Can Existing International Agreements on 'Investment Facilitation' Advance Sustainable Development, Climate Action, and Human Rights?

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Many governments are turning to bilateral, regional, and multilateral agreements on 'investment facilitation,' with measures aimed at "making it easier for investors to establish or expand their investments, as well as to conduct their day-to-day business in host countries," as defined by the United Nations Conference on Trade and Development (UNCTAD).[1] *But can these agreements stimulate sustainable investment, including in a just transition away from fossil fuels to renewable energy systems?*

Pivoting toward genuine investment facilitation

At the Columbia Center on Sustainable Investment (CCSI), we think of investment facilitation differently,[2] with a focus on sustainable development for the benefit of host countries and communities rather than narrowly focusing on the economic interests of foreign investors.

Governments should primarily adopt measures to address the real economic determinants of sustainable investment. For example, to scale investment in renewables,[3] facilitating investment requires overcoming various challenges currently faced by governments, particularly in lower-income economies. These challenges[4] include:

- Obtaining access to low-interest, long-tenor concessional finance[5] from development finance institutions, both to enable public investment and to leverage and de-risk private investments that would not come without public guarantees or finance.
- Developing ambitious regional[6] and national[7] energy roadmaps and master plans,[8] to provide clarity on energy strategy and targets, permitting processes, guarantees for offtake, the needs for investment in generation, grid, and storage[9] infrastructure, and a pipeline of bankable projects.
- Designing appropriate fiscal policy tools, such as carbon pricing and incentive schemes.
- Streamlining permitting processes for renewable energy while addressing social and environmental concerns and realizing human rights.[10]
- Building institutional capacity[11] in energy ministries and power utilities.
- Strengthening domestic administrative and judicial systems[12] to enforce energy investment rules.
- Phasing out subsidies and public financing for fossil fuel investments.
- Ceasing the expansion of coal, oil, and gas investments, and creating mechanisms to encourage keeping fossil fuels in the ground.
- Supporting upskilling and reskilling for low-carbon energy jobs and livelihoods.
- Creating mechanisms for transparency, accountability,[13] stakeholder participation, and procedural justice,[14] such as just transition commissions or task forces,[15] to understand the concerns of vulnerable groups and protect their rights.

In the context of a just energy transition, genuine investment facilitation mechanisms—particularly those put forward by emerging and developed economies—should be tailored to help their partners overcome these and other barriers to sustainable energy investment, with higher-income governments committing to providing capacity building, technical, and financial assistance to lower-income governments.

More broadly, governments should redefine 'investment facilitation' and reshape the agenda around catalyzing drivers and lifting roadblocks to the massive sustainable investments needed to achieve global goals.

Safeguarding the notion of investor-focused facilitation

However, it was a narrower, investor-focused notion of 'investment facilitation' that inspired agreements such as Brazil's Cooperation and Facilitation Investment Agreements[16] (CFIAs), the Angola–EU Sustainable Investment Facilitation Agreement[17] (SIFA), the Protocol on Investment[18] to the African Continental Free Trade Area Agreement[19] (AfCFTA), and the proposed Investment Facilitation for Development Agreement (IFDA)[20] at the World Trade Organization (WTO).

Domestic law should hold the primary role under that investor-focused notion of facilitation. Governments—through their investment promotion agencies[21] (IPAs) and other investment authorities—can and often do take 'investment facilitation' measures unilaterally, based on their domestic legal regimes. Unilateral measures ensure greater flexibility for governments, especially in developing economies that may not be in a position to take on international obligations. To the extent it is desirable to foster international cooperation and coordination on facilitation for investors, international instruments can only be useful if they require higher-income governments to provide technical and financial assistance to lower-income governments that lack the resources to build their capabilities to facilitate investment.

Though investment is fundamental to achieving sustainable development, not all investment is sustainable, and therefore not all investors are worthy of facilitation. To help ensure that existing types of 'investment facilitation' agreements advance and do not undermine sustainable development, climate action, and human rights, governments should exercise care in (1) defining the types of investment that will benefit from facilitation measures, (2) studying what provisions to avoid or to include, and (3) accounting for the outsized risks and costs of investment treaties with investor–state dispute settlement (ISDS).

