

# Investment Facilitation for Development: Opening the doors of the WTO for hard rules on investment

*A rebuttal to “The WTO Investment Facilitation Initiative: Why It Matters” – Background Note prepared by the Friends of Investment Facilitation for Development (FIFD) for the 11th Ministerial Conference (MC11) of the World Trade Organization (WTO), Buenos Aires 2017*

## 1. Background

The World Trade Organization (WTO) is currently holding its 11th Ministerial Conference (MC11) in Buenos Aires (December 10–13, 2017).<sup>1</sup> A number of countries led by the Friends of Investment for Development (FIFD)<sup>2</sup> have proposed that Ministers agree in MC11 to “begin structured discussions with the aim of developing a multilateral framework on investment facilitation.”<sup>3</sup> This note rebuts the background note prepared by the FIFD that is being circulated at the WTO MC11 and draws attention to the attention of delegates to the risks—particularly for developing countries—behind this push to bring the topic of investment facilitation (IF) onto the WTO agenda.

## 2. Overview of the risks of bringing investment into the WTO

Beyond the legal issue arising from the fact that the WTO’s mandate covers *trade*, but not *investment*, bringing investment facilitation into the WTO will likely work against the interests of developing countries, for at least four reasons:

1. **Once investment facilitation is brought into the WTO, other investment-related issues could be brought in at a later stage.** Proponents of the Draft Ministerial Declaration aimed at bringing investment facilitation discussions into the WTO state that “these discussions shall not address market access, investment protection, and investor–state dispute settlement.”<sup>4</sup> However, other proposals have been circulated, including one by Russia, which says that “rules should include elements for their future development and expansion to regulating market access and treatment for investments.”<sup>5</sup> “Treatment for investments” could include investor protection such as fair and equitable treatment and expropriation. By allowing investment facilitation to be brought into the WTO now, developing countries would open the doors of the WTO to investment issues more broadly—and thus open themselves to a high risk of being pulled into broader negotiations on investment in the future.
2. Investment facilitation should be about cooperative approaches and efforts, but the WTO focuses on binding disciplines and dispute settlement. Taking the investment facilitation approach to the WTO could result in placing overly burdensome obligations on developing countries (least-developed countries in particular). Developing countries do not need to commit to international obligations regarding investment facilitation through a multilateral agreement

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<sup>1</sup> [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/mc11\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_e.htm)

<sup>2</sup> Members of the FIFD group are Argentina, Brazil, Chile, China, Colombia, the Gambia, Hong Kong, Kazakhstan, Liberia, Mexico, Mauritania, Nigeria, Pakistan, Qatar, Republic of Korea and Uruguay.

<sup>3</sup> WT/MIN(17)/12, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/documents\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/documents_e.htm)

<sup>4</sup> WT/MIN(17)/12, para. 2, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/documents\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/documents_e.htm)

<sup>5</sup> JOB/GC/120, para. 1.3(e), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S001.aspx](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx)

under the WTO and take on the risk of being brought to international dispute settlement based on those obligations. Investment facilitation measures can be adopted by means of domestic legislation.

3. **The WTO’s mandate and core focus is *trade*—not sustainable development for developing countries.** Furthermore, by venturing into investment facilitation, the WTO diverts attention away from the unresolved issues of the Doha Development Agenda.<sup>6</sup>
4. **Bringing investment facilitation into the WTO is unnecessary because it is already occurring in other fora.** There are ongoing discussions at the United Nations Conference on Trade and Development (UNCTAD) on reforming investment policy at the international level<sup>7</sup> including investment facilitation,<sup>8</sup> and at the United Nations Commission on International Trade Law (UNCITRAL) on reforming investor–state dispute settlement.<sup>9</sup> The European Union has also been advancing its proposal to create a multilateral investment court.<sup>10</sup>

Multilateral discussions on investment were rejected at the Organisation for Economic Co-operation and Development (OECD) in 1998 and at the WTO itself because it did not suit developing countries,<sup>11</sup> so investment cannot be part of the Doha Round work program and therefore “no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.”<sup>12</sup> Just like developing countries rejected multilateral investment negotiations in the past, most remain opposed to bringing investment facilitation into the WTO. Delegates should carefully consider these issues before making commitments in Buenos Aires.

