Briefing Note: Investment Promotion and Facilitation for Sustainable Development

July 2020

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What are investment promotion and investment facilitation?

Investment is a critical component of sustainable development. In particular, under the right conditions, foreign direct investment (FDI) can improve economic growth and living standards, create jobs, transfer technology and know-how and result in supply chain upgrading. However, its benefits are not automatic, and, if not carefully governed, investment can result in harm to the environment, labour standards and lead to tax evasion or other undesirable outcomes.

Investment promotion and investment facilitation, in turn, can help states attract, expand and retain FDI. These two concepts are mutually supportive but in practice entail very different activities: investment promotion is about promoting a country (or location within a country) as an investment destination, and investment facilitation means ensuring that investors do not face undue hurdles in establishing or expanding investments or in conducting their business, including opaque, confusing, or burdensome regulatory requirements; complicated or delayed administrative procedures; difficulties in understanding or assessing investment opportunities; corruption; or a lack of critical infrastructure or services.

Even though in many countries investment promotion agencies are tasked with both promoting and facilitating investment, the legal and policy frameworks required to effectively facilitate and retain investment require broader governance and government approaches.

Key takeaways:

- Investment promotion is about promoting a country (or location within a country) as an investment destination.
- Investment facilitation is ensuring investors do not face undue hurdles in establishing or expanding investments or in conducting their business.

What is investment facilitation for sustainable development?

Traditional concepts of investment facilitation, and even many of today's discussions of this topic (even those purporting to incorporate sustainable development objectives), tend to be investor-centric, focusing on speeding up approvals, removing hurdles or regulatory barriers and stabilising the legal and regulatory environment.

However, as the United Nations Conference for Trade and Development (UNCTAD) Global Action Menu for Investment Facilitation (2016) states:

> *[A]ny facilitation initiative cannot be considered in isolation from the broader investment for development agenda. Effective investment facilitation efforts should support the mobilization and channeling of investment towards sustainable development, including the build-up of productive capacities and critical infrastructure. It should be an integral part of the overall investment policy framework, aimed at maximizing the benefits of investment and minimizing negative side effects.*

Similarly, the Organisation for Economic Co-operation and Development (OECD), as reflected in its Policy Framework for Investment, conceptualises investment facilitation as a part of a broader policy context in which governments should aim to support an enabling environment for investment, but one that enhances its development benefits to society (Novik and de Crombrugghe, 2018).

Thus, factors that are now recognised as critical to advance, alongside investor-oriented policies, are environmental protection, local economic and social development (including with respect to female entrepreneurship), industrial upgrading, employment and skills training, human rights, health, climate and other elements of national, regional and international development plans and agendas.

Investment facilitation for sustainable development, then, may be understood as a combination of tools, policies and processes that foster a regulatory and administrative framework to facilitate investment that maximises and does not undermine sustainable development objectives. However, there is not sufficient empirical evidence or common agreement as to precisely what tools, policies and processes are necessary or desirable for countries to facilitate investment for sustainable development, and whether these tools are best implemented at the:

- national
- regional or
- international level

and whether by:

- the home state of the investor
- the host state of the investment
- the investor
- bilateral or multilateral networks (e.g. economic organisations or treaty-based networks) or
- international institutions (Novik and de Crombrugghe, 2018).

Key takeaways:

- Investment facilitation for sustainable development is a combination of tools, policies and processes that foster a regulatory and administrative framework to facilitate investment that maximises and does not undermine sustainable development objectives.
- Each tool may be best implemented at the national, regional or international level, and/or by the home state, host state, investor, bilateral or multilateral networks or international institutions.

National, regional or international governance and tools

Decisions as to how a country will admit, approve and govern investment are complex and require weighing (competing) costs and benefits in areas as wide-ranging as environment, health, labour, competition, tax and sector-specific considerations that may vary by industry (e.g. financial institutions, extractives, water and sanitation, health care, manufacturing, telecommunications, agriculture, etc.) and indeed by economy.

