Introduction

Law, Politics, and Economics of International Disciplines on Investment Facilitation for Development

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Introduction

There is much talk about the crisis of the World Trade Organization (WTO) in recent years, if not since its foundation almost thirty years ago. In fact, one does not have to look far to find symptoms of crisis. The comprehensive multilateral negotiations of the Doha Development Round remain unfinished, despite constant requests by developing countries to conclude the agenda before turning to new topics. The dispute settlement system, once the WTO's crown jewel, is de facto dysfunctional as the United States blocks the appointment of new Appellate Body judges. Of course, there is the entry into force of the Trade Facilitation Agreement (TFA) in 2017 or the adoption of an Agreement on Fisheries Subsidies at the 12th Ministerial Conference in 2022 that helps countering the pessimistic and crisis-focused narrative about the WTO. Moreover, a process initiated at the 11th Ministerial Conference in 2017 points to a more structural, yet largely overlooked process of reform, the so-called Joint Statement Initiatives (JSIs).

While the name may be new, the idea behind the JSIs is an old one. A group of like-minded countries comes together to advance a set of new rules or principles in a specific issue area that may not (yet) find support in the broader membership of a given organization. In the context of the European Union (EU), this is at times referred to as differentiated integration or variable geometries,[1] in the WTO, the term plurilateral

[1] For a recent account on the academic discussion on differentiated integration of the European Union, see F. Schimmelfennig, D. Leuffen, and C. E. De Vries, 'Special Issue:

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agreements is used regularly.[2] Since the 1970s, members of the General Agreement on Tariffs and Trade (GATT) have formed groups of countries to negotiate so-called codes of conduct that bound only signatories that were either later integrated into multilateral agreements or became Annexes to the Marrakesh Agreement establishing the WTO.[3] Two of these early plurilateral agreements that still exist are the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft. Subsequent plurilateral agreements include the Pharma Agreement (in force since 1994), the Information Technology Agreement (1996, subsequently updated), the Reference Paper on Telecommunications Services (1998), and the Finance Reference Paper (1999). These agreements can be considered market access agreements and, with the exception of the Government Procurement Agreement, apply commitments on an MFN basis.

The JSIs launched in 2017 build on this tradition of plurilateral negotiations and aim at developing disciplines in new areas such as e-commerce, investment facilitation, and micro, small, and medium-sized enterprises or build on previous negotiation mandates, such as in the area of domestic services regulation. In contrast to previous plurilateral agreements, the JSIs are mainly about negotiating regulatory principles and disciplines, rather than market access commitments. Since rules on data protection, transparency of laws and regulations, or predictability of administrative procedures are typically applied on a non-discriminatory basis, the JSIs, while creating binding commitments only for signatories, generate benefits also for non-signatories. They should thus be largely compatible with the existing multilateral trading system. Still, a few vocal WTO members contest that the JSIs are consistent with the multilateral approach of the WTO, at least not as long as the agreements have not been adopted by consensus. Plurilateral agreements are also contested on the grounds that their impact is uncertain, that they may restrict the policy space of signatories, and that developing countries may not be able to participate in the negotiation process. The implementation of complex regulatory disciplines promoted by the JSIs may pose a

Differentiated Integration in the European Union: Institutional Effects, Public Opinion, and Alternative Flexible Arrangements' (2023) 24 *European Union Politics* 3–20.

[2] See, e.g., B. M. Hoekman and P. C. Mavroidis, 'WTO "à la carte" or "menu du jour"? Assessing the Case for More Plurilateral Agreements' (2015) 26 *European Journal of International Law* 319–343.

[3] B. M. Hoekman and M. M. Kostecki, *The Political Economy of the World Trading System. The WTO and Beyond*, 3rd ed. (Oxford: Oxford University Press, 2009).

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further challenge for developing countries' members, and least developed countries (LDCs) in particular.

This edited volume focuses on a largely overlooked, yet important JSI, the Investment Facilitation for Development (IFD) Agreement negotiations in the WTO. The IFD Agreement negotiations, which started as structured discussions in March 2018 and continued as formal negotiations in September 2020, have a number of distinct features that make it an important subject to study from a multidisciplinary perspective. This study may yield important lessons for the future of not only the multilateral trading system but also other areas of international rule-making such as the international investment system.