### 3. Rebuttal of the main claims in the FIFD Background Note

The first three pages of the FIFD background note imply some spurious causal nexus between the benefits they claim and having rules in the WTO, without specifying the rules or establishing the link. The claims they make throughout are unreferenced. In the rare cases where there are references, the lack of accuracy (for example, “World Bank research...”) makes it impossible to check if the studies cited actually say what they claim and the details.

FIFD paper claim	Rebuttal
Investment is a trade issue (and so belongs in the WTO):	
a) Because trade and investment are	While there are interlinkages between trade and investment, states have deliberately decided to keep the

<sup>6</sup> [https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm)

<sup>7</sup> <http://investmentpolicyhub.unctad.org/Pages/2017-edition-of-unctad-s-high-level-annual-iaa-conference-phase-2-of-iaa-reform>

<sup>8</sup> eg <http://investmentpolicyhub.unctad.org/Publications/Details/148>

<sup>9</sup> <http://www.unis.unvienna.org/unis/en/pressrels/2017/unis1257.html>

<sup>10</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>

<sup>11</sup> <http://www.twn.my/title2/t&d/tnd33.pdf>

<sup>12</sup> WT/L/579 from [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S001.aspx](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx)

FIFD paper claim	Rebuttal
interlinked	regulation of these two areas of international economic law separate. This decision was based on concerns regarding by the contentious nature of the international regulation of FDI and the divergence of views among countries. Among the main concerns were that multilateral rules on investment would threaten the protection of human rights, labour and environmental standards by fostering a race to the bottom. <sup>13</sup>
b) Because of global value chains (GVCs) which countries need to integrate into and so countries need to encourage FDI to encourage exports and get jobs	<p>Developing countries have not benefited much from joining GVCs. For example, 67% of total global value created under global value chains accrue to OECD countries while the share accruing to newly industrialised countries and BRICS countries is 25%. Only 8% of total value added is shared among all other developing countries and LDCs.<sup>14</sup></p> <p>According to the Centre for WTO Studies:<sup>15</sup></p> <ul style="list-style-type: none"> <li>• Oligopolies among lead firms in GVCs and intense competition amongst suppliers of parts and components means lead firms such as Apple, Dell etc often dictate the terms of supply. This asymmetry is fostered by the WTO rules which lower tariffs on imports of the parts and components but keep intellectual property protection on the lead firms so maintaining barriers to entry to competitors to the lead firms. Therefore many studies across a variety of product groups from textiles to agricultural products and IT products have found that manufacturing (the part done in developing countries) generates the least income compared to other activities in a GVC eg product design (protected by intellectual property so can make monopoly profits) and marketing, sales, branding, after-sales activity etc. ends of the GVC which are done in the USA. For example only \$ 4 out of an iPods total retail price of \$ 299 can be attributed to producers located in China while most of the value accrues to the US, Japan and Korea.</li> </ul>

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[https://web.archive.org/web/20120214110423/http://www.gppi.net/fileadmin/gppi/Tieleman\\_MAI\\_GPP\\_Network.pdf](https://web.archive.org/web/20120214110423/http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf)

<sup>14</sup> [http://unctad.org/en/PublicationsLibrary/ecidc2013misc1\\_bp8.pdf](http://unctad.org/en/PublicationsLibrary/ecidc2013misc1_bp8.pdf)

<sup>15</sup> <http://wtocentre.iift.ac.in/workingpaper/woriking%20paper%2036.pdf>

