Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia FDI Perspectives
Perspectives on topical foreign direct investment issues
No. 291 November 16, 2020
Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Riccardo Loschi (Riccardo.Loschi @columbia.edu)

Investment facilitation and the GATS: Do overlaps matter?*

by
Rudolf Adlung, Pierre Sauvé and Sherry Stephenson**

Discussions on investment facilitation have generated more traction than any other recent WTO initiative. Launched by a Joint Ministerial Statement (JMS) at the WTO's 2017 Ministerial Conference, they currently involve over 100 WTO members. They wade into new territory by developing investment facilitation (IF) disciplines applicable to all sectors. The discussions overlap with two ongoing negotiations on the domestic regulation of service sectors: one proceeds from a mandate enshrined in Article VI:4 of the General Agreement on Trade in Services (GATS); the second flows from a JMS endorsed by some 50 WTO members.

The broad modal definition of services trade includes suppliers' commercial presence (Mode 3—akin to FDI) in host countries. It is the most important means of supplying services internationally, accounting for some two-thirds of world FDI stocks and flows. While WTO members often scheduled services commitments at low levels of market opening in the Uruguay Round, their propensity to undertake commercially meaningful Mode 3 commitments on market access and/or national treatment is generally high. This reflects positive attitudes toward the contribution of services FDI to economic development.

GATS commitments trigger follow-up obligations, concerning, *inter alia*, the administration of measures in a reasonable, objective and impartial manner and the observance of regulatory disciplines, pending the outcome of the Article VI:4 negotiations. Focusing on licensing and qualification requirements, technical standards and the like, these negotiations have lingered inconclusively for 25 years. Sparked by recent developments, they have, however, attracted renewed interest in an IF context.

Navigating the interaction of IF disciplines and domestic regulation requirements is a challenge. Issues include admission criteria and processes, license fees, timeframes, transparency and notification requirements, opportunities to comment on proposed measures, and the administrative review of decisions. Responsibilities at the national level tend to be scattered across various ministries and agencies that are not necessarily used to coordination and cooperation. This, in turn, raises the risk of substantive and procedural overlaps that, compounded by uncertainties surrounding the respective mandates,[1] might give rise to inconsistencies.

Most conflicts leading to FDI withdrawals stem from alleged adverse regulatory changes, breaches of contract, *de facto* expropriations, transfer and convertibility restrictions, and more recently from lack of transparency and predictability in dealing with public agencies and delays in obtaining the necessary government permits to start or operate businesses.

There are several areas of overlap between the IF and domestic regulation discussions. For instance, GATS Article III obligations on enquiry points already extend to investment in services. Yet, similar provisions are included in the draft Reference Paper on Domestic Regulation Disciplines for Services and the draft IF text. However similar, parallel sets of administrative procedures and notification obligations would entail costly duplication and confuse services exporters and investors. Similar overlaps could arise in such other areas as the substantive criteria to be used to determine whether qualification and licensing requirements and technical standards for investors are unnecessarily burdensome. Conflicts could arise if IF disciplines defining "more burdensome than necessary" differ from GATS language.

These examples underscore the critical importance of coordination among parallel negotiating efforts and the need for a continuous review of emerging legal texts. No such coordination currently exists. Doing so now would lessen the need for future legal revisions and potential delays in negotiated outcomes.

Beyond this coordination challenge, the relationship between these negotiations raises important policy questions worth pondering:

A variable geometry of hard and soft law. While key GATS Article VI obligations apply solely to sectors in which specific commitments are undertaken, prospective IF disciplines apply to investment in all sectors, regardless of GATS commitments. The coexistence of two agreements with differing scope might produce a variable geometry of relevant obligations. Meanwhile, domestic regulation disciplines are largely framed in hortatory terms, encouraging best-practice compliance by members. Provisions covering the same or similar issues could thus only be enforceable under an IF agreement.

Free riding. Will IF-agreement signatories extend treaty privileges on an unreciprocated most-favored-nation (MFN) basis to non-signatories (assuming it is a plurilateral agreement)? Experience with the WTO's Trade Facilitation Agreement suggests that free-riding concerns are low when market-access issues are not involved. Absent liberalizing content, IF disciplines are tantamount to unilateral measures enhancing host countries' investment climate. But other considerations may arise, e.g., concerning public services, data localization requirements and state-owned enterprises.

A final, critical, question is whether an IF agreement will need the endorsement of all WTO members. Given the *de novo* nature of the discussions—in particular the extension of Mode 3-type disciplines to non-service sectors—there is virtually no other option. The 2015 Nairobi Ministerial Conference provides that "*[a]ny decision to launch negotiations multilaterally on such issues [i.e., non-Doha Development Agenda issues] would need to be agreed by all Members*." Accordingly, non-participants could yet exert significant leverage, notably by calling for concessions on unrelated issues, such as those listed above. Things are less problematic regarding domestic regulation, where

participants can undertake additional commitments (via Article XVIII) within the agreement's existing structure, as was done in the Reference Paper on Basic Telecommunications.

---

[*] **The *Columbia FDI Perspectives* are a forum for public debate. The views expressed by the author(s) do not reflect the opinions of CCSI or Columbia University or our partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

[**] Rudolf Adlung (rudolf.adlung@gmail.com) is a former Counsellor in the Trade in Services Division of the World Trade Organization; Pierre Sauvé (psauve@worldbank.org) is a Senior Trade Specialist in the World Bank Group's Macroeconomics, Trade and Investment Global Practice; Sherry Stephenson (sherry.stephenson@gmail.com) is a member of the Services Network of the Pacific Economic Cooperation Council. The views expressed in this note are those of its authors and should not be attributed to the World Bank Group or its shareholders. The authors wish to thank Roberto Echandi for the valuable comments and drafting suggestions as well as Julia Calvert, Juan Marchetti and an anonymous peer reviewer for their helpful peer reviews.

[1] While the JMS on IF explicitly excludes market access, investment protection and investor-state dispute settlement from the discussions, it remains silent on the (remaining) role of national treatment.

Most recent *Columbia FDI Perspectives*

- No. 290, Roberto Echandi, 'The blind side of international investment law and policy: The need for investor-state conflict-management mechanisms fostering investment retention and expansion,' November 2, 2020
- No. 289, Maria Adele Carrai, 'Outward FDI under China's Belt and Road Initiative: Between regulation and adaption,' October 19, 2020
- No. 288, Ivan Anton Nimac, 'COVID-19 and FDI: How should governments respond?,' October 5, 2020
- No. 287, Florence Dafe and Zoe Williams, 'Explaining the rise of third-party funding in investment arbitration,' September 21, 2020
- No. 286, George A. Bermann, N. Jansen Calamita, Manjiao Chi, and Karl P. Sauvant, 'Insulating a WTO Investment Facilitation Framework from ISDS,' September 7, 2020

All previous *FDI Perspectives* are available at http://ccsi.columbia.edu/publications/columbia-fdi- perspectives/.