Distinct Features of Investment Facilitation Rule-Making at the WTO

The first reason why the IFD Agreement is distinct is that the parties negotiating the agreement are pushing the scope of the WTO system beyond the traditional areas of trade in goods and services. While the WTO rulebook, to some extent, already covers investment, the existing agreements are rather limited in their scope. The disciplines of the General Agreement on Trade in Services (GATS) extend to investment as its scope also covers the commercial presence of service providers in a foreign country (Mode 3 of service). The GATS includes market access commitments, which are applied by members according to a positive-list approach. It also includes disciplines on domestic regulations for investments in services sectors, which are updated by a subgroup of members as part of the JSI on Services Domestic Regulation. In September 2021, a group of sixty-seven WTO members have concluded the negotiations by adopting a Reference Paper on Services Domestic Regulation.[4] The Services Domestic Regulation Agreement features a number of important similarities to the IFD Agreement, in particular with regard to improving regulatory disciplines of its signatories for economic activities by multinational companies. While the GATS covers foreign investment in services, which account for roughly two-thirds of global investment flows, its coverage does not extend to all areas of foreign investment and the disciplines bind only those members that have included specific commitments in their schedules.

[4] WTO, Reference Paper on Services Domestic Regulation, INF/SDR/2, 26 November 2021.

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The second WTO Agreement that covers investment is the Agreement on Trade-Related Investment Measures (TRIMs). The TRIMs Agreement has a rather limited scope and applies only to investment measures that have restricting effects on trade in goods such as local content and other performance requirements. There are, however, other non-services agreements that in part overlap with the provisions of the IFD Agreement, such as the Agreement on Technical Barriers to Trade (TBT), the Agreement on Subsidies and Countervailing Measures (SCM), or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Such overlaps relate to issues such as transparency requirements or more efficient regulatory processes.

Second, while past investment rule-making had a clear focus on investment protection, market access, and investor–state dispute settlement (ISDS), investment facilitation has a distinct focus on procedural issues related to the administrative processes surrounding foreign investments. As part of the negotiations of an IFD Agreement, its participating members cover issues that have been included in some more recent international investment agreements (IIAs). Turning away from rigid rules, enshrined in a network of 2,558 international investment agreements in force,[5] investment facilitation is focusing on defining good regulatory practices for the attraction and retention of foreign investments.[6] Investment facilitation "can be understood as a set of practical measures concerned with improving the transparency and predictability of investment frameworks, streamlining procedures related to foreign investors, and enhancing coordination and cooperation between stakeholders, such as the host- and home-country governments, foreign investors, domestic corporations, and societal actors".[7] Investment facilitation clearly draws conceptually on trade facilitation and the WTO's TFA. Investment facilitation, however, is distinct since it goes beyond the "at the border" character of the TFA and touches upon a broad range of regulations and agencies "behind the border". Furthermore, while the

[5] UNCTAD, *World Investment Report 2022. International Tax Reform and Sustainable Investment* (Geneva: United Nations Publications, 2022), p. 65.

[6] B. M. Hoekman, 'From Trade to Investment Facilitation – Parallels and Differences', in A. Berger, Y. Kagan, and K. P. Sauvant (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers*, 2nd ed. (Geneva: International Trade Centre, 2022), pp. 28–42.

[7] A. Berger, A. Dadkhah, F. Gitt, Z. Olekseyuk and J. Schwab, 'The Investment Facilitation Index (IFI): Quantifying Domestic Investment Facilitation Frameworks' (Geneva: International Trade Centre).

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TFA is mainly about reducing times and costs for the border crossing of goods, investment facilitation is not primarily about the lowering of standards and regulations, rather its main focus is on more transparent, predictable, and cooperative investment frameworks.[8]

After several years of structural discussions, participating WTO members have moved to formal negotiations since September 2020 and concluded text-based negotiations in July 2023. Several rounds of negotiations have been completed, and various major issues have been discussed. According to a latest informal consolidated text of the IFD Agreement,[9] several types of investment facilitation measures have been identified and negotiated. These measures touch on a range of administrative measures, such as transparency of investment measures, streamlining and speeding up administrative procedures and requirements, focal point types of mechanism, arrangements to enhance domestic regulation and cross-border coordination on investment facilitation, special and differential treatment for developing and LDC members, and some cross-cutting issues like corporate social responsibility and anti-corruption issues. Participating WTO members have finalized the IFD Agreement in November 2023 and aim to include it as a new plurilateral agreement under Annex 4 of the Marrakesh Agreement.