FIFD paper claim	Rebuttal
	<p>“Apple employees in the United States have an average annual profit per employee of about \$400,000, whereas many workers at Foxconn (the Taiwanese-owned, China-based contract manufacturer that does the iPhone assembly) earned less than \$400 per month in 2012.”</p> <ul style="list-style-type: none"> <li>• Developing countries need to move up the value chain however developing country firms find it extremely difficult, if not totally impossible, to do this in GVCs including because a) developing countries lack the specialised skills, access to technology and credit etc and b) due to the asymmetry in power relations between lead firms and suppliers where lead firms keep control over the higher value added areas such as R&amp;D, design, distribution etc.</li> <li>• For a number of years, the desire to facilitate integration into GVCs has already been used as a justification for a variety of proposed changes to WTO rules including stronger intellectual property protection.</li> <li>• There are actually a number of costs to joining GVCs including: <ul style="list-style-type: none"> <li>i) Overdependence and therefore vulnerability to lead firms for GVC access which weakens the bargaining position of developing country suppliers</li> <li>ii) Lead firms often switch to lower cost suppliers</li> <li>iii) Integration into GVCs has not helped develop a vibrant industrial sector or domestic production beyond low value-added activities. In fact it can have a negative effect on industrial upgrading, trapping developing country firms in low-value addition</li> </ul> </li> </ul>
c) Because of the growing importance of services which blurs lines between trade and investment. Many services	There is still a difference between services and investment. Eg providing banking services via a branch in another country is mode 3, but the land the bank bought for the branch is the investment and the

<b>FIFD paper claim</b>	<b>Rebuttal</b>
are delivered via mode 3	trademarked name of the bank is an investment etc.
<p>d) Because of the rapid rise of the digital economy where it is unclear whether a downloaded movie is a good or service or investment &amp; developing countries can't participate in the digital economy without increased investment in the hard and soft infrastructure needed to connect to it and most of this will come from the private sector. Increased broadband increases growth</p>	<p>There is a digital divide where developing countries need investment in electrification and broadband cables etc. However:</p> <p>a) the rules proposed at the WTO in the name of investment facilitation (IF) have not been proven to attract foreign direct investment (FDI), see Annex.</p> <p>b) even if the WTO's IF proposals did attract FDI (eg a single window for investments), WTO Members could implement those unilaterally tomorrow, without locking in the IF rules which have a number of other consequences including restricting regulatory and policy space.</p> <p>c) even if new WTO IF rules are agreed, it is highly unlikely that there will be sufficient new, enforceable aid to electrify and connect to the internet all the remaining unserved areas in developing countries and LDCs. For example the EU's WTO ecommerce proposal<sup>16</sup> explicitly says that each international organisation has a role to play and it is the World Bank that "provides financial and technical assistance" while the WTO negotiates new rules</p>
<p>e) SDGs recognise the significant role of investment and there is a need for FDI</p>	<p>That does not mean the WTO must have investment rules, especially since the IF proposals have not been proven to attract FDI, see below</p>
<p>f) SDGs emphasise the importance of retooling investment policies</p>	<p>If it is helpful and the benefits outweigh the costs, developing countries can do that unilaterally tomorrow, without locking in IF rules at the WTO that restrict regulatory and policy space.</p>
<p>g) The combining of trade and investment in a single ministry shows that governments recognise trade and investment policies are intertwined. 133/260 regional trade agreements (RTAs) include investment provisions</p>	<ul style="list-style-type: none"> <li>• Capital exporting countries have been pushing investment rules in RTAs because it suits their companies investing abroad.</li> <li>• It does not specify what investment provisions are in these 133 RTAs. Eg is it a cooperation provision saying the Parties would like to cooperate to encourage FDI? Or just the same mode 3 services liberalisation commitments as they have made at the</li> </ul>

<sup>16</sup> JOB/GC/97/Rev.3 from [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S001.aspx](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx)