Regulatory issues relating to the accessibility and transparency of investment regulations and procedures, the administrative procedures applicable to an investment and the ways in which linkages with the broader economy can be facilitated are all focused at the national level. Relatedly, many governments have individually set forth development agendas and plans that can be significantly advanced through investment facilitation measures. Thus, national legal and regulatory frameworks are in many ways most directly relevant to advancing sustainable development outcomes (Brauch et al., 2019).

Many governments have also established regional development objectives that incorporate investment facilitation measures. For example, the Southern African Development Community, the Common Market for Eastern and Southern Africa and other regional organisations have model agreements and other initiatives to advance certain investment objectives to and within the region. These established regional platforms are also important for advancing agreed outcomes and facilitating investment for sustainable development purposes.

However, the role for investment facilitation is broader than just the policies of capital importing states, or among regions; the circumstances under which home states should be, and are, regulating, facilitating or subsidising (e.g. via political risk insurance, guarantees, investment treaty protection) outward investment vary by economy, but are also part of the larger question of how and under what circumstances capital is, and should be, moving from one economy into another.

Similarly, investor-focused norms relating to responsible business conduct and responsibilities to respect human rights are quickly evolving, placing more responsibility, and liability, on corporate actors to comply with these frameworks.

As such, there may also be an important role for supra-national-level cooperation that may help coordinate facilitation efforts, promote learning and address certain collective action challenges. (Novik and de Crombrugghe, 2018).

> **Key takeaway:** *Many of the regulatory issues related to investment facilitation for sustainable development may be best implemented at the national level, but there may also be a role for regional and international cooperation to address certain governance issues.*

Using international agreements to promote and facilitate sustainable investment

In a world of global value chains and mobile capital, countries face various collective action problems relating to investment facilitation for sustainable development. For example, many countries are competing for FDI, and regulatory races to the bottom, in terms of environmental, labour and social standards, can occur. From this perspective, 'investment facilitation' may mean excessively streamlining and expediting critical requirements, such as environmental, social or human rights impact assessments with the hope of easing FDI, despite evidence that these processes ultimately result in higher-quality and longer-term investments (Coleman et al., 2018). Crafting norms and platforms that will incorporate international cooperation on these issues may help balance the competing priorities of investment facilitation from a sustainable development perspective.

Similarly, bridging transnational governance gaps, in terms of drafting, monitoring and enforcing, laws regulating corporate conduct, can be difficult. Corporate structuring can result in eroding tax bases, externalised harms to societies and an inability for home or host economies to effectively obtain information about or regulate corporate conduct. International cooperation and information-sharing relating to corporate families and ways in which the investment chain can be effectively regulated for the social benefit of both home and host country could similarly be a useful basis for supra-national efforts.

Finally, platforms for information exchanges surrounding best practices and challenges may be underdeveloped. Investment promotion agencies and other government entities may wish to better understand and benefit from successful practices, or learn from challenges, of other countries, in establishing:

- tools to facilitate investments (one-stop shops, business registration systems, aftercare services)
- policies to improve investment (rules on transparency, anti-corruption practices, good governance mechanisms) and
- processes to make tools and policies useful (dialogues; interagency coordination; capacity-building) (Novik and de Crombrugghe, 2018; Brauch et al., 2019).

What will be important for governments to consider is, to the extent that regional or international efforts on investment facilitation are advanced, the extent to which sustainable development objectives are achieved through more collaborative, 'soft' approaches, or though more commitment-based, 'hard' approaches. Examples of each are discussed below.

Key takeaways:

- Solving collective action problems is necessary to facilitate investment for sustainable development, although at what level and with what tools this is best accomplished is complex and often unclear.
- Governments should consider whether 'soft', collaborative or 'hard', commitment-based approaches best solve these problems.

The Brazilian model – using international investment agreements to promote investment cooperation and facilitation

In 2014 Brazil, a country that has never been a party to an investment agreement containing investor–state dispute settlement, proposed a new model of investment agreement – one that focused less on concepts of 'investor protection' and rather focused on attracting and retaining investment with a focus on 'cooperation and facilitation' (Brauch, 2020). Brazil has since concluded several cooperation and facilitation investment agreements (CFIAs).