The third distinctive feature of the IFD Agreement is the group of WTO members that have initiated and drive the negotiations, namely, emerging market economies and developing countries. To appreciate this fact, it is necessary to go back twenty years in time. As part of the Doha Development Round, developed countries wanted to advance negotiations on four so-called Singapore Issues that also included investment.[10] The Doha Declaration, adopted at the WTO Ministerial Conference in 2001, made "the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and

[8] Ibid.

[9] WTO, WTO Structured Discussion on Investment Facilitation for Development: Informal Consolidated Text Revision, INF/IFD/RD/50/Rev.8, online at: www.bilaterals.org/IMG/pdf/wto_plurilateral_investment_facilitation_draft_consolidated_text.pdf.accessed (last accessed 13 June 2023).

[10] The other Singapore Issues included transparency in government procurement, trade facilitation and competition policies.

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capacity-building in this area."[11] A group of emerging and developing countries, including Brazil, China, and India, was staunchly opposed to entering into negotiations on such a set of multilateral disciplines on investment. This opposition was one of the key reasons why the Ministerial Conference in Cancun in 2003 failed. Importantly, it is almost the same group of countries, with the notable exception of India, which is advancing a negotiation agenda similar to the one stated in the Doha Declaration cited before.

Investment facilitation is a concept that has been mainly promoted by emerging and developing countries. For instance, Brazil has proposed a new investment treaty template that focuses on investment facilitation and cooperation while eschewing many of the controversial disciplines on investor protection, market access, and ISDS that form part of traditional IIAs. Brazil has negotiated Agreements on Cooperation and Facilitation of Investments (ACFI) since 2015 with more than fifteen developing countries. Furthermore, the ACFI template provided the blueprint for regional instruments such as the intra-MERCOSUR Cooperation and Facilitation Investment Protocol adopted in 2017, as well as proposals submitted by Brazil to the WTO negotiations. Besides Brazil, China has been another key promoter of the international investment facilitation agenda. During its G20 presidency in 2016, China has supported the adoption of "Guiding Principles for Global Investment Policymaking", which has an emphasis on, among other things, international disciplines of investment facilitation. China is also promoting the IFD negotiations in particular through its role as the convener of the Friends of Investment Facilitation for Development (FIFD) group, comprising seventeen developing countries.

While developing countries have clearly taken over the role of rule-makers in the context of international cooperation on investment facilitation, developed countries have been less active in the beginning. While the United States is not participating at all in the negotiations, the EU and other developed countries such as Japan, Canada, and the United Kingdom only slowly became more proactive in the IFD negotiations. By now, however, the EU is one of the main promoters of an IFD Agreement in the WTO. Furthermore, the most recent bilateral Sustainable Investment Facilitation Agreement between the EU and Angola is based on a template that is clearly inspired by the contents of the IFD

[11] WTO, Ministerial Declaration, Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001.

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Agreement. The IFD Agreement negotiations are thus an interesting example of rule-making by emerging and developing countries that is inclusive enough to also ensure the participation of developed countries.

A Multidisciplinary Research Agenda on Investment Facilitation

As can be said, investment facilitation rule-making is attracting increasing attention at the bilateral, regional, and multilateral levels. Many countries have adopted policies to increase the transparency and predictability of investment-related laws and regulations. Furthermore, some countries have implemented instruments such as one-stop-shop or single-window services that enable foreign investors to submit investment applications and other registration requirements through a single entity of the host country's administrative system. Other countries are operating ombudsperson-type mechanisms to handle investor grievances and prevent possible disputes between foreign investors and host states to escalate to the level of ISDS proceeding.[12] Furthermore, international and regional organizations are supporting developing countries in implementing investment facilitation reforms.[13]

However, especially investment frameworks in many developing countries show large gaps in terms of the adoption of investment facilitation measures. And even some developed countries do not adopt the full spectrum of investment facilitation measures. In light of these implementation gaps, there is a case to be made for a multilateral investment facilitation framework at the WTO as an instrument to incentivize reforms, promote international benchmarking, and support peer learning. The fact that the number of members participating in the discussions and negotiations toward an IFD Agreement increased substantially suggests that many countries, developing countries in particular, see the benefits of such a multilateral framework. The first Joint Ministerial Statement on Investment Facilitation for Development signed at the 11th Ministerial Conference of the WTO at the end of 2017 was signed by seventy members, which increased to ninety-eight members that

[12] For an overview of different investment facilitation measures, please refer to the inventory of measures in A. Berger, Y. Kagan, and K. P. Sauvant (eds.), *Investment Facilitation for Development: A Toolkit for Policymakers*, 2nd ed. (Geneva: International Trade Centre, 2022).