FIFD paper claim	Rebuttal
	<p>WTO?</p> <ul style="list-style-type: none"> <li>• Governments may have combined trade and investment into one ministry because they are negotiating RTAs with investment provisions</li> </ul>
<p>h) The private sector in developing countries and LDCs is calling on governments to address trade and investment issues in an integrated way</p>	<ul style="list-style-type: none"> <li>• The private sector calls for many things, but governments have to balance many competing considerations. Eg the private sector may not want to pay any taxes, but the government needs revenue to pay for civil servants and public services etc. The private sector may not want any environmental regulations eg in the mining sector, but the government may also need to consider the impact if the river is polluted and the downstream people who rely on the river for water and fish can no longer do so.</li> <li>• This only cites one survey of 3 countries (with how many respondents?), so are it all private sector companies in all countries calling for this?</li> <li>• The private sector from these 3 countries are asking for: <ul style="list-style-type: none"> <li>○ Goods and services trade policies to support more investment. However, as noted in the Annex below, liberalising goods or services is not proven to attract FDI.</li> <li>○ Facilitating integration into GVCs. However, as noted above, GVC integration can have many costs and limited benefits.</li> </ul> </li> </ul>
<p>Kenyan success story</p>	<p>a) If these investment facilitation measures are useful, WTO Members can unilaterally implement them tomorrow, without having their regulatory and policy space restricted by the proposed WTO IF rules</p> <p>b) No evidence is provided that these Kenyan IF measures actually increased FDI</p>
<p>Many countries are already doing IF measures</p>	<p>So it shows that governments can and are already doing IF voluntarily if they think:</p> <p>a) they need to,</p>

FIFD paper claim	Rebuttal
	<ul style="list-style-type: none"> <li>b) it suits them</li> <li>c) the benefits outweigh the costs and</li> <li>d) it is an important priority for them at their current stage of development (including a spending priority given their other spending needs eg health, education etc)</li> </ul>
<p>Private sector companies surveyed say regulatory uncertainty is a main entry barrier to invest in value chains in developing countries and they say a more stable and predictable investment regime is a top priority</p>	<ul style="list-style-type: none"> <li>• None of these have been shown to be empirically significant attractors of FDI, see Annex below.</li> <li>• As noted above, the private sector wants many things, eg not to pay any taxes, but governments have to balance competing considerations eg flexibility to adjust investment regulations as: <ul style="list-style-type: none"> <li>○ It receives new information (eg that fracking is dangerous to health and so deny investment permits for fracking), or</li> <li>○ There are changes in external circumstances, eg climate change means investments in coal-fired power plants are no longer allowed, or</li> <li>○ The economy and society develop and the government's regulatory capacity increases (eg the government can now analyse environmental impact assessments, so it begins to require them for mining permits), or</li> <li>○ The government's policies change (including when a new government is formed)</li> </ul> </li> </ul>
<p>IF is analogous to the WTO's Trade Facilitation Agreement (TFA).</p> <p>IF would entail few costs for Members and be win-win</p>	<p>a) The TFA was about facilitating trade in goods. Developing countries and LDCs also export products and could theoretically benefit from the TFA (although see below). However most developing countries and LDCs are net capital importers, ie they do not have companies investing abroad which face barriers. So while the beneficiaries of the TFA are theoretically all WTO Members since they all export products, the</p>

FIFD paper claim	Rebuttal
	<p>beneficiaries of IF would be the net capital exporters, which are generally not developing countries/LDCs. (Since if a country wants to facilitate FDI, they can do it unilaterally tomorrow without being locked into the restrictions on regulation proposed in the IF rules at the WTO).</p> <p>b) The TFA basically exported the systems already in place in developed countries, so they had no costs of compliance and there were unlikely to be any increased exports from developing countries/LDCs into developed countries since developed countries were not required to improve their customs administrations. IF is likely to be the same. Developed countries are already likely to have in place single windows etc and so they will not face any costs of compliance, while developing countries and LDCs will face all the costs of implementing the IF rules.</p>
WTO IF rules would:	
a) Minimise transaction costs making it easier for investors to invest	This could be done tomorrow unilaterally without WTO IF rules if governments felt the benefits outweighed the costs (eg of removing other regulations such as environmental regulations etc)
b) Locking it in at the WTO sends a positive signal to investors	As noted in the Annex below, this is not a significant attractor of FDI.
Linking IF to Members’ ability to implement them thereby ensuring they receive the technical assistance and capacity building needed	The WTO does not have a good track record in this area and the current US Administration seems to expect developing countries and LDCs to take on the same commitments as the USA, so it is unlikely to agree to this. <sup>17</sup>
It doesn’t make sense to have a single window for 1 trade partner, so the WTO is the logical place	<p>a) Many free trade agreement (FTA) commitments such as stronger intellectual property protection (TRIPS+) are in practice provided to applicants from all countries because it is too difficult logistically to distinguish between those from the FTA Party and other countries</p> <p>b) Many rules are logically agreed at the WTO level,</p>

