

# INVESTMENT FACILITATION IN THE WTO MULTILATERAL AGENDA: DRAWING LESSONS FROM THE EU-INDIA IFM

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**Abstract** *This article discusses the idea of an investment facilitation agreement in the WTO through the lens of bilateral initiatives like the EU-India mechanism. It is argued that while bilateralism offers a sense of perspective on how far countries want to go with an investment facilitation agreement, there is a risk that bilateral initiatives augment the already fragmented landscape of international economic law, proceeding in an uncoordinated and piecemeal manner. Regardless of the impact bilateral initiatives have on future work the WTO, it is important to crystallize the common principles that have emerged in the discussion so far into a unitary product and not to lose momentum.*

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## I. INTRODUCTION

When countries on the periphery of the global system are overcome by crisis we blame them for their failure and inability to adjust to the system's rigours. When countries on the centre are similarly engulfed, we blame the system and say it is time to fix it.<sup>1</sup> However, what happens when no clear rules have

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crystallised within the multilateral system? A case in point is the investment facilitation agreement, the discussion around which has been gaining in popularity in recent years' policy debates but has not yet resulted in a multilateral approach.

According to the UNCTAD definition, investment facilitation is the set of policies and actions aimed at helping investors navigate the intricacies of the host country, as well as to conduct their day-to-day business in host countries. Investment facilitation focuses on improving countries' key institutional determinants for attracting investment, such as transparency, the efficiency of administrative procedures, enhanced predictability, and stability of the policy environment.<sup>2</sup> Investment facilitation is distinct from investment promotion, which is about promoting a location as an investment destination and is therefore often country-specific and competitive in nature.

Although the importance of investment for promoting development has been recognized since the Havana Charter, the WTO has had a troubled history with attempts to negotiate investment rules. Investment considerations remained clearly outside the original GATT, but WTO member placed significant obligations on governments regarding the treatment of foreign nationals and companies in their territories, as can be seen especially in the GATS. Time and again, WTO members have asserted the need to foster global development and inclusive growth through trade and investment — the intertwining of which is particularly evident in the GATS that treats 'investment' (the establishment of a commercial presence to supply a service) as a modality of trade in services ('mode 3') — but no measures have eventually culminated into a concrete investment facilitation agreement within the WTO framework.

Over the last couple of years, however, the multilateral trading system has experienced a phase of growing pressure to discuss a possible investment facilitation agreement. The WTO inaction, in fact, did not prevent a group of 70 members to adopt the Joint Ministerial Statement on Investment Facilitation for Development at the Ministerial Conference in December 2017.<sup>3</sup> Beyond this plurilateral initiative, the issue has been discussed at different occasions in multilateral forums — including the OECD, and the G20

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<sup>1</sup> Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, and Democracy Can't Coexist* (Oxford University Press 2011).

<sup>2</sup> UNCTAD, *Global Action Menu for Investment Facilitation* (UNCTAD 2017); see also Karl P. Sauvant, "The Potential Value-Added of a Multilateral Framework on Investment Facilitation for Development" (2019) *Transnational Dispute Management*.

<sup>3</sup> WTO, "Joint Ministerial Statement on Investment Facilitation for Development", WTO Doc. WT/MIN (17)/48.

— and by multiple players.<sup>4</sup> Despite having gone almost unnoticed, even the EU is engaging in the discussion on investment facilitation. Little conceptual research has been undertaken, however, on the EU-India investment facilitation mechanism. Officially launched in 2017, the mechanism is a bilateral, very practical arrangement with India to facilitate the issues faced by EU investors on the ground.

Against this backdrop, this paper will attempt to understand the value of bilateral initiatives in the context of investment facilitation discussions through the lens of the EU-India mechanism. After this introductory section, the article elaborates on the concept of investment facilitation, looking at the contexts within which this idea emerged (Section II). Attention will then be focused on the EU-India investment facilitation mechanism (Section III). Conclusions will be drawn on the impact bilateral initiatives might have on the ongoing debate surrounding the negotiations of a multilateral framework on investment facilitation, and on whether the times are mature for a multilateral investment facilitation agreement— a topic for which multilateral negotiations were first proposed 70 years ago (Section IV).