[13] See e.g., N. J. Calamita, 'Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value' (2020) 23 *Journal of International Economic Law* 973–988.

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signed a second ministerial statement at the end of 2019 at a meeting of trade ministers in Shanghai. The most recent information suggests that more than 120 members have participated in the WTO negotiations on an IFD Agreement and more countries are considering joining the agreement.[14] Given the large number of participants, it comes as no surprise that the IFD Agreement can be considered the most inclusive plurilateral negotiation track at the WTO.[15]

Given this dynamic negotiation process and the high hopes associated with the IFD Agreement, especially among developing countries, it is necessary that decisions to join the agreement, the design of the agreement text, or the support structure for a successful implementation is being made on a sound scientific basis. Unfortunately, many research gaps still exist with regard to a number of legal, economic, and political aspects. This edited volume will address a number of these aspects by adopting a multidisciplinary approach bringing together researchers and practitioners from various world regions.

We are interested in the legal basis of investment facilitation disciplines negotiated as part of IFD Agreement. An obvious place to look for the origins of the investment facilitation agenda is in IIAs concluded by the international community thousands of times over. In his chapter, Rodrigo Polanco provides an overview of the different approaches to how investment facilitation is addressed in IIAs, identifying at least twelve provisions that can be classified under the concept of investment facilitation. However, investment facilitation provisions are not yet a standard feature of traditional IIAs – the Brazilian ACFI's being the exception to the rule – and it could be that the IFD Agreement will rather become a benchmark that countries use to introduce further innovations in regional and bilateral IIAs. The recent treaty-making practice of the EU points in that direction, as shown in the chapter by Sophie Meunier and Christilla Roederer-Rynning.

The negotiation parties of the IFD Agreement furthermore have clearly been inspired by other WTO Agreements. Christian Pitschas analyzes the similarities and the difference between investment facilitation and WTO rules on services, such as the Services Domestic

[14] See online at: www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm (last accessed 07 July 2024).

[15] See, e.g., M. S. Akman, A. Berger, F. Botti, P. Draper, A. Freytag, and C. Schmucker, 'Boosting G20 Cooperation for WTO Reform: Leveraging the Full Potential of Plurilateral Initiatives' (T20 Policy Brief, 2021).

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Regulation Agreement, which itself is based on the GATS. An aspect that is often overlooked is the relationship between the IFD Agreement and other WTO agreements in non-services sectors. Agreements such as the TRIMs, TBT, SPS, or TRIPs include a number of investment facilitation-related provisions, in particular on transparency requirements. The chapter by Yuka Fukunaga analyzes these overlooked legal relationships.

Lastly, from a legal perspective, it is necessary to analyze the ways in which potential disputes over investment facilitation disciplines could be settled. In this chapter, Manjiao Chi argues that both the WTO dispute settlement system and ISDS could offer avenues to settle investment facilitation disputes, with the possibility that claimants may initiate parallel proceedings. He argues that states should use dispute prevention methods to avoid that grievances between investors and host states escalating to the level of dispute settlement.

From an economic perspective, the question is whether an IFD Agreement will have a positive impact on participating members and to what extent it contributes to sustainable development. Edward J. Balistreri and Zoryana Olekseyuk quantify the impacts of the IFD Agreement using a Computable General Equilibrium method. They indeed show that an IFD Agreement may lead to substantial economic gains for participating members and for developing countries in particular. The higher potential gains for developing countries are a result of low levels of adoption of investment facilitation measures at domestic level, as empirically shown by Axel Berger, Ali Dadkhah, and Florian Gitt. They employ a novel dataset, the Investment Facilitation Index[16], to uncover the gaps in terms of investment facilitation measures. Based on their analysis, they argue that developing countries, in order to reap the large potential economic benefits, will need substantial technical assistance and capacity development to successfully implement the IFD Agreement. In a sector specific analysis, Simon B. C. Lacey analyzes the needs of investors in the technology and digital economy sector in terms of domestic regulatory environments. He argues that the provisions contained in the IFD Agreement can help to improve such systems. Whether the IFD Agreement not only advances economic objectives but also contributes to sustainable development more broadly is a question tackled by Ole Kristian Fauchald. He argues that the agreement is likely to restrict the

[16] Berger, Dadkhah, Gitt, Olekseyuk, and Schwab, 'The Investment Facilitation Index (IFI)'.