The Brazilian model arose out of consultations with a wide variety of domestic stakeholders and foreign investors, trying to understand the ways in which investor attraction and retention could be better achieved, and how international agreements and cooperation could help facilitate these processes. As a result of these inquiries, Brazil's agreements now include contact points, and establish national ombudsperson offices as a focal point to manage concerns surrounding investment processes. Procedures are in place that facilitate visas and other procedural issues that are necessary for investment to occur. While Brazil had originally intended that the ombudsperson offices would be available only to investors from CFIA treaty partners, it has now opened these offices and the services that they offer to all foreign investors.

While relatively new, the Brazilian model represents a shift in thinking about international investment agreements, moving towards a focus on improved coordination and consultation with an aim of facilitating investment in the treaty parties. The aim is to prevent disputes, and, if and when disputes occur, and cannot be resolved by the contact point, ombudsperson or other mechanisms established by the treaty, to provide for state–state resolution of these issues, through dispute settlement if required, rather than granting to private companies the right to bring a claim against the host country.

Key takeaway: *Brazil's new model represents a shift in thinking about international investment agreements, moving towards a focus on improved coordination and consultation with an aim of facilitating investment into the treaty parties.*

World Trade Organization – structured discussions on investment facilitation

In December 2017, 70 World Trade Organization (WTO) Members issued a Joint Ministerial Statement on Investment Facilitation for Development calling for structured discussions with the aim of developing a multilateral framework on investment facilitation (which should not include market access, investment protection and investor–state dispute settlement). A total of 98 members are currently participating in discussions. These discussions have not yet resulted in agreement as to the nature of the framework that should emerge, and whether it should include binding rules or focus to a greater extent on cooperation and softer obligations. Thus far, text has not been made public, although bracketed versions are significantly advanced and were intended to be progressed or finalised during the course of 2020 (Baliño et al., 2020).

While there is agreement on what legal format or content the proposed framework would have, the current draft prepared contains a mix of binding and best-effort obligations, subject to capacity-building and special and differential treatment carve-outs for developing countries. Substantive areas included in the WTO discussions include non-discrimination and most-favoured nation treatment; transparency and predictability of investment measures; streamlining and speeding up administrative procedures; establishment of contact points; regulatory coordination and coherence; corporate social responsibility; and anti-corruption (Baliño et al., 2020).

Inclusion of investment facilitation within the WTO has been opposed by some countries not participating in the framework discussions, and other commentators for various reasons, including that WTO processes typically lead to binding disciplines, while investment facilitation measures may benefit from cooperative approaches and capacity-building, and that the WTO does not have a mandate to advance sustainable development approaches (Brauch, 2017; Mann and Brauch, 2018).

> **Key takeaway:** *The WTO is addressing investment facilitation through an agreement, although the final framework, including whether or not it should include any binding obligations, is not yet agreed.*

Conclusion: how should governments approach these complex issues?

When considering how to approach the issue of investment facilitation governments may wish to start with the following questions:

- What are national (and sub-national), regional and international sustainable development objectives?
- What frameworks, national, regional and international, are currently governing those objectives?
- What investment processes and outcomes are desirable to achieve those objectives?
- Are there regulatory or technical gaps that are putting up hurdles to desirable investment?
- Are those regulatory or technical gaps best addressed at national, regional or international levels?
- What tools, policies and processes are best suited to address those gaps?
- Are such tools, policies and processes most effective as voluntary- or commitment-based measures, and what are the costs and benefits of each alternative?
- What type of assistance, if any, would governments need to implement these tools, policies and processes?
- What are the costs, benefits and potential consequences (intended or unintended, positive or negative) of taking these steps?

About

This briefing note was authored by Brooke Skartvedt Guven, Senior Legal Researcher at the Columbia Center on Sustainable Investment (CCSI).

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Cover Photo by Tyler Casey on Unsplash

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