## II. THE IDEA OF AN INVESTMENT FACILITATION MECHANISM

At present, international investment agreements (IIAs) remain the most common legal means through which States attract investments, even though they seldom include, at least until recently, provisions that effectively encourage proactive investment promotion or that facilitate outward or inward foreign investments. What IIAs generally do is to promote investments by simply protecting the investor and the covered investment, without ensuring that the attracted investments meet certain ‘quality’ criteria, like, for example, ensuring that the investment is indeed beneficial to the development of the host country.<sup>5</sup>

Seeing the Trade Facilitation Agreement as a successful example, some WTO members proposed to explore the options for a multilateral instrument on investments that can be adapted and applied to enhance facilitation measures.<sup>6</sup> The WTO Trade Facilitation Agreement (TFA), which entered into

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<sup>4</sup> Significant proposals have been put forward, inter alia, by the MIKTA grouping (Mexico, Indonesia, Republic of Korea, Turkey and Australia), as well as China, Brazil, Argentina, the Friends Facilitation for Development, the African Abuja Statement.

<sup>5</sup> UNCTAD, Reform Package for the Investment Regime (UNCTAD 2015).

<sup>6</sup> Joe Zhang, “Investment Facilitation: Making Sense of Concepts, Discussions and Processes” (2018) International Institute for Sustainable Development.

force in February 2017,<sup>7</sup> contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. It further contains provisions for technical assistance and capacity building in this area with particular reference to developing and least-developed countries (LDCs).

Inspired by the TFA, the concept of investment facilitation has been developed in the last five years at the national, bilateral, regional and multilateral level. Investment facilitation is an expansive notion, not always clearly defined and sometimes conflated with the concepts of investment promotion or investment retention. Investment facilitation is often described as a group of principles, including transparency, consistency and predictability, aimed at changing some national regulations in order to ease investment flows.<sup>8</sup> As such, it is not altogether clear whether investment facilitation should comprise provisions on investment protection, investment promotion, policy liberalization, or about dispute settlement. More narrowly, investment facilitation appears to concern the relations between investors and host countries, helping the latter attracting the former. In other words, investment facilitation measures look like practical ways and means to encourage the flow of sustainable FDI to emerging economies and, in particular, to the least developed among them.<sup>9</sup> Many have highlighted the importance of the link between investment facilitation and development.<sup>10</sup> They have emphasised that investment facilitation should concern the facilitation of those investments that support the sustainable development of contracting states,<sup>11</sup> and have insisted that investment facilitation measures are particularly needed in developing and LDCs, which often lack the capacity to attract foreign capitals.

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<sup>7</sup> Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization (28 November 2014) WT/L/940.

<sup>8</sup> Luciana Ghiotto, "A Critical Review of the Debate on Investment Facilitation" (2018) Investment Treaty News 4.

<sup>9</sup> Karl P. Sauvnt, and Khalil Hamdani, "An International Support Programme for Sustainable Investment Facilitation" (2015) International Centre for Trade and Sustainable Development (hereinafter "ICTSD") and World Economic Forum.

<sup>10</sup> Sauvnt and Hamdani, *supra* note 9; Ada Bogliolo Piancastelli de Siqueira, "What Can an Investment Facilitation Agreement at the WTO Do for Sustainable Development?" (2018) ICTSD and World Economic Forum.

<sup>11</sup> Khalil Hamdani, "Investment Facilitation at the WTO is Not Investment Redux" (2018) ICTSD and World Economic Forum.