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policy space of host countries and, therefore, may prevent them adopting policy measures necessary to advance sustainable development.

From a political perspective, a key question relates to the concerns and challenges of countries, especially developing countries, in promoting investment facilitation. What is the political economy of establishing an international investment facilitation framework? What are the positions of key WTO members on the IFD Agreement and how can these be explained? Julia Calvert analyzes the political economy of an IFD Agreement. She argues that the negotiations were made possible by a dissolution of the dichotomy of capital exporting and importing countries and the following convergence of interests among key WTO members. Furthermore, the legitimacy crisis of the international investment regime made the shift to the WTO system possible, as well as a rethinking of the kind of rules that help to promote foreign investments. A key policy instrument that is often employed by developing countries to promote international trade and investment is special economic zones (SEZs). Richard Bolwijn and Jing Li argue that SEZs are an often-overlooked aspect in discussions about investment facilitation. In their chapter, they argue that both policy instruments can be complementary and their combination can enable host countries to be competitive in an increasingly difficult international environment of efficiency-seeking foreign investments.

Last but not the least, this edited volume focuses on important countries and regions that play key roles during the negotiations of an IFD Agreement. The chapters by Xiuli Han on China and Michelle R. Sanchez-Badin and Manu Misra on Brazil analyze the interests of two key promoters of the investment facilitation agenda. Both played a key role in creating the foundations for the IFD negotiations. Due to its troubled relationship with the traditional investment treaty system and in light of the need to support Brazilian companies' growing foreign investments, Brazil introduced a number of key innovations as part of their bilateral ACFI's and promoted investment facilitation in the regional context of MERCOSUR. China adopted a number of investment facilitation measures domestically as part of its overall investment law reform and used international forums such as the BRICS and the G20 to promote the investment facilitation agenda internationally. Both countries have been key promoters of the IFD Agreement negotiations, in particular as part of the FIFD group. The chapter by Sophie Meunier and Christilla Roederer-Rynning explores the reasons why the EU has evolved from a bystander to one of the most vocal supporters of an

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IFD Agreement in the WTO. For the EU, they argue, the IFD negotiations offered the possibility to support the EU's "open strategic autonomy" agenda promoting multilateralism in a largely noncontroversial issue domain and thus promoting WTO reform. Malebakeng Agnes Forere focuses on the important role of African countries in the IFD negotiations. While there are a number of especially West African countries, with Nigeria at the forefront, that have helped to promote the investment facilitation agenda and are actively participating in the IFD Agreement negotiations at the WTO, a large part of the African continent remains skeptical or outright opposed. She argues that an IFD Agreement may reduce the policy space of African countries. However, despite this, she contends that staying outside of the negotiations prevents African countries from shaping the IFD Agreement that they may find compelled to join at a later stage.

Conclusion

Plurilateral negotiations are a key way to update the outdated multilateral trade rule book in areas where consensus among the whole membership of the WTO is not yet reachable. Plurilateral agreements are thus an important element of the overall process of WTO reform. At least five different plurilateral negotiation tracks, referred to as JSIs, are ongoing, respectively, focusing on Services Domestic Regulations, e-commerce, MSMEs, trade and gender, and investment facilitation. In light of the successful conclusion of the Services Domestic Regulation negotiations and the substantial progress being made in other JSI negotiation tracks, the plurilateral approach to negotiating WTO agreements seems here to stay for the foreseeable future.

Against this background, it is surprising to note that the JSIs that have been on the WTO's agenda since the 11th Ministerial Conference at the end of 2017 are an underexplored area. This book tries to fill this gap by focusing on the legal, economic, and political aspects of the IFD Agreement. This distinct negotiation process helps broaden the WTO's agenda by covering investment, supports the reform of the international investment regime by mainstreaming the investment facilitation approach, and is mainly promoted by developing countries. The various chapters of this edited volume, written by a group of researchers and practitioners representing multiple disciplines and world regions, invite a much-needed discussion about the potentials and challenges of the plurilateral negotiation approach to reform the WTO and update the

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multilateral rule book in light of the various challenges faced by the WTO's increasingly diverse membership. In particular, in view of the fact that the IFD Agreement negotiations are driven by developing countries and have an explicit "for development" focus, it is a pertinent subject of research for those interested in sketching out a future path for a WTO that can address the challenges faced by its entire membership.

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