<sup>17</sup> <https://www.whitehouse.gov/the-press-office/2017/11/10/remarks-president-trump-apec-ceo-summit-da-nang-vietnam>

FIFD paper claim	Rebuttal
	such as disciplines on domestic subsidies in agriculture (since the EU argues that subsidies to an Irish beef farmer who exports to 30 countries can only be disciplined at the WTO because the EU cannot stop subsidising only the cows that are exported to the other FTA Party). However just because it is logical, does not mean it has occurred. Disciplines on agricultural domestic subsidies, clearly a trade issue, still have not been agreed at the WTO.
Footnote: the WTO initiative does not address investment liberalisation, investment protection and investor-state dispute settlement (ISDS)	Despite this claim, some IF proposals such as Russia's, explicitly states that a major element of future investment rules is expansion to market access and treatment for investments. <sup>18</sup> "Treatment for investments" includes investor protection such as fair and equitable treatment and expropriation.

Page 4 of the FIFD paper presents the key to the FIFD proposal: "What is the focus and purpose of Investment Facilitation?"

- The language of "efficient, transparent and investment-friendly business climate" mirrors the proposed domestic regulation disciplines by promoting pro-investor regulation, active roles for foreign investors in decision making on regulation and specific investments, and streamlined timelines and processes.
- But it goes much further by "making it easier to invest, conduct business, and expand existing businesses" – which parallels the rules in existing investment agreements that apply to establish, conduct and expand an investment.
- The goal to promote "clear, efficient, predictable, and fair" implementation and administration of national investment policies again echoes the domestic regulation proposals. Worse, predictability and fairness are key elements of the fair and equitable treatment provisions of investment agreements that investors principally rely on to sue and which are the most opaque and controversial. Similar terminology on page 5 says a "transparent, stable and predictable regulatory environment" is a priority for investors. That correlates precisely with the way foreign investors describe the substance of the fair and equitable treatment rule.
- Simplifying and speeding up processes and removing red tape has superficial merit, but it also privileges light-handed pro-business regulation, single window processes that marginalise other ministries with legitimate concerns regarding an investment, and imposing time pressures on agencies with limited resources to reach a favourable decision.

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<sup>18</sup> JOB/GC/120 from [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S001.aspx](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx)

- The notion of barriers to entry for investors is code for domestic regulations that investors do not like. But a regulation that an investor considers an obstacle is not *per se* undesirable. Regulations serve multiple national policy objectives on the environment, indigenous rights, employment, economic and regional development, social wellbeing, security, economic stability.

This assessment is reinforced by the specific aims:

- Improving transparency and predictability of investment measures. The description of what this means is quite restrictive, but experience in the WTO shows that meanings are in the eye of the beholder (or the Member with offensive interests)
- Streamlining and speeding up administrative procedures. This refers explicitly to reducing discretions, presumably including references to national interest tests that require subjective evaluations and weighing of a range of factors. It also requires significant investment in computer processing systems.
- Strengthening stakeholder cooperation and consultation. In practice, the “consultation and dialogue” are opportunities for investors and their home states to pressure host governments and respond to unlimited requests for information. Examples where Corporate Social Responsibility have been incorporated into agreements (eg TPP Article 9,17) only require the government to encourage investors voluntarily to adopt internationally recognised standards that the host country has endorsed.