Originally, the idea of an investment facilitation agreement at the WTO was born within the discussion of the E-15<sup>12</sup> initiative in 2015.<sup>13</sup> A further push came from the G20 forums, despite the disappointing results. Under the Chinese presidency (in 2016), the G20 adopted the nine ‘Guiding principles for Global Investment Policymaking’,<sup>14</sup> and called other international organizations, like UNCTAD, the WTO, the OECD, to get engaged in the discussions about investment facilitation. Still in the context of the G20, the discussion continued in 2017 under the German presidency, aiming to agree to on a non-binding investment-facilitation package that included the fostering of open and transparent business climates and action to promote inclusive economic growth. Regrettably, the circumstance turned out to be unfortunate as the negotiations collapsed, due to the opposition of India, South Africa, and, unexpectedly, the US.<sup>15</sup> In consequence of this, the investment facilitation was left out of the agenda of the 2018 Argentinian G20 presidency. But it is brought back in the 2019 agenda, with the G20 group considering the adoption of Guiding Principles on Investment Facilitation for Sustainable Development to help ensure that multilateral efforts result in an effective, coherent, and development-oriented outcome.<sup>16</sup>

Outside the G20 context, other international institutions have elaborated on the concept of investment facilitation. Despite some minor language differences, there are at least two recurrent components that are found across different definitions and that concur to shape the concept of investment facilitation. The first is a normative component, focused on policies, laws, and regulations that enable foreign investors to establish and operate in a specific location, with an emphasis on the policy and procedural aspects of investing. The second one is a functional component, centred on the activities conducted to support an investor through various phases of the investment process, usually coordinated by investment promotion agencies that directly assist the investor, with an emphasis on the practical and operational needs of investors and investments.

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<sup>12</sup> Jointly implemented by ICTSD and the World Economic Forum, the E-15 Initiative was established to convene world-class experts and institutions to generate strategic analysis and recommendations for Government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.

<sup>13</sup> Crafting a Framework on Investment Facilitation (2018) ICTSD and World Economic Forum; Axel Berger, “What’s Next for the Investment Facilitation Agenda?” (2018) Columbia FDI Perspectives.

<sup>14</sup> Berger, *supra* note 13.

<sup>15</sup> *Ibid.*

<sup>16</sup> Axel Berger, Ahmad Ali Ghouri, Tomoko Ishikawa, Karl P. Sauvant, and Matthew Stephenson, “Towards G20 Guiding Principles on Investment Facilitation for Sustainable Development” (2019) G20 Task Force on Trade, Investment and Globalization.

UNCTAD's definition offers a good example of how the two components can be merged together:

Investment facilitation is the set of policies and actions aimed at making it easier for investors to establish and expand their investments [*normative component*], as well as to conduct their day-to-day business in host countries. It focuses on alleviating ground-level obstacles to investment, for example through improvements in transparency and information available to investors, more efficient and effective administrative procedures for investors, or enhanced predictability and stability of the policy environment for investors [*functional component*]. Investment facilitation is distinct from investment promotion, which is about promoting a location as an investment destination (e.g. through marketing and incentives) and is therefore often country-specific and competitive in nature.<sup>17</sup>

On the distinction between investment facilitation and investment promotion insisted even the OECD's Policy Framework for Investment:

While promotion is rather about attracting potential investors that have not yet selected an investment destination, *investment facilitation starts at the pre-establishment phase*, when an investor shows interest in a location, and touches upon the policy framework.<sup>18</sup>

This point is of particular interest because, both in UNCTAD and OECD' views, investment facilitation measures should operate since the pre-establishment phase of an investment — that is when the investor is actually planning to enter the host state's market. Investment facilitation measures should aim, therefore, to implement transparency and easing access to administrative information through the enhancement of the domestic framework even before a foreign investment occurs. It is on this respect that investment facilitation measures can be seen as a valuable policy option especially for economies in transition and LDCs: the improvement of the domestic institutional framework becomes both an enabling factor in attracting FDIs and a way for the host state to promote its own development. Building on these definitions, it appears that the establishment of an investment facilitation mechanism essentially responds to a demand for enduring investment, not just for current growth. Investment facilitation is, therefore, congenial to rebuild infrastructure for sustaining future growth<sup>19</sup> through the improvement of

<sup>17</sup> UNCTAD, *supra* note 2. (Text between square brackets added).