1. Defining the types of investment that will benefit from facilitation measures

Governments may consider facilitating not just any kind of investment, but only sustainable investment. To be considered sustainable, projects should be required to demonstrably advance and not undermine the achievement of the Sustainable Development Goals (SDGs); climate change mitigation, adaptation, and resilience goals under the Paris Agreement; national or regional development priorities; and human rights requirements. Accordingly, unsustainable investments would not benefit from traditional 'investment facilitation' measures such as streamlined procedures and investor aftercare services.

The proposed WTO IFDA has the stated goal of facilitating investment for sustainable development. But based on the WTO factsheet[22] and analyses[23] of drafts, the provisions of the IFDA are not aimed at facilitating only investment that is sustainable; instead, they facilitate all foreign direct investment (FDI) in all economic sectors, regardless of the climate, sustainability, or human rights performance of the project.

IFDA provisions on sustainable investment are limited to encouraging voluntary measures for responsible business conduct, falling short of mandatory and enforceable norms on investors.

If they pursue other 'investment facilitation' instruments, governments should consider raising the bar by adopting mandatory and enforceable requirements imposed on investors both by capital-exporting and capital-importing governments and by requiring that investors comply with those requirements to benefit from facilitation measures.

2. Studying what 'investment facilitation' provisions to avoid or to include

In the negotiation of the proposed IFDA, important exclusions from the scope of the agreement ultimately made the negotiation viable and palatable to many, though not all, WTO members: market access, investment protection, and ISDS. Governments should replicate those exclusions in any international instrument on 'investment facilitation.'

In determining what provisions to include, IPAs and other investment authorities are most well suited to identify what measures are most effective, and they may increase cooperation in that regard. They may draw ideas from their own practice, existing agreements, UNCTAD's Global Action Menu for Investment Facilitation,[24] and other work by UNCTAD, the Organization on Economic Co-operation and Development (OECD),[25] the World Economic Forum[26] (WEF), and CCSI.[27]

In addition, international instruments on 'investment facilitation' give governments an opportunity to create additional hurdles, or 'investment un-facilitation' measures, to effectively discourage and reduce undesirable, unsustainable investments. These may include additional investments in coal, oil, and gas supply—which are not needed in a Paris-aligned pathway to net-zero by 2050[28]—along with others that work against the SDGs and human rights. Rather than facilitating those investment projects, governments should consider subjecting them to stricter administrative procedures and oversight.

3. Accounting for the outsized risks and costs of investment treaties with ISDS

When considering 'investment facilitation' provisions in international instruments, it is advisable that governments do not neglect the outsized risks and costs of investment treaties with ISDS. In practice, these treaties protect investments that often are unsustainable, damaging to the climate, detrimental to human rights, or all the above.[29]

Decades of academic literature indicate that there is no conclusive empirical evidence[30] that investment treaty protections and ISDS are effective at fostering sustainable investment, including renewable energy projects.[31] At the same time, there is robust evidence in academic literature[32] that investment protection and ISDS render policymaking more difficult and costly for governments and limit their regulatory space for sustainable development, including the flexibility governments need to regulate energy investments.

Investment treaties and ISDS are increasingly used against legitimate policy measures in the energy sector;[33] for example, measures to restrict oil and gas exploration or exploitation, stop the expansion of pipelines and other fossil fuel infrastructure, or phase out coal-fired power generation; as well as measures to regulate investments in renewables.

Many governments, international organizations, academics, and civil society stakeholders have recognized that investment treaties and ISDS are problematic. Reforms so far have not been effective[34] at curbing those risks and costs.

Adding 'investment facilitation' provisions onto investment treaties or concluding 'investment facilitation' agreements without reforming the stock of more than 2,500 investment treaties in force does nothing to address the risks and costs of the existing regime. Unsustainable investors could still bring ISDS cases challenging public policies and even undermine well-intended 'investment facilitation' policies.

Terminating investment treaties and withdrawing advance consent to ISDS[35] would allow governments to clear the path[36] from problematic treaties centered on investment protection and ISDS, which in practice benefit unsustainable investment. From a clean slate, governments could design effective international investment governance approaches and instruments[37] centered on genuine facilitation, cooperation, and regulation of investment for sustainable development.

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