



## **Columbia FDI Perspectives**

Perspectives on topical foreign direct investment issues

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### **Investment facilitation in the WTO: The case for early harvesting**

by

Bernard M. Hoekman and Petros C. Mavroidis\*

The [Joint Statement on Investment Facilitation](#) for Development was launched and supported by 70 WTO Members at the 2017 WTO Ministerial Conference. Participation has since grown to encompass more than 110 WTO members. The aim is to identify elements of an agreement for facilitating FDI by improving the transparency of investment measures. A key goal is to support FDI flows to developing and least developed countries by reducing costs associated with administrative procedures related to domestic investment measures—complementing existing disciplines in the GATT (covering goods trade) and the GATS (covering liberalization of services trade).

The challenge lies in how to incorporate an Investment Facilitation for Development Agreement (IFDA) into the WTO rulebook, given that the negotiations do not encompass all WTO members. The WTO does not have a provision for adding new agreements that bind only a subset of members, even if the benefits are extended to all WTO members, including those that do not sign it. Establishing a “docking station” for non-discriminatory open plurilateral agreements would be the best solution to this problem. But it is unlikely to be possible in the near term, given strong opposition by several WTO members to the idea that [open plurilateral agreements](#) applying on a non-discriminatory basis have a place in the WTO.

What could be a way forward to attain the benefits of the Agreement if consensus cannot be obtained to incorporate an IFDA into the WTO? If the participating members stick to their stated intention to apply an IFDA in non-discriminatory manner, they could engage in coordinated scheduling, i.e., listing the agreed provisions in their GATS and GATT schedules of commitments.

Commitments related to facilitation of investment in service sectors may be scheduled as GATS horizontal commitments (such as having a single window clearance system) or additional commitments under the GATS (as was done for the [Joint Initiative on Services Domestic Regulation](#)). For FDI in goods-producing sectors, updated schedules encompassing IFDA commitments can be incorporated under Section 3 of each participating WTO member's GATT schedules of concessions, inscribing both their most-favored-nation treatment and special and differential commitments. These may relate to any and all elements of an IFDA, e.g., measures relating to responsible business conduct, domestic supplier databases, cross-border cooperation, or authorization procedures for investments.

Members that take the scheduling approach can also unilaterally commit to provide technical assistance and capacity building support to developing countries. In the case of developing countries, there is no constraint to inscribing commitments in their schedules to self-designate dimensions of the implementation of substantive provisions, e.g., that certain provisions are conditional on the provision of technical assistance and capacity building.

Since investment facilitation involves domestic policies (behind-the-border measures), the only relevant legal discipline is non-discrimination. If signatories adhere to this principle, there is nothing that they have to fear from a legal challenge by non-signatories. Once scheduled, WTO members would notify the Secretariat, which would then transmit the new schedules to all WTO members for certification. Objections to amended GATS or GATT schedules can only concern the [technical verification](#) of a measure's effects on other members. Their legality can only be [challenged](#) before a WTO Panel. But what is there to challenge, if most-favored-nation treatment has been respected?

It would be a particularly strong signal of commitment to cooperation within the multilateral trading system if the big three trade and investment powers—China, the EU and the US—were among the first to proceed this way.

The [scheduling approach](#) has another advantage. There is no need to wait for all signatories to complete their (domestic) ratification processes for commitments to enter into force. Signatories could simply push the “implement” button and notify the WTO of their decision to schedule the IFDA's provisions. Unlike agreements that only come into force once a critical mass of signatories have ratified them, businesses will benefit from enhanced transparency immediately in those markets that act sooner.

The advent of an IFDA will be a signal that the WTO's rulemaking function is not subject to unilateral veto. It will demonstrate that variable geometry can be a way forward for a large number of countries to commit to jointly agreed good regulatory practices. In a world where the consensus-working practice of the WTO has increasingly taken the form of vetoes, non-discriminatory open plurilateral agreements among like-minded members offer a path forward. As there are no negative spillovers for non-participants, where is the harm?

There is therefore a strong case for early harvesting—and a lot to gain for both participating WTO members and investors worldwide in terms of reducing information, uncertainty and compliance-related transaction costs associated with the implementation of national investment policies.

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