<sup>18</sup> Ana Novik and Alexandre de Crombrughe, "Towards an International Framework for Investment Facilitation" (2018) OECD (emphasis added) Insights.

<sup>19</sup> Sauvart and Hamdani, *supra* note 9.

countries' key institutional determinants for attracting investments, such as transparency, the efficiency of the administrative procedures, the establishment of an investor-friendly environment, especially when economies in transition and LDCs are concerned.

Still along with these lines, the idea of an investment facilitation has been further articulated through other initiatives launched by a group or single countries. Initiatives, for example, have been taken by the Friends of Investment Facilitation for development that launched an open-ended informal dialogue on investment facilitation for development.<sup>20</sup> Other countries, or group of countries, circulated suggestions for possible investment facilitation elements to be included in a multilateral WTO agreement – like Russia,<sup>21</sup> China,<sup>22</sup> Brazil and Argentina,<sup>23</sup> and the MIKTA group.<sup>24</sup> While all these proposals converge on the need to implement the transparency, coherence, and predictability of the investment environment, they also expand towards other directions and elaborate on further points. Russia, for example, called for the inclusion of dispute prevention and resolution provisions, as well as the establishment of a mechanism to sanction non-compliant countries.<sup>25</sup> China's proposal emphasised the need to take into account LDCs' needs when designing the possible elements of an investment facilitation agreement. To reach this goal, special and differential treatments, commensurate with their development circumstances, should be granted to LDCs, along with 'effective technical assistance and capacity building to strengthen developing countries' domestic services capability, efficiency and competitiveness'.<sup>26</sup> Brazil's more comprehensive approach is devised in its 'Cooperation and Investment Facilitation Agreements' (CIFAs).<sup>27</sup> Among the novelties of

<sup>20</sup> Argentina, Brazil, Chile, China, Colombia, Hong Kong, Kazakhstan, Mexico, Nigeria and Pakistan, Joint Communication from the Friends of Investment Facilitation for Development, Proposal for a WTO Informal Dialogue on Investment Facilitation for Development, WTO Doc. JOB/GC/122.

<sup>21</sup> Communication from the Russian Federation, Investment Policy Discussion Group, WTO Doc. JOB/GC/120.

<sup>22</sup> Communication from China, Possible Elements of Investment Facilitation, WTO Doc. JOB/GC/123.

<sup>23</sup> Communication from Argentina and Brazil, Possible Elements of a WTO Instrument on Investment Facilitation, WTO Doc. JOB/GC/124.

<sup>24</sup> Mexico, Indonesia, Korea, Turkey and Australia; MIKTA Investment Workshop Reflections, WTO Doc. JOB/GC/121.

<sup>25</sup> Communication from the Russian Federation, *supra* note 21 at 1.3(b)(viii): The rules should include disciplines on the imposition of penalties for a breach of regulation concerning investment.

<sup>26</sup> Communication from China, *supra* note 22 at 3.1 and 3.2.

<sup>27</sup> See in this sense: Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the Republic of Suriname (signed May 2, 2018, not yet entered into force); Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (signed 11 April 2018, not yet entered into force).

the CFIA approach are the introduction of new safeguard clauses to balance investors and host states' rights and obligations (e.g. corporate social responsibility clauses and provisions to protect the environment, labour affairs and public health), along with a dispute prevention mechanism, and the requirement that dispute settlement be initiated by the home state of the investor. In other words, all these countries appear inclined to a broad investment facilitation agreement, which might even encompass investment protection and dispute settlement.

Particularly surprising in this flourishing of initiatives is the WTO inaction, as it will be discussed in the following section.