Page 5 says a quarter of all investments in developing and transition economies are said to stop expanding or withdraw due to political risks arising from conduct of political agencies. There are three problems with the claim:

- Where it is true it assumes that such behaviour would cease where an “investment facilitation” agreement exists. But this is really talking about investor protection, which the proposal says is not meant to be excluded from their scope.
- It assumes that some kind of investor protection is needed to minimise those risks. But investment is a market transaction. When an investor chooses to pursue profit in another country it takes a risk in return for anticipated profit. If it wants to minimise that risk it takes out insurance, as with other market transactions. It contradicts the basic market principles of the WTO to suggest there should be some form of protection for foreign investors.
- Countries that have withdrawn from or do not have investment agreements have not suffered investor flight. South Africa was ranked by UNCTAD as the top recipient of FDI inflows among the African countries in 2013, despite withdrawing from BITs. FDI inflows to Bolivia steadily increased after it denounced all its BITs, reaching an unprecedented peak of US\$1.75 billion in 2013. Brazil, which never had BITs, was the 5<sup>th</sup> largest recipient of FDI in the world in 2013.

There is no guarantee of any technical assistance and capacity building.

The assumption that these procedural and legal measures would enable FDI (p. 6) ignores the evidence of what factors are most significant in attracting FDI to developing countries.

UNCTAD said in 2014: “results do not support the hypothesis that BITs foster bilateral FDI. . . Thus developing-country policymakers should not assume that signing up to BITs will boost FDI.”

A World Bank study in 2011 found ‘size and growth potential of markets is the strongest determinant of FDI.’”

If the WTO is committed to evidence based policy making it needs to justify these assertions. It also ignores the option for governments to liberalise unilaterally.

Arguments that bargains over commitments should be replaced by cooperation to find solutions to shared challenges ignores the reality that the WTO has capital importing and capital exporting members, largely aligned on a North South basis, and empowerment of foreign investors but not other communities in the host state who are affected by the investments.

The concrete mechanisms on page 6 confirm the intention to impose some of the standard investment rules:

- “Global benchmarks” suggest global harmonisation of regulatory regimes and processes for foreign investment, at least through common rules, which removes flexibility and regulatory sovereignty from individual governments;
- Domestic “facilitation” reforms would be subject to ‘shared international commitments’ to ‘strengthen Members’ reform efforts’, “decrease policy uncertainty” and ‘send a positive message to investors’. Decoded, that means binding WTO rules on investment that constrain Member’s policy space and lock them in to regulatory settings and processes.
- Providing technical assistance and capacity building to implement the framework, even if that did occur, is counter-productive if the substance of the framework is flawed.

## Annex

Studies find that bilateral investment treaties (BITs) are not proven to attract foreign direct investment (FDI) – some examples:

- An UNCTAD study found that: “results do not support the hypothesis that BITs foster bilateral FDI. . . Thus developing-country policymakers should not assume that signing up to BITs will boost FDI.”<sup>19</sup>
- According to a World Bank study (2011)<sup>20</sup>: “both a review of the empirical literature and analysis using new data sources suggest that business opportunities - as represented by, for example, the size and growth potential of markets - are by far the most powerful determinants of FDI”.

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<sup>19</sup> [http://unctad.org/en/PublicationsLibrary/tdr2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf)

<sup>20</sup> Kusi Hornberger, How Much Does Investment Climate Matter? Joseph Battat, and Peter Kusek (2011) “Attracting FDI; How Much Does Investment Climate Matter?”, published as World Bank Group- View Point: Public Policy for the Private Sector, available at: <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/327-Attracting-FDI.pdf>

