations and conformance requirements.

Enhance predictability and consistency in the application of investment policies.

- Ensure consistent application of investment regulations across relevant institutions.
- Avoid discriminatory use of bureaucratic discretion in the application of laws and regulations on investment.
- Establish clear criteria and procedures for administrative decisions with respect to investment screening, appraisal and approval mechanisms.
- Establish amicable dispute settlement mechanisms, including mediation, to facilitate investment dispute prevention and resolution.

Improve the efficiency of investment administrative procedures.

- Shorten the processing time and, where appropriate, simplify procedures for investment and license applications, investor registration and tax-related procedures.
- Promote the use of time-bound approval processes or a "no objections within defined time limits" approach to speed up processing times, where appropriate.
- Provide timely and relevant administrative advice; keep applicants informed about the status of their applications.
- Encourage and foster institutional cooperation and coordination. Where appropriate, establish an online one-stop approval authority; clarify roles and accountabilities between national and local government or where more than one agency screens or authorizes investment proposals.
- Create "Client Charters" in investment agencies that define service delivery standards and good practices.

Source: UNCTAD (2017, pp. 5–6).



prohibiting unreasonable, arbitrary or discriminatory measures—are also designed to ensure predictability and consistency. It is widely recognized that the broad interpretations of these clauses by investor–state arbitration tribunals have extended to include precisely these types of measures linked to transparency and predictability and have led to awards issued against states. For example, in *Metalclad Corporation v. Mexico*, the tribunal held that the obligation to provide fair and equitable treatment to investors encompasses a high standard on regulatory transparency and predictability.⁴ Other tribunals took similar approaches.⁵

In addition to UNCTAD, other international organizations have been working on the issue of investment facilitation. For example, the OECD's Policy Framework for Investment contains a chapter on investment facilitation, which distinguishes investment facilitation from investment promotion (OECD, 2015). Noting that liberalization has an “unambiguously positive effect on investment,” it encourages national governments to implement policies to facilitate investment. Recently, the OECD also indicated its openness to a multilateral framework for investment facilitation (OECD, 2018).

G20 first mentioned investment facilitation during China’s presidency in 2016. That year, the group adopted the G20 Guiding Principles for Global Investment (G20, 2016). In the following year, under Germany’s presidency, a draft Investment Facilitation Package was tabled and discussed among the members.⁶

⁴ Metalclad Corporation v. Mex., ICSID Case No. ARB(AF)/97/1, Award, para. 76 (August 30, 2000).

⁵ See, for example, Tecnicas Medioambientales TECMED S.A. v. Mex., ICSID Case No. ARB(AF)/00/2, Award, para. 164 (May 29, 2003); LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, para. 125 (October 3, 2006); Murphy Exploration & Prod. Co. Int'l v. Ecuador, PCA Case No. 2012-16, Partial Final Award, para. 206 (May 6, 2016).

⁶ The discussion at G20 is currently on hold due to opposition from the United States (Third World Network, 2017).



A New Multilateral Framework on Investment Facilitation?

Discussions on investment facilitation have drawn much attention from members at the WTO. After more than a decade of negotiation, the Trade Facilitation Agreement was concluded in 2013 and went into effect in 2017. Seeing this as a successful example that can be adapted and applied to investment facilitation measures, some WTO members proposed to explore the options for a multilateral instrument on investment facilitation. During the Buenos Aires Ministerial in 2017, over 70 members (including the European Union and each of its member states) issued a joint statement calling for “structured discussions with the aim of developing a multilateral framework on investment facilitation” (WTO, 2017). Since March 2017, there have been at least six proposals submitted to WTO by members.⁷

Figure 5. Overview of investment facilitation elements identified in WTO member proposals

	Def. of IF	Regulatory Transparency and Predictability	Streamlining & simplifying admin process	Non-discrim.	Single processing window	E-application	Protection of confidential information	Facilitation of outward investment	Appeals and reviews of admin decisions	Nat'l institution arrangement	Multilateral institution arrangement	Institutional cooperation	SDT	Tech. assistance	CSR	Dispute Prevention and/or Dispute Settlement	Future Disciplines on Market Access and Treatment
Russia (2017)		Y	Y		Y	Y	Y			Y			Y	Y		Domestic remedies	Y
MIKTA* (2017)		Y	Y	Y									Y		Y		
FIFD+ (2017)		Y	Y										Y	Y			
China (2017)		Y	Y		Y			Y		Y			Y	Y	Y	Y	
Argentina & Brazil (2017)	Y	Y	Y		Y					Y			Y	Y	Y	Y	
Brazil (2018)	Y	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	Y	Refer to DSU	

* MIKTA is a group of five WTO members: Mexico, Indonesia, Korea (Republic of), Turkey and Australia.

+ FIFD stands for “Friends of Investment Facilitation for Development”, a group of WTO members. Initiated by China in April 2017. By December 2017, 16 countries had joined FIFD.

Meanwhile, other members have been hesitant to start negotiating the new issues, as the July Package in 2004 clearly prioritized the need to conclude the Doha Round. It is important to note that most of the proposals submitted do not yet contain a clear definition of investment facilitation. Also, most of the proposals still focus predominately on the obligations of the host states and would raise concerns about the actual application due to their broad and vague coverage of measures. These would have to be further refined.

⁷ Following is a list of the proposals. Figure 5 shows an overview comparison of the elements contained in each proposal:

- Russia: Proposed Multilateral Disciplines for Investment Facilitation ([JOB/GC/120](#)), March 31, 2017
- Mexico, Indonesia, Korea, Turkey and Australia (MIKTA): Reflections on Investment Workshop ([JOB/GC/121](#)), April 6, 2017
- Friends of Investment Facilitation for Development (FIFD): Proposal for a WTO Informal Dialogue on Investment Facilitation for Development ([JOB/GC/122](#)), April 26, 2017
- China: Possible Elements for Investment Facilitation ([JOB/GC/123](#)), April 26, 2017
- Argentina & Brazil: Possible Elements of a WTO Instrument on Investment Facilitation ([JOB/GC/124](#)), April 26, 2017
- Brazil: Proposal for an Investment Facilitation Agreement ([JOB/GC/169](#)), February 1, 2018



Conclusion

The past half century has witnessed multiple attempts to create binding multilateral instruments on investment. All of these have failed. The limitation of the current discussions at the WTO to investment facilitation reflects the wish of countries to avoid the thorny issues that have led to failure in the past: investment liberalization and market access, and investment protection. Whether countries will accept developing binding disciplines for new issues before coming to some kind of outcome in the Doha Development Round and whether the issue of investment facilitation can be shielded to exclude investment protection and liberalization elements remain open questions. While these debates continue, other institutions, like the UNCTAD, will continue their work on the issue of investment cooperation and facilitation. The focus of this work on sustainable development will be crucial. Indeed, given the importance of investment for achieving the Sustainable Development Goals (SDGs), a discussion is urgently needed on designing new processes to promote not just any investment, but investment that advances sustainable development.



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