### A. Investment facilitation within the WTO agenda

Contrary to what many would expect, the WTO's position on investment facilitation remains committed but indeterminate to this day. Despite being a rule-maker organization with a compliance mechanism (Dispute Settlement Understanding), whose trade and services agenda would consistently overlap with an investment facilitation agenda, the WTO appear hesitant to take the lead in the establishment of a multilateral investment facilitation agreement. The idea that investment is instrumental to development is not particularly new and it has been recognized in the world trade system since the Havana Charter:

international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress.<sup>28</sup>

Despite the positive incipit, WTO's attempts to negotiate investment rules have not been particularly fruitful. Investment considerations remained clearly outside the original GATT, but WTO members placed significant obligations on governments regarding the treatment of foreign nationals and companies in their territories, as can be seen especially in the GATS.<sup>29</sup> Time and again, WTO members have asserted the need to foster global development and inclusive growth through trade and investment<sup>30</sup> — the intertwining of which is particularly evident in the GATS that treats 'investment' (the

<sup>28</sup> United Nations Conference on Trade and Employment, *Final Act and Related Documents*, E/CONF.2/78, United Nations Publication, Sales No. 1948.II.D.4, Art. 12(1)(a).

<sup>29</sup> General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1-B, 1869 UNTS 183, 33 ILM 1167 (1994) Art. XVII.

<sup>30</sup> Bogliolo Piancastelli de Siqueira, *supra* note 10.

establishment of a commercial presence to supply a service) as a modality of trade in services ('mode 3').

Beyond GATS commitments, some advanced economies tried to incorporate broader investment issues, especially market access, into a binding multilateral agreement. However, the failure of the OECD's negotiation of the Multilateral Agreement on Investment (1995-1998), along with the first investor-state case brought under the investment chapter of the North America Free Trade Agreement (NAFTA) (in 1996)<sup>31</sup> contributed to the suspicion about investment protection provisions, and attempts to implement further commitments were ultimately abandoned.<sup>32</sup> Subsequent attempts to improve the trade-investment relationship were pursued in the following years but no significant developments were reached. Things were further complicated by the persistent deadlock in the WTO's Doha Development Round, which furthermore showed the global trade system's limits to respond to new and emerging trade and development challenges.

More recent attempts to initiate WTO rule-making on investment facilitation traces to the 2017 WTO ministerial conference in Buenos Aires. Fourteen emerging economies<sup>33</sup> tabled a proposal to inform the other members about the intention to begin structured discussions with the aim of developing a multilateral framework on investment facilitation,<sup>34</sup> despite investment facilitation not being part of the official negotiating agenda. The draft proposal was rightly followed by a joint ministerial statement on investment facilitation and development,<sup>35</sup> adopted on the margins of the conference by a more heterogeneous group of 41 countries, which included, among others, developed economies like the EU, Australia, Canada, Singapore and Switzerland. Both developing and developed countries essentially recognized the 'dynamic links between investment, trade and development in today's global economy, as well as the need for closer international cooperation', and welcomed negotiations that:

seek to identify and develop the elements of a framework for facilitating foreign direct investments that would: improve the transparency and predictability of investment measures; streamline and

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<sup>31</sup> *Ethyl Corpn. v. Govt. of Canada*, UNCITRAL, Notice of Intent to Submit a Claim to Arbitration (10 September 1996).

<sup>32</sup> Zhang, *supra* note 6.

<sup>33</sup> The fourteen emerging economies were: Argentina; Brazil; Chile; China; Colombia; Hong Kong, China; Kazakhstan; Republic of Korea; Liberia; Mexico; Nigeria; Pakistan; Qatar; and Uruguay.

<sup>34</sup> World Trade Organisation, "Draft Ministerial Decision on Investment Facilitation for Development", WTO Doc. WT/MIN (17)/12.

<sup>35</sup> World Trade Organisation, "Joint Ministerial Statement on Investment Facilitation for Development", WTO Doc. WT/MIN (17)/48.

speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention.<sup>36</sup>

Very much in line with the other definitions and approaches mentioned above, even within the WTO context, significant emphasis is placed on the functional components, with the ultimate aim to build a framework congenial to attract foreign investments that have positive repercussions in terms of development. Following up this call, in the course of 2018, there have been seven substantive meeting on structured discussions on a multilateral framework on investment facilitation for development. The final meeting, held in December 2018, took stock on what had been achieved so far. As Sauvant reported, ‘delegates made significant headway in identifying the possible elements of an investment-facilitation framework aimed at improving transparency and predictability of investment measures; streamlining and speeding up administrative procedures and requirements; and enhancing international cooperation, information sharing, the exchange of best practices, and relations with stakeholders, including dispute prevention’. The seven substantive meetings resulted in a ‘checklist of issues and a work program and meeting schedule for the first half of 2019, with the goal of developing the elements of a multilateral framework for submission to the 2020 WTO Ministerial’.<sup>37</sup> Despite these developments, the negotiations have not yet materialized in a concrete investment facilitation agreement. Nor where all of this should ultimately lead has been determined.

### III. THE EU-INDIA INVESTMENT FACILITATION MECHANISM<sup>38</sup>

In these set of developments, the establishment of the EU-India investment facilitation mechanism has gone almost unnoticed, despite India being an active proponent of facilitation of services instruments. The EU-India Investment Facilitation Mechanism (IFM) was officially launched in July 2017 and in full operation since then. Moved by a reciprocal interest to re-engage towards relaunching negotiations for a comprehensive and mutually beneficial FTA (the negotiation of which were in a *de facto* standstill

<sup>36</sup> *Ibid*, at 4.

<sup>37</sup> Karl P. Sauvant, “Five Key Considerations for the WTO Investment-Facilitation Discussions, Going Forward” (2019) Columbia FDI Perspectives.

<sup>38</sup> The author is grateful to the Delegation of the European Union to India, and in particular to Marika Jakas for background information provided for the drafting of Maria Laura Marceddu, “Another Brick in the Wall: The EU-India Investment-Facilitation Mechanism” Columbia FDI Perspectives.

after 12 negotiating rounds and only recently resumed), India has opted for a very practical approach with the EU, putting in place - in less than a couple of years - a simple mechanism, not WTO-related at all. The IFM does not concern attracting potential investors that have not yet selected an investment destination (investment promotion), but starts at the pre-establishment phase, when an investor shows interest in a location, and touches upon the policy framework. The EU-India IFM is a platform to address issues faced by existing EU investors in India – and to some extent by companies that consider investing in India, as some of the issues raised under the IFM may be of a nature that discourages new investments.

The EU-India IFM builds on the Joint Statement<sup>39</sup> of the 13th EU-India Summit held in Brussels in March 2016, in which both sides recognized that a fair, transparent and rules-based environment was key ‘to unlock the potential of EU-India trade relations’, as identified in the 2020 EU-India Agenda for Action.<sup>40</sup> Unsurprisingly, promotion and facilitation of EU investments in India are the drivers of the EU-India IFM, with the key objectives of identifying and solving problems faced by EU companies and investors with regard to their operations in India. To this end, the mechanism allows the EU to raise issues faced by EU investors in India on a regular basis with India’s Department of Industrial Policy & Promotion (DIPP), both at the technical level and at a higher political level (EU Ambassador, Secretary of DIPP). The Delegation of the European Union to India meet the Department for Promotion of Industry and Internal Trade (DPIIT) 3-4 times a year, followed by a meeting between the EU Ambassador and DPIIT Secretary 1-2 a year. Prior to these meetings, the Delegation of the European Union consult the EU Member States Commercial counsellors through regular meetings, to update the matrix of issues raised. In some cases, the EU delegation also liaises directly with the companies concerned.

Invest India, the official Investment Promotion and Facilitation Agency of the Government of India, is also part of the mechanism and helps EU investors navigate the intricacies of the Indian bureaucracies. Invest India serves both as a contact point, which any EU companies can approach with their queries, and as a single-window entry point for EU companies that need assistance for their investments at the central or state level. The mechanism also reinforces the bilateral fast track mechanisms established by some EU Member States, especially when more company-specific issues are at stake.

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<sup>39</sup> European Parliament, Joint Statement 13th EU-India Summit (30 March 2016) <<http://www.europarl.europa.eu/cmsdata/122861/20160330-joint-statement-eu-india.pdf>> at 24>.