- World Bank when assessing the impact of a multilateral investment agreement: “merely creating new protections does not seem to be strongly associated with increased investment flows. For these reasons, the overall additional stimulus of multilateral rules that apply to new investment over and above unilateral reforms would probably be small – and virtually nonexistent for low-income developing countries.”<sup>21</sup>
- Noting the findings of a survey of FDI flows from OECD members to 31 developing countries over 20 years, as well as previous UNCTAD research, the World Bank acknowledges, “Countries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact.”<sup>22</sup>
- Studies<sup>23</sup> show that issues of primary concern to investors include: size and growth potential of markets, infrastructure development, and availability of resources (natural and abundant labor).
- A survey of investment determinants across 30 African countries identified the regulatory and legal framework as having a negative impact on investment decisions in under 5% of cases.<sup>24</sup>
- Similarly, a 2011 survey of 19 African countries including Nigeria found that whether there was an investment or double taxation treaty was the 10<sup>th</sup> most important factor (out of 12 factors listed) that foreign investors considered when deciding where to invest.<sup>25</sup>
- See also literature reviews and interviews and surveys of government officials, investors, risk insurers, risk rating agencies etc that show they do not generally check whether there is an investment treaty before deciding whether to invest/give a risk rating/provide political risk insurance<sup>26</sup>
- UNCTAD concluded, on the basis of its assessment of the impact of GATS commitments on foreign investment, “There is no empirical evidence to link any significant increase in FDI flows to developing countries with the conclusion of GATS.”<sup>27</sup>

The experience of countries reforming investment protection treaties

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<sup>21</sup> World Bank. (2003). *Global Economic Prospects and the Developing Countries 003: Investing to Unlock Global Opportunities*. pp133. Washington DC, World Bank.

<sup>22</sup> World Bank. (2003). *Global Economic Prospects and the Developing Countries 2003: Investing to Unlock Global Opportunities*. pp129. Washington DC, World Bank.

<sup>23</sup> Paulo Elichea Tembe & Kangning Xu (2012) « Attracting Foreign Direct Investment in Developing Countries: Determinants and Policies-A Comparative Study between Mozambique and China ». See also: U.S. Agency for International Development (2005) *Foreign Direct Investment: Putting It to Work in Developing Countries*. Washington, DC: USAID.

<sup>24</sup> UNCTAD. (1999). *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development*. Geneva, United Nations Conference on Trade and Development.

<sup>25</sup> Figure 2.6a, [https://www.unido.org/fileadmin/user\\_media/Publications/Pub\\_free/AIS\\_Report\\_A4.pdf](https://www.unido.org/fileadmin/user_media/Publications/Pub_free/AIS_Report_A4.pdf)

<sup>26</sup> [http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=lauge\\_poulsen](http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=lauge_poulsen) and [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1594887](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887)

<sup>27</sup> UNCTAD. (2000). *A Positive Agenda for Developing Countries: Issues for Future Trade Negotiations*. Geneva, United Nations Conference on Trade and Development.

- Foreign investors are offered protections via a web of international investment protection treaties, which currently amount to more than 3000 agreements, and offer broad standards of protections.
- Countries that attempted to redress the proven imbalance in the investment treaty regime have been faced by severe scrutiny by the guards of the status quo. However, their experiences show that even after they took steps to withdraw from the international investment treaty regime or revise their commitments under international investment treaties, they remained growing markets attracting foreign investments.

For example:

- **Situation in South Africa:** South Africa commenced in terminating BITs after a cabinet review undertaken in 2009. South Africa remains a top receiver of FDI on the African continent; it was ranked by UNCTAD as the top recipient of FDI inflows among the African countries in 2013.
- **Situation in Bolivia:** In 2006, Bolivia started to systematically withdraw from every BIT that reached its expiration date. In May 2013, Bolivia collectively denounced all its remaining BITs. Concurrently, FDI inflows into Bolivia have steadily increased, reaching an unprecedented peak of US\$1.75 billion in 2013.
- **Situation in Brazil:** Brazil had negotiated 14 BITs, however these agreements were not approved and ratified by its Congress due to the imbalance of the agreements and their impact on the state's right to regulate. Brazil remained one of the highest receivers of FDI, and was ranked the 5<sup>th</sup> largest recipient of FDI in the world in 2013.<sup>28</sup>

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<sup>28</sup> Source: UNCTAD- excluding the estimate for British Virgin Islands.