<sup>40</sup> European Parliament, EU-India Summit — EU-India Agenda for Action-2020 (30 March 2016) <<http://www.europarl.europa.eu/cmsdata/122862/20160330-agenda-action-eu-india.pdf>>.

The added value of an instrument like the EU-India mechanism lies in its simplicity and practicability. Very much in line with WTO structured discussions on investment facilitation, the EU-India mechanism focuses on transparency, streamlining procedures and eliminating bottlenecks for foreign investors, also echoing India's proposal on Trade Facilitation Agreement for Services, circulated among WTO Members in July 2017.<sup>41</sup> Being among the top ten WTO Member countries in global trade in services, India has repeatedly pushed for an agreement to facilitate the reduction in transactions cost associated with unnecessary regulation and administrative burden on trade in services. However, one of the most controversial issue with the position India is taking within the WTO is market access, given India's unwillingness to implement reforms to reduce market access barriers in services. Although excluded from the discussions on investment facilitation, market access remains one of the most sensitive issues for India, which strongly opposed to a multilateral agreement that encompasses market access as it would amount to surrendering policy space. While India remains committed to enhancing transparency, improving efficiency and promoting cooperation, it appears less inclined to be bound to a multilateral agreement with commitments on market access and/or investor-state arbitration. In other words, India is not opposed to investment facilitation *per se*, but it is opposed to a multilateral investment facilitation agreement under the aegis of WTO<sup>42</sup> if this encompasses thorny issues such as market access, and investment arbitration, which, in India's view, will severely hinder the right to regulate investment in strategic sectors like defence and power.<sup>43</sup> India's position, however, appears more nuanced within the bilateral context. The investment facilitation mechanism with the EU, in fact, addresses issues which also touch upon market access, for instance repeated and sudden customs duties in the ICT or automotive sectors, which increase the costs of inputs of companies that have invested in India and thus make the business environment unpredictable.

Almost two years down the road, the IFM is working with mixing results. FDIs in 2017-18 from the EU decreased, but trade in services exports increased modestly for the EU (from 16.6mln EUR in 2017 to 16.7mln EUR in 2018) and more remarkably for India (from 17.1mln EUR in 2017 to

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<sup>41</sup> Communication from India, Trade Facilitation Agreement for Services, WTO Doc. TN/S/W/63.

<sup>42</sup> Joseph Reji K., "Investment Facilitation Agreement in WTO: What It Contains and Why India Should Be Cautious?" (2017) <<https://ssrn.com/abstract=3083945>> or <<http://dx.doi.org/10.2139/ssrn.3083945>>.

<sup>43</sup> As an Indian senior official put it: 'Things like investment facilitation and arbitration are bilateral and should remain so'. Subhayan Chakraborty, "Why India Has Opposed Investment Facilitation Talks at WTO", *Business Standard* (May 15, 2017) <[https://www.business-standard.com/article/economy-policy/why-india-has-opposed-investment-facilitation-talks-at-wto-117051400826\\_1.html](https://www.business-standard.com/article/economy-policy/why-india-has-opposed-investment-facilitation-talks-at-wto-117051400826_1.html)>.

19.3mIn EUR in 2018),<sup>44</sup> in line with India's current policies to favour local production at the expense of imports. This, in turn, has resulted in most of the issues addressed by the mechanism to be not straightforwardly manageable and/or solvable, but to be dealt with on a bilateral basis between India and the EU Member State concerned. These complications notwithstanding, what the EU expects is that by raising these problematic issues continuously, some improvements in the regulatory environment/ease of doing business will come eventually. Recently the Delegation of the EU to India established also a 'European Economic Group' (EEG) to strengthen EU wide business advocacy (in the absence of an EU Chamber of Commerce in India). The EEG will be another channel (in addition to Member States commercial counsellors) to feed into the EU-India IMF and reinforce it.

#### IV. OUTLOOK AND CONCLUDING REMARKS

Since the WTO position on investment facilitation remains indeterminate, initiatives like the EU-India IMF raise the question of the value bilateralism might have in the discussion around the creation of a multilateral framework for investment facilitation. Bilateral initiatives should be seen as bricks in building the wall of a multilateral investment facilitation mechanism. Bilateralism offers a sense of perspective on how things might evolve and is instrumental to understand where countries want to go with an investment facilitation agreement (policy-making level), and how they plan to get there (regulatory level). Bilateral initiatives are, therefore, congenial to identify the elements to be included in a multilateral facilitation agreement. In this sense, bilateralism might help define the scope of a multilateral facilitation agreement, identifying possible elements to be included, and the stage(s) of an investment project which should (or not) be covered by a multilateral framework. For example, Brazil is embracing a wider approach that encompasses dispute prevention, and investment protection standards; whereas other states might want to pursue a narrower approach.

Bilateralism, however, does not come without problems. Bilateral initiatives augment the already fragmented landscape of international economic law, proceeding in an uncoordinated and piecemeal manner.<sup>45</sup> Bilateralism exposes countries (especially LDCs) to the risk of being left behind because of their inability to mobilize international support for technical assistance and capacity building. Good practices such as transparency and fast track procedure have indeed the potential to improve the domestic institutional

<sup>44</sup> Source Eurostat.

<sup>45</sup> ICTSD, *supra* note 13.

framework and serves both as an enabling factor in attracting FDI and as a way for the host state to promote its own development. However, without the technical assistance for the implementation of obligations, these practices are to be implemented mostly on a voluntary basis.

In the absence of an agreement on the structure of a unitary framework within the WTO, bilateral initiatives are instrumental to understand how far countries are willing to go, but what is achieved bilaterally cannot automatically be transplanted into a multilateral agreement, unless the level of ambition remains low. For example, the fact that India has been lenient about an issue as sensitive as market access with the EU does not imply India is willing to do the same at a multilateral level. The most valuable contribution of bilateral (and plurilateral) initiatives is, therefore, to compel future multilateral negotiations to face questions that these bilateral initiatives have unavoidably left open. A good starting point is to determine which level of ambition to pursue when creating a multilateral framework, possibly in the WTO context. The identification of the issues of interest is not a purely academic exercise but has political implications. As India has demonstrated, states might be more or less inclined to be bound to certain commitments and might take different positions at bilateral and multilateral levels. As a consequence, while it might be relatively straightforward to get a consistent number of countries to agree on provisions that are easy to implement (e.g. transparency and predictability), a multilateral approach might take years to conclude. As often is the case in the multilateral trading system, one should be reminded that the higher the ambition, the harder the negotiations.

Since the WTO is a member-driven organization, it will ultimately be on its members to decide on purpose and direction<sup>46</sup> when discussing the range of provisions that might be included (or excluded) in the designing of a unitary investment facilitation framework.<sup>47</sup> As of April 2019, in the course of WTO structured discussions there was convergence among the participating members ‘that administrative procedures and requirements (APRs), together with transparency and predictability of measures, constituted the core of any investment facilitation framework’.<sup>48</sup> A further step towards the design of a multilateral investment facilitation mechanism might be the establishment of a common denominator, upon which states are more likely to agree on a multilateral level, to be expanded and implemented gradually.

<sup>46</sup> See in this sense, WTO News, “DG Azevêdo addresses the Informal Dialogue on Investment Facilitation” (April 23, 2018).

<sup>47</sup> ICTSD, *supra* note 13.

<sup>48</sup> WTO structured discussions on investment facilitation for development, meeting held on 11 April 2019, elements aimed at streamlining and speeding up administrative procedures and requirements, summary of discussions by the coordinator WTO Doc. INF/IFD/R/2, cited in Sauvart, *supra* note 2.

Should the WTO members be unable to agree on the structure of a unitary framework within the WTO, other initiatives may (and will) be pursued, both at the plurilateral and bilateral levels. Regardless of the future work the WTO will carry out, it is important to crystallize these principles of transparency, streamlining procedures, and predictability into a unitary product and not to lose momentum.